

BOARD REVIEW COMMITTEE ON PROFESSIONAL ETHICS

20c. Proposed Amendments to Rule 4-7.13 (Google AdWords)

Summary: A Florida Bar member requests amendments to Rule 4-7.13 and its commentary that would state it is inherently misleading or deceptive for a lawyer to intentionally use, or arrange for the use of, the name of a lawyer not in the same firm or the name of another law firm as words or phrases that trigger the display of the lawyer's advertising on the Internet or other media, including directly or through a group advertising program. For example, the proposal would ban the purchase of another lawyer's name in Google AdWords. The Board Review Committee on Professional Ethics voted not to adopt the bar member's proposal, but drafted its own proposal to prohibit a lawyer from stating or implying that another lawyer is currently part of the advertising lawyer's firm when that is not the case. Draft commentary provides examples and guidance on compliance with the new proposed rule. A refined draft based on input from the original requestor is under consideration by the Board Review Committee on Professional Ethics. The original proponent supports the draft under consideration.

Background/History of Issue: On January 22, 2018, Florida Bar member Alex Hanna through his attorney, Timothy P. Chinaris, requested that The Florida Bar Board of Governors approve an amendment to Rule 4-7.13 to prohibit a Florida Bar member from using the name of another lawyer or law firm to trigger a search result that includes an Internet advertisement of the first lawyer. An example would be the purchase of a competitor's name through Google AdWords so that the purchaser's advertisement or sponsored website link would be displayed in a search using the competitor's name. He argues that the practice is inherently misleading and cites to examples in which Mr. Hanna's competitors have purchased Mr. Hanna's name, and persons who have hired the competitors' firms have threatened bar complaints against Mr. Hanna because they believe they have hired Mr. Hanna's law firm based on their contact with the competitor who showed up in the search result. He argues that the practice is hidden from the bar, unlike the advertising that is required to be filed for review. He also argues that the practice is unprofessional, and that it may violate trademark law and Florida consumer protection laws. He points to North Carolina Ethics Opinion 2010-14 to support his position, and New York Rule of Professional Conduct 7.1(g)(2), which states "A lawyer or law firm shall not utilize: . . . meta tags or other hidden

computer codes that, if displayed, would violate these Rules."

The Florida Bar previously reviewed this issue in a proposed advisory advertising opinion. The Standing Committee on Advertising was directed by the Board of Governors to draft an opinion regarding the use of search engine optimization techniques such as metatags and hidden text. The committee approved Proposed Advisory Opinion A-12-1 on March 5, 2013, which, in part, concluded that is misleading and therefore impermissible for a Florida Bar member to purchase the name of another lawyer or law firm as a key word in search engines to allow the advertising lawyer's advertisement or sponsored website link to appear in the search result. The Board of Governors voted 23-19 to withdraw Proposed Advisory Opinion A-12-1 on December 13, 2013, because the purchase of ad words (such as Google ad words or other search engines such as Yahoo or Bing) is permissible as long as the resulting advertisements or sponsored links clearly are advertising based on their placement and wording, and because meta tags and hidden text are outdated forms of web optimization that are penalized by search engines and can be dealt with via existing rules prohibiting misleading forms of advertising.

The Board's Citizens Advisory Committee supports the amendment, stating that the practice is misleading, particularly to vulnerable consumers.

The Board Review Committee on Professional Ethics heard comments from Mr. Hanna and others at its March 22, 2018 meeting, but deferred the item due to lack of time. At its May 17, 2018 meeting, a motion was made and seconded, but failed 4-5, to approve the amendments as proposed.

The Board Review Committee on Professional Ethics drafted an alternative proposal that prohibits any advertisements from stating or implying that a lawyer is affiliated with the advertising lawyer or law firm or that misleads a person searching for a particular lawyer or law firm, or for information regarding a particular lawyer or law firm, to unknowingly contact a different lawyer or law firm. The Board Review Committee circulated its draft to those who previously filed comments on June 4, 2018 and extended the deadline for comments to August 31, 2018.

The Board Review Committee on Professional Ethics received comments from Google, from a group of professors including Eric Goldman, and from Mr.

Hanna's new lawyer, Richard Ovelmen. It is unclear whether Google was commenting on the prior proposal or the BRC's new proposal, but Google objected to the proposal. Professor Goldman, et al., continue to state that the proposal is anti-competitive and that The Florida Bar should maintain its position from 2013 and reject the proposal. Mr. Hanna's new lawyer, Richard Ovelmen, has proposed an amendment that is substantially the same as Mr. Hanna's original proposal.

After receiving comments at its October 11, 2018 meeting, the Board Review Committee on Professional Ethics circulated a second draft to all commenters, which amended its proposed commentary. Mr. Hanna sent an alternative draft. The Board Review Committee on Professional Ethics considered further amendments to address Mr. Hanna's concerns.

Staff Analysis: The Board of Governors should approve an amendment as proposed by the inquirer only if the board concludes that the conduct is inherently misleading. Additionally, even if the Board of Governors concludes that the conduct is misleading, the Board of Governors should consider whether enforcement of existing rules prohibiting misleading communications (Rules 4-7.13 and 4-7.14) and misleading conduct (Rule 4-8.4(c)) would adequately address the issue. The amendments drafted by the Board Review Committee on Professional Ethics address the concerns regarding misleading advertising.

The Board of Governors has previously reviewed the issue of purchasing competitor's names in 2013 and determined that the purchase of a competitor's name as a search term is not misleading as long as the resulting advertisement or resulting sponsored link clearly is an advertisement, does not itself use the name of a lawyer not employed by the advertising law firm, and otherwise complies with the lawyer advertising rules.

Authority from other states is limited, but mixed. Texas Ethics Opinion 661 reaches the same conclusion that The Florida Bar Board of Governors did in 2013: that a lawyer does not violate rules by using competitor's name as a keyword in search engine optimization, as long as any Internet advertisement by the lawyer complies with the advertising rules.

North Carolina Ethics Opinion 2010-14 concludes the opposite:

It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Rule 8.4(c). Dishonest conduct includes conduct that shows a lack of fairness or

straightforwardness. . . .The intentional purchase of the recognition associated with one lawyer's name to direct consumers to a competing lawyer's website is neither fair nor straightforward. Therefore, it is a violation of Rule 8.4(c) for a lawyer to select another lawyer's name to be used in his own keyword advertising.

Additionally, a South Carolina lawyer was publicly reprimanded for creating website that did not contain the names of any responsible lawyer and purchasing competitors' names in Google AdWords, which the lawyer and bar agreed violated the oath requiring fairness, integrity, professionalism, and honor. *In re Naert*, 777 S.E. 2d 823 (S.C. 2015).

The proponent's reliance on New York Rule of Professional Conduct 7.1(g)(2) is somewhat attenuated, as it is merely analogous and not directly on point; the rule states "A lawyer or law firm shall not utilize: . . . meta tags or other hidden computer codes that, if displayed, would violate these Rules."

The proponent's reliance on trademark and violation of Florida consumer protection laws is misplaced. Neither are necessarily the basis of disciplinary action. Additionally, in the context of invasion of privacy, another state court has determined the conduct did not violate that state's statute. *Habush v. Cannon*, 828 N.W.2d 876 (2013). The court found that the law firm's use of the names of competitors as key words in Google, Yahoo, and Bing search engines was not a "use" of the competitors' names as contemplated by the right of privacy statute, and therefore the court upheld the trial court's summary judgment in defendant's favor and did not enjoin the use. In that case, a law firm paid search engines to have the firm appear as the first sponsored link whenever 2 competitor's names were searched.

The Board Review Committee on Professional Ethics draft, by contrast, focuses on prohibiting an advertisement that is misleading by stating or implying that a lawyer is a member of the advertising law firm when that is not the case. It does not address the conduct of purchase of a competitor's name, but rather whether the resulting advertisement would mislead consumers.

RULE 4-7.13 DECEPTIVE AND INHERENTLY MISLEADING ADVERTISEMENTS

A lawyer may not engage in deceptive or inherently misleading advertising.

(a) Deceptive and Inherently Misleading Advertisements. An advertisement is deceptive or inherently misleading if it:

- (1) contains a material statement that is factually or legally inaccurate;
- (2) omits information that is necessary to prevent the information supplied from being misleading; or
- (3) implies the existence of a material nonexistent fact.

(b) Examples of Deceptive and Inherently Misleading Advertisements. Deceptive or inherently misleading advertisements include, but are not limited to advertisements that contain:

- (1) statements or information that can reasonably be interpreted by a prospective client as a prediction or guaranty of success or specific results;
- (2) references to past results unless the information is objectively verifiable, subject to rule 4-7.14;
- (3) comparisons of lawyers or statements, words or phrases that characterize a lawyer's or law firm's skills, experience, reputation or record, unless such characterization is objectively verifiable;
- (4) references to areas of practice in which the lawyer or law firm does not practice or intend to practice at the time of the advertisement;
- (5) a voice or image that creates the erroneous impression that the person speaking or shown is the advertising lawyer or a lawyer or employee of the advertising firm. The following notice, prominently displayed would resolve the erroneous impression: "Not an employee or member of law firm";
- (6) a dramatization of an actual or fictitious event unless the dramatization contains the following prominently displayed notice: "DRAMATIZATION. NOT AN ACTUAL EVENT." When an advertisement includes an actor purporting to be engaged in a particular profession or occupation, the advertisement must include the following prominently displayed notice: "ACTOR. NOT ACTUAL [. . .]";
- (7) statements, trade names, telephone numbers, Internet addresses, images, sounds, videos or dramatizations that state or imply that the lawyer will engage in conduct or tactics that are prohibited by the Rules of Professional Conduct or any law or court rule;
- (8) a testimonial:

(A) regarding matters on which the person making the testimonial is unqualified to evaluate;

(B) that is not the actual experience of the person making the testimonial;

(C) that is not representative of what clients of that lawyer or law firm generally experience;

(D) that has been written or drafted by the lawyer;

(E) in exchange for which the person making the testimonial has been given something of value; or

(F) that does not include the disclaimer that the prospective client may not obtain the same or similar results;

(9) a statement or implication that The Florida Bar has approved an advertisement or a lawyer, except a statement that the lawyer is licensed to practice in Florida or has been certified pursuant to chapter 6, Rules Regulating the Florida Bar;~~or~~

(10) a judicial, executive, or legislative branch title, unless accompanied by clear modifiers and placed subsequent to the person's name in reference to a current, former or retired judicial, executive, or legislative branch official currently engaged in the practice of law. For example, a former judge may not state "Judge Doe (retired)" or "Judge Doe, former circuit judge." She may state "Jane Doe, Florida Bar member, former circuit judge" or "Jane Doe, retired circuit judge...."; or

(11) a statement or implication that another lawyer or law firm is part of, is associated with, or affiliated with the advertising law firm when that is not the case, including contact or other information presented in a way that misleads a person searching for a particular lawyer or law firm, or for information regarding a particular lawyer or law firm, to unknowingly contact a different lawyer or law firm.

Comment

Material Omissions

An example of a material omission is stating "over 20 years' experience" when the experience is the combined experience of all lawyers in the advertising firm. Another example is a lawyer who states "over 20 years' experience" when the lawyer includes within that experience time spent as a paralegal, investigator, police officer, or other nonlawyer position.

Implied Existence of Nonexistent Fact

An example of the implied existence of a nonexistent fact is an advertisement stating that a lawyer has offices in multiple states if the lawyer is not licensed in those states or is not

authorized to practice law. Such a statement implies the nonexistent fact that a lawyer is licensed or is authorized to practice law in the states where offices are located.

Another example of the implied existence of a nonexistent fact is a statement in an advertisement that a lawyer is a founding member of a legal organization when the lawyer has just begun practicing law. Such a statement falsely implies that the lawyer has been practicing law longer than the lawyer actually has.

Predictions of Success

Statements that promise a specific result or predict success in a legal matter are prohibited because they are misleading. Examples of statements that impermissibly predict success include: “I will save your home,” “I can save your home,” “I will get you money for your injuries,” and “Come to me to get acquitted of the charges pending against you.”

Statements regarding the legal process as opposed to a specific result generally will be considered permissible. For example, a statement that the lawyer or law firm will protect the client’s rights, protect the client’s assets, or protect the client’s family do not promise a specific legal result in a particular matter. Similarly, a statement that a lawyer will prepare a client to effectively handle cross-examination is permissible, because it does not promise a specific result, but describes the legal process.

Aspirational statements are generally permissible as such statements describe goals that a lawyer or law firm will try to meet. Examples of aspirational words include “goal,” “strive,” “dedicated,” “mission,” and “philosophy.” For example, the statement, “My goal is to achieve the best possible result in your case,” is permissible. Similarly, the statement, “If you’ve been injured through no fault of your own, I am dedicated to recovering damages on your behalf,” is permissible.

Modifying language can be used to prevent language from running afoul of this rule. For example, the statement, “I will get you acquitted of the pending charges,” would violate the rule as it promises a specific legal result. In contrast, the statement, “I will pursue an acquittal of your pending charges,” does not promise a specific legal result. It merely conveys that the lawyer will try to obtain an acquittal on behalf of the prospective client. The following list is a nonexclusive list of words that generally may be used to modify language to prevent violations of the rule: try, pursue, may, seek, might, could, and designed to.

General statements describing a particular law or area of law are not promises of specific legal results or predictions of success. For example, the following statement is a description of the law and is not a promise of a specific legal result: “When the government takes your property through its eminent domain power, the government must provide you with compensation for your property.”

Past Results

The prohibitions in subdivisions (b)(1) and (b)(2) of this rule preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, if the results are not objectively verifiable or are misleading, either alone or in the context in which they are used. For example, an advertised result that is atypical of persons under similar circumstances is likely to be misleading. A result that omits pertinent information, such as failing to disclose that a specific judgment was uncontested or obtained by default, or failing to disclose that the judgment is far short of the client's actual damages, is also misleading. The information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances. An example of a past result that can be objectively verified is that a lawyer has obtained acquittals in all charges in 4 criminal defense cases. On the other hand, general statements such as, "I have successfully represented clients," or "I have won numerous appellate cases," may or may not be sufficiently objectively verifiable. For example, a lawyer may interpret the words "successful" or "won" in a manner different from the average prospective client. In a criminal law context, the lawyer may interpret the word "successful" to mean a conviction to a lesser charge or a lower sentence than recommended by the prosecutor, while the average prospective client likely would interpret the words "successful" or "won" to mean an acquittal.

Rule 4-1.6(a), Rules Regulating the Florida Bar, prohibits a lawyer from voluntarily disclosing any information regarding a representation without a client's informed consent, unless one of the exceptions to rule 4-1.6 applies. A lawyer who wishes to advertise information about past results must have the affected client's informed consent. The fact that some or all of the information a lawyer may wish to advertise is in the public record does not obviate the need for the client's informed consent.

Comparisons

The prohibition against comparisons that cannot be factually substantiated would preclude a lawyer from representing that the lawyer or the lawyer's law firm is "the best," or "one of the best," in a field of law.

On the other hand, statements that the law firm is the largest in a specified geographic area, or is the only firm in a specified geographic area that devotes its services to a particular field of practice are permissible if they are true, because they are comparisons capable of being factually substantiated.

Characterization of Skills, Experience, Reputation or Record

The rule prohibits statements that characterize skills, experience, reputation, or record that are not objectively verifiable. Statements of a character trait or attribute are not statements that characterize skills, experience, or record. For example, a statement that a lawyer is aggressive, intelligent, creative, honest, or trustworthy is a statement of a lawyer's personal attribute, but

does not characterize the lawyer's skills, experience, reputation, or record. These statements are permissible.

Descriptive statements characterizing skills, experience, reputation, or a record that are true and factually verified are permissible. For example, the statement "Our firm is the largest firm in this city that practices exclusively personal injury law," is permissible if true, because the statement is objectively verifiable. Similarly, the statement, "I have personally handled more appeals before the First District Court of Appeal than any other lawyer in my circuit," is permissible if the statement is true, because the statement is objectively verifiable.

Descriptive statements that are misleading are prohibited by this rule. Descriptive statements such as "the best," "second to none," or "the finest" will generally run afoul of this rule, as such statements are not objectively verifiable and are likely to mislead prospective clients as to the quality of the legal services offered.

Aspirational statements are generally permissible as such statements describe goals that a lawyer or law firm will try to meet. Examples of aspirational words include "goal," "dedicated," "mission," and "philosophy." For example, the statement, "I am dedicated to excellence in my representation of my clients," is permissible as a goal. Similarly, the statement, "My goal is to provide high quality legal services," is permissible.

Areas of Practice

This rule is not intended to prohibit lawyers from advertising for areas of practice in which the lawyer intends to personally handle cases, but does not yet have any cases of that particular type.

Dramatizations

A re-creation or staging of an event must contain a prominently displayed disclaimer, "DRAMATIZATION. NOT AN ACTUAL EVENT." For example, a re-creation of a car accident must contain the disclaimer. A re-enactment of lawyers visiting the re-construction of an accident scene must contain the disclaimer.

If an actor is used in an advertisement purporting to be engaged in a particular profession or occupation who is acting as a spokesperson for the lawyer or in any other circumstances where the viewer could be misled, a disclaimer must be used. However, an authority figure such as a judge or law enforcement officer, or an actor portraying an authority figure, may not be used in an advertisement to endorse or recommend a lawyer, or to act as a spokesperson for a lawyer under rule 4-7.15.

Implying Lawyer Will Violate Rules of Conduct or Law

Advertisements which state or imply that the advertising lawyers will engage in conduct that violates the Rules of Professional Conduct are prohibited. The Supreme Court of Florida found that lawyer advertisements containing an illustration of a pit bull canine and the telephone

number 1-800-pitbull were false, misleading, and manipulative, because use of that animal implied that the advertising lawyers would engage in “combative and vicious tactics” that would violate the Rules of Professional Conduct. *Fla. Bar v. Pape*, 918 So. 2d 240 (Fla.2005).

Testimonials

A testimonial is a personal statement, affirmation, or endorsement by any person other than the advertising lawyer or a member of the advertising lawyer’s firm regarding the quality of the lawyer’s services or the results obtained through the representation. Clients as consumers are well-qualified to opine on matters such as courtesy, promptness, efficiency, and professional demeanor. Testimonials by clients on these matters, as long as they are truthful and are based on the actual experience of the person giving the testimonial, are beneficial to prospective clients and are permissible.

Florida Bar Approval of Ad or Lawyer

An advertisement may not state or imply that either the advertisement or the lawyer has been approved by The Florida Bar. Such a statement or implication implies that The Florida Bar endorses a particular lawyer. Statements prohibited by this provision include, “This advertisement was approved by The Florida Bar.” A lawyer referral service also may not state that it is a “Florida Bar approved lawyer referral service,” unless the service is a not-for-profit lawyer referral service approved under chapter 8 of the Rules Regulating the Florida Bar. A qualifying provider also may not state that it is a “Florida Bar approved qualifying provider” or that its advertising is approved by The Florida Bar.

Judicial, Executive, and Legislative Titles

This rule prohibits use of a judicial, executive, or legislative branch title, unless accompanied by clear modifiers and placed subsequent to the person’s name, when used to refer to a current or former officer of the judicial, executive, or legislative branch. Use of a title before a name is inherently misleading in that it implies that the current or former officer has improper influence. Thus, the titles Senator Doe, Representative Smith, Former Justice Doe, Retired Judge Smith, Governor (Retired) Doe, Former Senator Smith, and other similar titles used as titles in conjunction with the lawyer’s name are prohibited by this rule. This includes, but is not limited to, use of the title in advertisements and written communications, computer-accessed communications, letterhead, and business cards.

However, an accurate representation of one’s judicial, executive, or legislative experience is permitted if the reference is subsequent to the lawyer’s name and is clearly modified by terms such as “former” or “retired.” For example, a former judge may state “Jane Doe, Florida Bar member, former circuit judge” or “Jane Doe, retired circuit judge.”

As another example, a former state representative may not include “Representative Smith (former)” or “Representative Smith, retired” in an advertisement, letterhead, or business card. However, a former representative may state, “John Smith, Florida Bar member, former state representative.”

Further, an accurate representation of one's judicial, executive, or legislative experience is permitted in reference to background and experience in biographies, curriculum vitae, and resumes if accompanied by clear modifiers and placed subsequent to the person's name. For example, the statement "John Jones was governor of the State of Florida from [. . . years of service . . .]" would be permissible.

Also, the rule governs attorney advertising. It does not apply to pleadings filed in a court. A practicing attorney who is a former or retired judge may not use the title in any form in a court pleading. A former or retired judge who uses that former or retired judge's previous title of "Judge" in a pleading could be sanctioned.

Implication of Association or Affiliation with Another Lawyer or Law Firm

This rule prohibits any statement or implication that a lawyer or law firm is affiliated or associated with the advertising lawyer or law firm when that is not the case. Lawyers may not state or imply another lawyer is part of the advertising firm if the statement or implication is untrue. For example, when a lawyer leaves a law firm, the firm must remove the lawyer's name from the firm's letterhead, website, advertisements, and other communications about the law firm. 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. In order to comply, the triggered advertisement must state, in the first text that appears, the name of the advertising lawyer or law firm. 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.

From: rmarble@marblelawfirm.com [<mailto:rmarble@marblelawfirm.com>]
Sent: Sunday, September 16, 2018 7:59 PM
To: Thomas Bopp <TBopp@BANKERLOPEZ.COM>
Subject: Bar News Article

Tom,

Great article in the Florida Bar News. This email applies to the last paragraph regarding advertising aimed at a search directed towards a competitors firm's name:

1. I run my own Google Ads campaigns. In adwords you target "key words," that apply to your practice, and then enter auctions to bid on searches related to the key words.
2. You can set your key words to varying degrees of "broadness." The major options for each key word are: (i) broad; (ii) phrase; and (ii) exact. (I have included a link below)
3. At the broadest level Google might treat a search for a family law lawyer as a trigger for an auction aimed at the key word "divorce"
4. However, even when selecting more limited key word "broadness," ads may be triggered by unintended search phrases. So for example, a search for Morgan and Morgan injury lawyer, will trigger ads purchased by the ABC Law firm for the key words "injury lawyer." (I tried this for Tampa). I would guess that relatively few, if any, of the triggered ads are actually targeting "Morgan and Morgan," as a key word. (I do not practice in the same areas as Morgan and Morgan – but their size works well for finding examples).

While I agree that selecting "Morgan and Morgan," as a key word could be an issue; many searches that include the terms "Morgan and Morgan," will pull up ads from folks that have not targeted that firm as a key word. My concern is a rule that would overly narrow the use of legitimate key words, on platforms like adwords.

https://support.google.com/google-ads/answer/7478529?visit_id=636727376092984528-2139612934&rd=1

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Google AdWords is now Google Ads. Our new name reflects the full range of advertising options we offer across Search, Display, YouTube, and more. [Learn More](#)

About keyword matching options

Keyword match types help control which searches on Google can trigger your ad. So you could use *broad match* to show your ad to a wide audience or you could use *exact match* to hone in on specific groups of customers.

Where to start

Consider starting with broad match. Add negative match keywords to exclude searches on Google that aren't related to your business (optional).

- **Broad match**

Broad match is the default match type that all your keywords are assigned. Ads may show on searches that include misspellings, synonyms, related searches, and other relevant variations. So if your keyword is "women's hats," someone searching for "buy ladies hats" might see your ad. [Learn more about broad match](#)

- **Negative keywords**

Excludes your ads from showing on searches with that term. So if you're a hat company that doesn't sell baseball hats, you could add a negative keyword, designated with a minus sign (-**baseball hats**). [Learn more about negative keywords](#)

More advanced options

These options are only recommended for advanced advertisers trying to segment specific sets of searches.

So that you don't miss out on potential customers, we may show your ads for close variations on broad match modifier, phrase match, and exact match keywords. Close variations of these match types can include misspellings, singular or plural forms, acronyms, abbreviations, accents, and stemmings (such as floor and flooring), and for exact match keywords, this includes queries with the same meaning.

- **Broad match modifier**

Similar to broad match, except that the broad match modifier option only shows ads in searches including the words designated with a plus sign (+**women's hats**) or close variations of them. [Learn more about broad match modifier](#)

- **Phrase match**



Describe your issue



more about phrase match

- **Exact match**

Ads may show on searches that match the exact term or are close variations of that exact term. Close variants include searches for keywords with the same meaning as the exact keywords, regardless of spelling or grammar similarities between the query and the keyword. Close variations here may also include a reordering of words if it doesn't change the meaning, and the addition or removal of function words (prepositions, conjunctions, articles, and other words that don't impact the intent of a search), implied words, synonyms and paraphrases, and words that have the same search intent. Designated with brackets, the keyword [women's hats] could show when someone searches on Google for "hats for women." Learn more about exact match

Related links

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Describe your issue



Keywords

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-  [Choose the right keyword match types](#)
-  [Set up broad match modifiers](#)

English



English





Mark Gold <markgold@theticketclinic.com> on 10/16/2018 11:26:50 AM

Please respond to Mark Gold <markgold@theticketclinic.com>

To: "Ethics_Opinions@flabar.org" <Ethics_Opinions@flabar.org>
cc: (bcc: Ethics Mail)
Subject: Re: Proposed Amendments to Rule 4-7.13 - Google AdWords
Staff: Elizabeth Tarbert/The Florida Bar

Thank you Elizabeth. As an aside, I just have to comment on Mr. Hanna's alleged "professional injuries". Mr. Hanna has consistently opened offices next door or down the street from my offices, and has even copied my slogan "don't pay that ticket". perhaps we should consider a rule that says a lawyer cannot trade on the reputation of another by opening an office near another attorney practicing in the same field?

Regardless, his proposal does not address the issue I initially raised, which is the use of negative keywords to prevent the circumvention of the rule.

The more general rule proposed, which suggested a lawyer cannot intentionally use a search engine to advertise to persons seeking a specific law firm would be acceptable to me.

When submitted, please provide any new drafts.

With warmest regards,

Mark Gold

November 25, 2018

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

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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