

AGENDA ITEM SUMMARY

BOG Meeting: March 2018

Item Number: 20a

Substantive Committee: Board Review Committee on Professional Ethics

Narrative Summary: The Board Review Committee on Professional Ethics recommends that the Board of Governors adopt amendments to Rule 4-7.14(a) and comment that address use of “specialist” and “expert” by lawyers and law firms who are not board certified to conform to the federal court order in the *Searcy* case as described in the history below.

Background/History of Issue: The U.S. District Court for the Northern District of Florida (Judge Robert L. Hinkle) issued an order on September 30, 2015 in *Searcy v. Florida Bar* (case number 4:13cv664-RH/CAS), in which the Searcy law firm sued The Florida Bar regarding 2 lawyer advertising issues: 1) the prohibition against advertising past results unless they are objectively verifiable; and 2) the prohibition against claiming specialization or expertise unless the lawyer is board certified.

The court upheld the prohibition against advertising past results unless they are objectively verifiable. However, the court enjoined the bar from enforcing the prohibition against claiming specialization or expertise unless the lawyer is board certified as to both lawyers and law firms. The proposed amendments address the federal court order.

The bar's original proposed amendments were filed with the Florida Supreme Court on October 26, 2016, case no. SC16-1961. The amendments were rejected by the Court: *In re Amendments to Rules Regulating Florida Bar* (Biennial Petition), No. SC16-1961, 42 Fla. L. Weekly S903, (Fla. Nov. 9, 2017). The Court stated:

We decline to adopt the Bar’s proposal to amend Bar Rule 4-7.14 (Potentially Misleading Advertisements). The Bar proposes amendments to this rule in response to a decision from the United States District Court for the Northern District of Florida, which held, in relevant part, that provisions in Bar Rule 4-7.14(a) broadly

prohibiting lawyers who were not board certified from making truthful statements that they “specialize in” or “have expertise in” a particular field of practice were unconstitutional. In response to this decision, the Bar recommended amending the rule in subdivision (a) (Potentially Misleading Advertisements) to add a new subdivision (a)(5), which would prohibit lawyers from using in their advertisements the terms “specialist,” “expert,” or other variations of those terms unless the lawyer meets one of the four criteria established in subdivisions (a)(5)(A)-(a)(5)(D). The criteria in subdivisions (a)(5)(A), (a)(5)(B), and (a)(5)(C) are similar to those in other parts of rule 4-7.14. However, subdivision (a)(5)(D) would provide that a lawyer may identify as a “specialist” or “expert” if the lawyer’s “experience and training demonstrate specialized competence in an area of practice that is reasonably comparable to that demonstrated by the standards of the Florida Certification Plan set forth in chapter 6 of these rules”; if the area of claimed specialization or expertise is or falls within an area of practice under the Florida Certification Plan, the advertisement must include a reasonably prominent disclaimer that the lawyer is not board certified in that area of practice by the Bar or another certification program. We are concerned that the Bar’s proposal here does not sufficiently address the district court’s decision, and that the language requiring that a lawyer’s experience be “reasonably comparable” to the Florida Certification Plan will prove to be problematic because it could lead to differing and inconsistent applications. Because we believe that this important issue requires further study, we decline to adopt the Bar’s proposed amendments to rule 4-7.14, and we refer this matter to The Florida Bar for additional consideration.

The Supreme Court of Florida originally directed that the bar file a new petition with amendments addressing its concerns no later than February 15, 2018, then granted an extension until May 15, 2018. Draft amendments were provided to the Board of Legal Specialization and Education, which suggested changes, most of which were made. The Board of Legal Specialization and Education, however, does not endorse the proposal. Instead, the Board of Legal Specialization and Education requested that the bar request an additional extension of time to allow it to further study the issue.

Staff Analysis: The bar has been directed by the Supreme Court of Florida to file a petition proposing amendments to Rule 4-7.14(a)(4) on or before May 15, 2018, that address the federal court's order in *Searcy* which enjoined the bar from enforcing the rule. The order in *Searcy* enjoined the bar from enforcing the parts of Rule 4-7.14(a)(4) that prohibit lawyers from referring to themselves as specialists, experts, or other variations of those terms, unless the lawyer is board certified. The rule prohibits law firms from claiming specialization or expertise because law firms cannot be board certified. The draft amendments address the *Searcy* order in 2 ways: 1) addressing the use of "specialist," "expert," or other variations of those terms by lawyers who are not board certified, either because the area of practice is not an area available for certification or because the lawyer did not go through the certification process; and 2) use of the terms "specialize," "expertise" or other variations of those terms by a law firm, which cannot be board certified.

If the area of claimed specialization or expertise is either an area of certification under Florida's Certification Plan or falls within an area of certification under Florida's Certification Plan (e.g., medical malpractice would fall within the area of certification of Civil Trial and DUI would fall within the area of certification of Criminal Trial), then a lawyer could only claim specialization or expertise if the lawyer meets or exceeds the standards for that area of certification, excluding examination and peer review. For example, to claim specialization or expertise in personal injury, the lawyer would have to meet or exceed the standards for certification for civil trial, set forth in subchapter 6-4, which include practice of at least 5 years with at least 50 percent actively practicing civil trial law, a minimum of 15 contested civil trials, and completion of at least 50 credit hours of approved continuing legal education in civil trial law. The lawyer would not have to meet the requirements of examination and peer review. Additionally, the advertisement would have to include a disclaimer that the lawyer is not certified by The Florida Bar if the lawyer is not.

For a law firm, a majority of the lawyers employed by the firm would have to meet or exceed the standards for that area of certification, excluding examination and peer review, and the advertisement would have to include a disclaimer that the lawyers are not board certified by The Florida Bar if they are not.

If the area is not an area of certification under the Florida Certification Plan, or does not fall within an area of certification under the Florida Certification Plan, then the lawyer must meet or exceed the minimum standards for certification set forth in Rule 6-3.5, excluding examination and peer review. The standards set forth in Rule 6-3.5 include at least 5 years substantial legal practice, substantial involvement in the area of claimed specialization or expertise during at least 3 of the last 5 years, and at least 10 hours of continuing legal education in the area of claimed specialization or expertise per year. For a law firm, the majority of lawyers employed by the firm would have to meet or exceed those standards. No disclaimer would be required for either a lawyer or law firm claiming expertise or specialization in this situation, because Florida does not offer certification in that area.

The Board of Legal Specialization and Education opposes these proposed amendments. The Board of Legal Specialization and Education has requested additional time to further study the issue. Staff recommends against an extension, because the bar has already sought and received an extension. Additionally, staff has concerns that the result of additional study is a proposal of specific standards that might differ from existing certification standards, effectively creating a mini certification plan. Using existing standards would avoid creating a second layer of standards. It would also avoid the criticism that the bar may try to hold lawyers who are not board certified to a different standard than those who are.


Committee Recommendation: The Board Review Committee on Professional Ethics approved 9-0 on February 14, 2018.

Board Action Required: Final action and waiver by 2/3 vote of all parts of Standing Board Policy 1.60 that have not been met so that the bar can file the petition to amend the rules by May 15, 2018, as directed by the Supreme Court of Florida.

AMENDMENT

Title:	RULE 4-7.14 POTENTIALLY MISLEADING ADVERTISEMENTS (Expert/Specialist after Searcy)
Type:	Rule Regulating The Florida Bar
Companion Rules:	None
Sponsor:	Board Review Committee on Professional Ethics
Staff Contact:	Elizabeth Tarbert
News Notice Summary:	Within subdivision (a)(4) and the commentary, omits the terms "specialist" and "expert" as terms prohibited unless the lawyer is board certified. Adds new subdivisions (a)(5) and (a)(6) and commentary adding that lawyers may use of terms "specialist" and "expert" if they meet certain requirements and that law firms may claim specialization or expertise if they meet certain requirements, but requiring a disclaimer that the lawyer or law firm is not certified under certain circumstances.
Justification for Amendment:	<p>The U.S. District Court for the Northern District of Florida (Judge Robert L. Hinkle) issued an order on September 30, 2015 in Searcy v. Florida Bar (case number 4:13cv664-RH/CAS), in which the Searcy law firm sued The Florida Bar regarding 2 lawyer advertising issues: 1) the prohibition against advertising past results unless they are objectively verifiable; and 2) the prohibition against claiming specialization or expertise unless the lawyer is board certified.</p> <p>The court upheld the prohibition against advertising past results unless they are objectively verifiable. However, the court enjoined the bar from enforcing the prohibition against claiming specialization or expertise unless the lawyer is board certified as to both lawyers and law firms. Amendments address the federal court order.</p> <p>The bar's original proposed amendments were filed with the Florida Supreme Court on October 26, 2016, case no. SC16-1961. The amendments were rejected by the Court: In re Amendments to Rules Regulating Florida Bar (Biennial Petition), No. SC16-1961, 42 Fla. L. Weekly S903, (Fla. Nov. 9, 2017). The Court stated:</p> <p>We decline to adopt the Bar's proposal to amend Bar Rule 4-7.14 (Potentially Misleading Advertisements). The Bar proposes amendments to this rule in response to a decision from the United States District Court for the Northern District of Florida, which held, in relevant part, that provisions in Bar Rule 4-7.14(a) broadly prohibiting lawyers who were not board certified from making truthful statements that they "specialize in" or "have expertise in" a particular field of practice were unconstitutional. In response to this decision, the Bar recommended amending the rule in subdivision (a) (Potentially Misleading Advertisements) to add a new subdivision (a)(5), which would prohibit lawyers from using in their advertisements the terms "specialist," "expert," or other</p>

variations of those terms unless the lawyer meets one of the four criteria established in subdivisions (a)(5)(A)-(a)(5)(D). The criteria in subdivisions (a)(5)(A), (a)(5)(B), and (a)(5)(C) are similar to those in other parts of rule 4-7.14. However, subdivision (a)(5)(D) would provide that a lawyer may identify as a “specialist” or “expert” if the lawyer’s “experience and training demonstrate specialized competence in an area of practice that is reasonably comparable to that demonstrated by the standards of the Florida Certification Plan set forth in chapter 6 of these rules”; if the area of claimed specialization or expertise is or falls within an area of practice under the Florida Certification Plan, the advertisement must include a reasonably prominent disclaimer that the lawyer is not board certified in that area of practice by the Bar or another certification program. We are concerned that the Bar’s proposal here does not sufficiently address the district court’s decision, and that the language requiring that a lawyer’s experience be “reasonably comparable” to the Florida Certification Plan will prove to be problematic because it could lead to differing and inconsistent applications. Because we believe that this important issue requires further study, we decline to adopt the Bar’s proposed amendments to rule 4-7.14, and we refer this matter to The Florida Bar for additional consideration.

History:	Board Review Committee on Professional Ethics approved 9-0 on February 14, 2018. Rules Committee approved 6-2 on procedural basis on February 22, 2018.
Section Committee Opinion	
Impact Statement	 4-7.14 FIS .doc
Substantive Committee:	Board Review Committee on Professional Ethics
Assigned to Substantive Committee on:	02/12/2018
Approved?	<input checked="" type="radio"/> Yes <input type="radio"/> No By Vote of: 9-0
Budget Review Completed on:	
Approved?	<input type="radio"/> Yes <input checked="" type="radio"/> No By Vote of:
Program Evaluation Review Completed on:	
Approved?	<input type="radio"/> Yes <input checked="" type="radio"/> No By Vote of:
Rules Committee Review Completed on:	
Approved?	<input checked="" type="radio"/> Yes <input type="radio"/> No By Vote of: 6-2
Ready for Board Final Action?	<input type="radio"/> Yes <input checked="" type="radio"/> No
Board Review Completed on:	
Approved?	<input type="radio"/> Yes <input checked="" type="radio"/> No By Vote of:
Date Publication of Notice of Proposed BOG Action:	3-15-18
Dates of Board Readings:	3/23/18
Next Referral:	PEC - Strategic Review Budget - Fiscal Review BoG - Final Action
Referral History:	PEC - Strategic Review, Budget - Fiscal Review, Rules - Procedural Review, BoG - Final Action

BRC - Substantive Review

Ready for Final Form?	<input type="radio"/> Yes <input checked="" type="radio"/> No (Only those that don't require court approval.)
Ready to publish to the web?	<input type="radio"/> Yes <input checked="" type="radio"/> No
Ready to Submit to Supreme Court: ✓	<input type="radio"/> Yes <input checked="" type="radio"/> No
Effective Date:	

Attachment:



sc16-1961 Court Order 11-9-17.pdf



Ltr from Clerk of Court 11-17-17 re refile of 4-7.14.pdf



Supreme Court Clerk Extension Letter 4-7.14 1-19-18.pdf



Searcy Order on Merits.pdf



BLSE Comments 1-27-18.pdf



BLSE Draft 1-27-18.pdf

Proposed Amendment

RULE 4-7.14 POTENTIALLY MISLEADING ADVERTISEMENTS

A lawyer may not engage in potentially misleading advertising.

(a) Potentially Misleading Advertisements. Potentially misleading advertisements include, but are not limited to:

- (1) advertisements that are subject to varying reasonable interpretations, 1 or more of which would be materially misleading when considered in the relevant context;
- (2) advertisements that are literally accurate, but could reasonably mislead a prospective client regarding a material fact;
- (3) references to a lawyer's membership in, or recognition by, an entity that purports to base ~~such~~the membership or recognition on a lawyer's ability or skill, unless the entity conferring ~~such~~the membership or recognition is generally recognized within the legal

profession as being a bona fide organization that makes its selections based upon objective and uniformly applied criteria, and that includes among its members or those recognized a reasonable cross-section of the legal community the entity purports to cover;

(4) a statement that a lawyer is board certified, ~~a specialist, an expert,~~ or other variations of ~~those~~that terms unless:

(A) the lawyer has been certified under the Florida Certification Plan as set forth in chapter 6, Rules Regulating the Florida Bar and the advertisement includes the area of certification and that The Florida Bar is the certifying organization;

(B) the lawyer has been certified by an organization whose specialty certification program has been accredited by the American Bar Association or The Florida Bar as provided elsewhere in these rules. A lawyer certified by a specialty certification program accredited by the American Bar Association but not The Florida Bar must include the statement "Not Certified as a Specialist by The Florida Bar" in reference to the specialization or certification. All such advertisements must include the area of certification and the name of the certifying organization; or

(C) the lawyer has been certified by another state bar if the state bar program grants certification on the basis of standards reasonably comparable to the standards of the Florida Certification Plan set forth in chapter 6 of these rules and the advertisement includes the area of certification and the name of the certifying organization.

~~In the absence of such certification, a lawyer may communicate the fact that the lawyer limits his or her practice to 1 or more fields of law; or~~

(5) a statement that the lawyer is a specialist or an expert, or other variations of those terms, in an area of practice that is not an area of practice or is not within an area of practice under the Florida Certification Plan unless the lawyer can objectively verify that the lawyer meets or exceeds the minimum standards for certification set forth in rule 6-3.5 excluding examination and peer review;

(6) a statement that the lawyer is a specialist or an expert, or other variation of those terms, in an area of practice that is an area of practice or is within an area of practice under the Florida Certification Plan unless the lawyer can objectively verify that the lawyer meets or exceeds the minimum standards for certification of that area set forth in the Florida Certification Plan in chapter 6 of these rules excluding examination and peer review and the advertisement includes a reasonably prominent disclaimer that the lawyer is not board certified by The Florida Bar if the lawyer is not;

(7) a statement that a law firm specializes or has expertise, or other variations of those terms, in an area of practice that is not an area of practice or is not within an area of practice under the Florida Certification Plan unless the law firm can objectively verify that a majority of the lawyers employed by the law firm meet or exceed the minimum standards

for certification set forth in rule 6-3.5 excluding examination and peer review;

(8) a statement that a law firm specializes or has expertise, or other variations of those terms, in an area of practice that is an area of practice or is within an area of practice under the Florida Certification Plan unless the law firm can objectively verify that a majority of the lawyers employed by the law firm meet or exceed the minimum standards for certification of that area set forth in the Florida Certification Plan in chapter 6 of these rules excluding examination and peer review and the advertisement includes a reasonably prominent disclaimer that the lawyers are not board certified by The Florida Bar if they are not;

(59) information about the lawyer's fee, including those that indicate no fee will be charged in the absence of a recovery, unless the advertisement discloses all fees and expenses for which the client might be liable and any other material information relating to the fee. A lawyer who advertises a specific fee or range of fees for a particular service must honor the advertised fee or range of fees for at least 90 days unless the advertisement specifies a shorter period; provided that, for advertisements in the yellow pages of telephone directories or other media not published more frequently than annually, the advertised fee or range of fees must be honored for no less than 1 year following publication.

(b) Clarifying Information. A lawyer may use an advertisement that would otherwise be potentially misleading if the advertisement contains information or statements that adequately clarify the potentially misleading issue.

Comment

Awards, ~~Honors~~honors, and ~~Ratings~~ratings

Awards, honors and ratings are not subjective statements characterizing a lawyer's skills, experience, reputation or record. Instead, they are statements of objectively verifiable facts from which an inference of quality may be drawn. It is therefore permissible under the rule for a lawyer to list bona fide awards, honors and recognitions using the name or title of the actual award and the date it was given. If the award was given in the same year that the advertisement is disseminated or the advertisement references a rating that is current at the time the advertisement is disseminated, the year of the award or rating is not required.

For example, the following statements are permissible:

"John Doe is AV rated by Martindale-Hubbell. This rating is Martindale-Hubbell's highest rating."

"Jane Smith was named a 2008 Florida Super Lawyer by Super Lawyers Magazine."

Claims of Board Certification, Specialization or Expertise **board certification,**

This rule permits a lawyer or law firm to indicate areas of practice in communications about the lawyer's or law firm's services, provided the advertising lawyer or law firm actually practices in those areas of law at the time the advertisement is disseminated. If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted to indicate that. A lawyer who is not certified by The Florida Bar, by another state bar with comparable standards, or an organization accredited by the American Bar Association or The Florida Bar may not be described to the public as a "specialist," "specializing," "certified," or "board certified," being an "expert," having "expertise," or any variation of similar import. A lawyer may indicate that the lawyer concentrates in, focuses on, or limits the lawyer's practice to particular areas of practice as long as the statements are true.

Certification is specific to individual lawyers; a law firm cannot be certified, and cannot claim specialization or expertise in an area of practice per subdivision (c) of rule 6-3.4. Therefore, an advertisement may not state that a law firm is certified, has expertise in, or specializes in any area of practice.

A lawyer can only state or imply that the lawyer is "certified," a "specialist," or an "expert" in the actual area(s) of practice in which the lawyer is certified. A lawyer who is board certified in civil trial law, may so state that, but may not state that the lawyer is certified, an expert in, or specializes in personal injury. Similarly, a lawyer who is board certified in marital and family law may not state that the lawyer specializes in divorce.

Fee and Cost Information **cost information**

Every advertisement that contains information about the lawyer's fee, including a contingent fee, must disclose all fees and costs that the client will be liable for. If the client is, in fact, not responsible for any costs in addition to the fee, then no disclosure is necessary. For example, if a lawyer charges a flat fee to create and execute a will and there are no costs associated with the services, the lawyer's advertisement may state only the flat fee for that service.

However, if there are costs for which the client is responsible, the advertisement must disclose this fact. For example, if fees are contingent on the outcome of the matter, but the client is responsible for costs regardless of the matter's outcome, the following statements are permissible: "No Fee if No Recovery, but Client is Responsible for Costs," "No Fee if No Recovery, Excludes Costs," "No Recovery, No Fee, but Client is Responsible for Costs" and other similar statements.

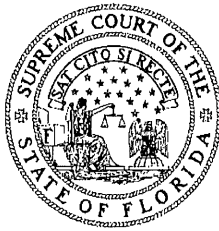
On the other hand, if both fees and costs are contingent on the outcome of a personal injury case, the statements "No Fees or Costs If No Recovery" and "No Recovery - No Fees or Costs"

are permissible.

Composed by Elizabeth Tarbert **on** 02/06/2018 **at** 04:25 PM

Revision History:

Revised by Kelly Smith/The Florida Bar -- 02/27/2018 04:03:11 PM
Revised by Kelly Smith/The Florida Bar -- 02/27/2018 02:40:53 PM
Revised by Elizabeth Tarbert/The Florida Bar -- 02/27/2018 11:03:17 AM
Revised by Elizabeth Tarbert/The Florida Bar -- 02/27/2018 11:02:04 AM
Revised by Elizabeth Tarbert/The Florida Bar -- 02/26/2018 08:08:00 AM
Revised by Elizabeth Tarbert/The Florida Bar -- 02/26/2018 08:07:15 AM
Revised by Elizabeth Tarbert/The Florida Bar -- 02/22/2018 10:22:43 AM
Revised by Elizabeth Tarbert/The Florida Bar -- 02/22/2018 08:19:55 AM
Revised by Elizabeth Tarbert/The Florida Bar -- 02/22/2018 08:13:51 AM
Revised by Kelly Smith/The Florida Bar -- 02/19/2018 11:23:49 AM
Revised by Elizabeth Tarbert/The Florida Bar -- 02/15/2018 08:15:10 AM
Revised by Elizabeth Tarbert/The Florida Bar -- 02/14/2018 11:52:32 AM
Revised by Kelly Smith/The Florida Bar -- 02/09/2018 10:35:31 AM
Revised by Kelly Smith/The Florida Bar -- 02/07/2018 10:40:48 AM
Revised by Elizabeth Tarbert/The Florida Bar -- 02/07/2018 09:38:49 AM
Revised by Kelly Smith/The Florida Bar -- 02/07/2018 09:03:24 AM
Revised by Elizabeth Tarbert/The Florida Bar -- 02/06/2018 05:38:10 PM
Revised by Elizabeth Tarbert/The Florida Bar -- 02/06/2018 05:29:30 PM
Revised by Elizabeth Tarbert/The Florida Bar -- 02/06/2018 05:29:08 PM



Supreme Court of Florida

Office of the Clerk
500 South Duval Street
Tallahassee, Florida 32399-1927

JOHN A. TOMASINO
CLERK
MARK CLAYTON
CHIEF DEPUTY CLERK
JULIA BREEDING
STAFF ATTORNEY

PHONE NUMBER: (850) 488-0125
www.floridasupremecourt.org

January 19, 2018

Elizabeth Clark Tarbert
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300

Re: Amendments to Rule Regulating The Florida Bar 4-7.14 (Potentially
Misleading Advertisements)

Dear Ms. Tarbert:

We have received your request for an extension of time filed January 18, 2018.
Your request for an extension has been granted. Your report should be submitted
directly to my office by May 15, 2018.

If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to be "JAT", followed by a horizontal line.

John A. Tomasino

JAT/sh

RECEIVED
JAN 23 2018
ETHICS/ADVERTISING

Supreme Court of Florida

No. SC16-1961

IN RE: AMENDMENTS TO THE RULES REGULATING THE FLORIDA BAR (BIENNIAL PETITION).

[November 9, 2017]

PER CURIAM.

This matter is before the Court on the petition of The Florida Bar proposing amendments to the Rules Regulating the Florida Bar (Bar Rules). We have jurisdiction. See art. V, § 15, Fla. Const.

The Florida Bar (Bar) has filed its biennial petition proposing both new rules and amendments to a number of existing Bar Rules. The proposals were approved by the Board of Governors of The Florida Bar, and formal notice of the proposed amendments was published in The Florida Bar News. The notice directed interested persons to file their comments directly with the Court. The Court received two comments; the Bar filed a response to the comments.

After fully considering the Bar’s petition, the comments, and the response, we adopt the majority of the Bar’s proposals, with some modifications,¹ as discussed in this opinion. However, as addressed below, we decline to adopt the Bar’s proposed amendments to Bar Rule 4-7.14 (Potentially Misleading Advertisements) at this time, and we refer this matter back to the Bar for further consideration. We discuss the new rules and more significant rule amendments below.

AMENDMENTS

First, Bar Rule 1-3.2 (Membership classifications) is amended in subdivision (a) (Members in Good Standing), as proposed by the Bar, to allow members of the Bar who have voluntarily selected inactive status to be classified as “members in good standing.” New subdivision (a)(2) provides that members of the Bar who have elected inactive status, paid their annual memberships fees, and who are not retired, resigned, delinquent, suspended, or inactive because of incapacity, are considered members in “good standing” for purposes of obtaining a certificate of good standing and for no other purpose.

We amend Bar Rule 1-7.5 (Retired, Inactive, Delinquent Members), as recommended by the Bar, to authorize retired or inactive Bar members to practice

1. We have revised the Bar’s proposals in several Bar Rules to make technical or editorial changes.

law as an “emeritus lawyer” pursuant to the Emeritus Attorneys Pro Bono Participation Program in Chapter 12 of the Bar Rules. This amendment, and other amendments to the Bar Rules addressed herein, were recommended by the Florida Commission on Access to Civil Justice, and are intended to increase the pool of lawyers authorized to provide pro bono legal services to the community under the supervision of a legal aid organization.

Next, we amend Bar Rule 1-12.1 (Amendment to Rules; Authority; Notice; Procedures; Comments), as proposed by the Bar—subdivision (g) (Notice of Intent to File Petition) will now require that the Bar’s notice of its intent to file a petition to amend the Bar Rules, published in The Florida Bar News and on its website, identify the rules to be amended and state in general terms the nature of the proposed amendments; the full text of the Bar’s proposals will be published only on the Bar’s website. Also in Bar Rule 1-12.1, we amend subdivision (h) (Action by the Supreme Court of Florida) to provide that a summary of the Court’s final action on a petition to amend the Bar Rules will be reported in The Florida Bar News and on the Bar’s website.

Bar Rule 3-7.16 (Limitation on Time to Bring Complaint) is renamed “Limitation on Time to Open Investigation” and is substantially amended to clarify the limitations period for opening an investigation into allegations of lawyer misconduct. Subdivision (a) is renamed “Time for Initiating Investigation of

Complaints and Re-opened Cases,” and will now include three new subdivisions.

Subdivision (a)(1) (Initial Complaint or Investigation) provides that a complainant must make a written “inquiry”² to the Bar within six years from the time the matter giving rise to the inquiry or complaint is discovered or should have been discovered. In the case of an investigation initiated by the Bar, the Bar must open the investigation within six years from the time the matter is discovered or should have been discovered. Subdivision (a)(2) (Re-opened Investigations) provides that a re-opened disciplinary investigation is not time barred if the matter is re-opened within one year after it was closed. And subdivision (a)(3) (Deferred Investigations) states that a timely disciplinary investigation that was deferred consistent with Bar policy and the Bar Rules is not time barred if the grievance committee finds probable cause and the Bar files its formal complaint within one year after notice that the civil, criminal, or other proceedings that were the basis for the deferral have concluded. The remaining subdivisions in this rule are also amended as proposed by the Bar.

Bar Rule 4-1.8 (Conflict of Interest; Prohibited and Other Transactions) is amended in subdivision (c) (Gifts to Lawyer or Lawyer’s Family) to prohibit a

2. We amend Bar Rule 3-2.1 (Generally), as proposed by the Bar, to add a new definition for the term “Inquiry,” meaning a written communication received by Bar counsel questioning the conduct of any Bar member.

lawyer from soliciting any gift from a client, or from preparing an instrument that gives the lawyer or a member of the lawyer's family any gift. This change was proposed by the Bar in response to a suggestion from the Real Property Probate and Trust Law Section. We also amend the comment to rule 4-1.8 to explain this prohibition, and other subdivisions throughout rule 4-1.8 to clarify language. However, we have revised the Bar's proposal in subdivision (h) (Limiting Liability for Malpractice), as recommended in the comment from Attorney Timothy P. Chinaris, to remove the reference to "prospective" malpractice.

We decline to adopt the Bar's proposal to amend Bar Rule 4-7.14 (Potentially Misleading Advertisements). The Bar proposes amendments to this rule in response to a decision from the United States District Court for the Northern District of Florida, which held, in relevant part, that provisions in Bar Rule 4-7.14(a) broadly prohibiting lawyers who were not board certified from making truthful statements that they "specialize in" or "have expertise in" a particular field of practice were unconstitutional. In response to this decision, the Bar recommended amending the rule in subdivision (a) (Potentially Misleading Advertisements) to add a new subdivision (a)(5), which would prohibit lawyers from using in their advertisements the terms "specialist," "expert," or other variations of those terms unless the lawyer meets one of the four criteria established in subdivisions (a)(5)(A)-(a)(5)(D). The criteria in subdivisions

(a)(5)(A), (a)(5)(B), and (a)(5)(C) are similar to those in other parts of rule 4-7.14. However, subdivision (a)(5)(D) would provide that a lawyer may identify as a “specialist” or “expert” if the lawyer’s “experience and training demonstrate specialized competence in an area of practice that is reasonably comparable to that demonstrated by the standards of the Florida Certification Plan set forth in chapter 6 of these rules”; if the area of claimed specialization or expertise is or falls within an area of practice under the Florida Certification Plan, the advertisement must include a reasonably prominent disclaimer that the lawyer is not board certified in that area of practice by the Bar or another certification program. We are concerned that the Bar’s proposal here does not sufficiently address the district court’s decision, and that the language requiring that a lawyer’s experience be “reasonably comparable” to the Florida Certification Plan will prove to be problematic because it could lead to differing and inconsistent applications. Because we believe that this important issue requires further study, we decline to adopt the Bar’s proposed amendments to rule 4-7.14, and we refer this matter to The Florida Bar for additional consideration.

Next, we have made several amendments to Bar Rule 4-7.18 (Direct Contact with Prospective Clients). As proposed by the Bar, subdivision (a) (Solicitation) is amended to provide that the term “solicit” includes contact in person, by telephone, by electronic means that include real-time communication face-to-face, or by any

other communication directed to a specific recipient that does not meet the requirements of the rule. Additionally, we amend subdivision (b)(2) (Written Communication) to require that permitted written communications to prospective clients for the purpose of obtaining professional employment must be marked with the label “advertisement” on each separate enclosure, rather than each separate page. If the written communication is a self-mailing brochure or pamphlet, the “advertisement” mark must be included on the address panel of the brochure or pamphlet, on the inside of the brochure or pamphlet, and on each separate enclosure. Subdivision (b)(3) is also amended, as proposed by the Bar, to provide that the requirements contained in subdivision (b)(2) do not apply to communications made at a prospective client’s request.

In Bar Rule 5-1.1 (Trust Accounts), we amend subdivisions (a)(1) (Nature of Money or Property Entrusted to Attorney; Trust Account Required; Location of Trust Account; Commingling Prohibited), (a)(2) (Nature of Money or Property Entrusted to Attorney; Compliance with Client Directives), (g)(1)(D) (Interest on Trust Accounts (IOTA) Program; Definitions; Eligible Institution), and (g)(5) (Interest on Trust Accounts (IOTA) Program; Eligible Institution Participation in IOTA) to permit lawyers to maintain trust accounts in federally insured credit unions. We amend subdivision (g)(4) (Interest on Trust Accounts (IOTA) Program; Notice to Foundation) to direct lawyers to the Bar’s website for The

Florida Bar Foundation's current address. We also amend other subdivisions in Bar Rule 5-1.1, as proposed by the Bar. However, we have revised the Bar's proposal in paragraphs seven and eight of the comment to the rule, as recommended in the comment from Mr. Chinaris, to delete the parentheticals included with the citations to case law.

We next adopt a new Bar Rule 6-3.7 (Inactive Status), to allow board certified members of the Bar to apply for a temporary inactive status in certain circumstances. Subdivision (a) (Purpose) of the new rule provides that the inactive status is available to eligible members who apply and are qualified for such status under the provisions of the rule. Subdivision (b) (Applicability) outlines six categories of eligible members. These include board certified members appointed or elected to serve as a judicial officer; we have revised the Bar's proposal in subdivision (b)(1) to include administrative law judges in the list of "judicial officers." Other categories of members eligible for inactive status include: law professors teaching in an accredited law school or graduate law course who agree not to practice if granted inactive status; professional neutrals, including mediators, arbitrators, or voluntary trial resolution judges, who agree not to practice law if granted inactive status; active duty military personnel; members who are unable to practice law due to a "unique substantial and material hardship, medical or otherwise"; and, during the two years immediately following the effective date of

the rule, members who voluntarily relinquished their board certification before the effective date of the rule, but who would otherwise be eligible for inactive status may be granted such status. Subdivision (c) (Qualifications) outlines the qualifications for maintaining board certified inactive status. Any Bar member granted board certified inactive status must maintain an active membership in The Florida Bar, obtain the continuing legal education credit that would be required for recertification in their practice area, and comply with the applicable rules and policies for board certification. Subdivision (d) (Revocation or Relinquishment of Board Certified Inactive Status) provides that the Board of Legal Specialization and Education (BLSE) may revoke a member's board certified inactive status if the member fails to comply with the policies. On revocation, the member cannot use the phrase "board certified inactive"; the member also cannot use the phrase "board certified" unless he or she is reactivated to board certification. Alternatively, a board certified inactive member is required to notify the BLSE within ninety days if he or she no longer qualifies for board certified inactive status, or no longer wishes to retain that status. The member must immediately cease using the phrase "board certified inactive," and either apply to reactivate their board certification or relinquish the certification. Finally, subdivision (e) (Reactivation to Board Certified Status and Recertification) outlines the procedures for seeking reactivation of board certification status.

We also adopt a new Subchapter 6-31 (Standards for Board Certification in International Litigation and Arbitration), outlining standards for board certification in the field of International Litigation and Arbitration. This subchapter includes four new Bar Rules. Bar Rule 6-31.1 (Generally) provides that a member in good standing with The Florida Bar, who is eligible to practice law in Florida and meets the standards prescribed in Subchapter 6-31, may be issued a certificate identifying the lawyer as board certified in International Litigation and Arbitration. Bar Rule 6-31.2 (Definitions) provides definitions for the terms “International Litigation and Arbitration,” “Practice of Law,” and “International Litigation and Arbitration Certification Committee.” Bar Rule 6-31.3 (Minimum Standards) outlines the minimum standards of practice, experience, and education required to earn a certification in International Litigation and Arbitration. And Bar Rule 6-31.4 (International Litigation and Arbitration Recertification) describes the requirements for seeking recertification in International Litigation and Arbitration at the conclusion of a five-year cycle.

We amend Bar Rule 10-2.1 (Generally), as proposed by the Bar, first in subdivision (b) (Paralegal or Legal Assistant) to add language authorizing a paralegal to work under the supervision of an out-of-state lawyer or foreign lawyer engaged in the authorized practice of law in Florida. We also amend subdivision

(e) (Bar Counsel) to include in the definition of “Bar Counsel” Unlicensed Practice of Law (UPL) counsel and UPL staff counsel.

Bar Rule 10-9.1 (Procedures for Issuance of Advisory Opinions on the Unlicensed Practice of Law) is amended, as proposed by the Bar, to address procedures for requesting and issuing proposed advisory opinions on the unlicensed practice of law. Subdivision (b) (Requests for Advisory Opinions) is reworded to provide that a petitioner may request a formal advisory opinion concerning activity that may constitute the unlicensed practice of law by submitting a question to the Bar’s UPL Department. We also amend subdivision (b) to make clear that the request must be in writing, include all of the operative facts, and ask whether the activity constitutes the unlicensed practice of law. We amend subdivision (c), renamed “Limitations on Advisory Opinions,” to include that no advisory opinion may be rendered as to any matter that is currently the subject of an unlicensed practice of law investigation or grievance investigation by the Bar. And we amend subdivision (g) (Service and Judicial Review of Proposed Advisory Opinions), pertaining to proceedings in this Court to review proposed advisory opinions issued by the Standing Committee on UPL. The petitioner or any other interested party may file either a brief or a memorandum in response to the proposed advisory opinion. The Standing Committee’s response, and any reply, may also be in the form of either a brief or a memorandum.

We amend several rules within Chapter 12 of the Bar Rules,³ as proposed by the Bar, which, together with the amendments to Bar Rule 1-7.5 discussed herein, expand the existing eligibility requirements and allow more lawyers to serve as emeritus lawyers, providing pro bono legal services to the community under the supervision of an approved legal aid organization. The Bar proposed these changes based on recommendations from the Florida Commission on Access to Civil Justice. As amended, this Chapter will now permit inactive or retired Bar members, inactive or retired lawyers who practiced in any other state or territory of the United States or the District of Columbia, former judges, current or former law professors, and authorized house counsel to serve as emeritus lawyers and perform this important service.

We also amend a number of rules within Chapter 16 of the Bar Rules (Foreign Legal Consultancy Rule), and add a new Bar Rule 16-1.7 (Annual Sworn Statement). Among other changes in this Chapter, Bar Rule 16-1.2, renamed “General Certification Regulations,” is amended to change some of the requirements for certification as a foreign legal consultant, such that a foreign lawyer applying for certification must demonstrate that he or she has engaged in the practice of law in a foreign country for not less than three of the five years

3. We also revise the title of Chapter 12 to “Emeritus Lawyers Pro Bono Participation Program.”

immediately preceding the application; he or she must not have been disciplined for professional misconduct by the bar or courts of any jurisdiction within the last seven years; and he or she must not have been denied admission to practice before the courts in any jurisdiction based upon the applicant's character and fitness during the ten-year period immediately preceding the application. We have deleted existing language in the rule requiring applicants to be over twenty-six years of age.

Additionally, in Bar Rule 16-1.3 (Activities), we amend subdivision (a) (Rendering Legal Advice), as recommended by the Bar; however, we decline to adopt the proposed amendments in subdivision (b) (Representing Status as Member of The Florida Bar), which would serve to delete the requirement that foreign legal consultants provide clients a letter disclosing the extent of their professional liability insurance coverage, as well as the fact that the client will not have access to the Clients' Security Fund in any discipline case against the foreign lawyer. We believe these disclosures serve an important role in protecting clients.

Finally, we amend several rules in Chapter 17 of the Bar Rules (Authorized House Counsel Rule), as proposed by the Bar, to allow both lawyers licensed to practice law in any United States jurisdiction other than Florida, and those authorized to practice as a lawyer or counselor in a foreign jurisdiction, to serve as authorized house counsel. Within Chapter 17, we delete existing Bar Rule 17-1.7

(Immunity from Prosecution) in its entirety, because this rule is no longer necessary. However, because the rule amendments we adopt in this case will now permit foreign lawyers to serve as authorized house counsel, such foreign lawyers who are duly registered as authorized house counsel under Chapter 17 of the Bar Rules will not be subject to prosecution for the unlicensed practice of law for acting as counsel to a business organization prior to the effective date of these rule amendments.

CONCLUSION

Accordingly, the Court amends the Rules Regulating the Florida Bar as set forth in the appendix to this opinion. New language is indicated by underscoring; deletions are indicated by struck-through type. The comments are offered for explanation and guidance only and are not adopted as an official part of the rules. The amendments shall become effective on February 1, 2018, at 12:01 a.m.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON,
and LAWSON, JJ., concur.

**THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE
EFFECTIVE DATE OF THESE AMENDMENTS.**

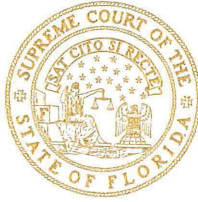
Original Proceeding – Rules Regulating The Florida Bar

John F. Harkness, Jr., Executive Director, Michael J. Higer, President, Michelle R. Suskauer, President-Elect, William J. Schifino, Jr., Past President, Lori S. Holcomb, Director, Division of Ethics and Consumer Protection, and Elizabeth Clark Tarbert, Ethics Counsel, The Florida Bar, Tallahassee, Florida,

for Petitioner

Thomas O. Wells of Wells & Wells, P.A., Coral Gables, Florida; and Timothy P. Chinaris, Nashville, Tennessee,

Responding with Comments



Supreme Court of Florida

500 South Duval Street
Tallahassee, Florida 32399-1925

JORGE LABARGA
CHIEF JUSTICE
BARBARA J. PARIENTE
R. FRED LEWIS
PEGGY A. QUINCE
CHARLES T. CANADY
RICKY POLSTON
C. ALAN LAWSON
JUSTICES

JOHN A. TOMASINO
CLERK OF COURT

SILVESTER DAWSON
MARSHAL

November 17, 2017

Mr. John F. Harkness, Jr.
Executive Director
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300

Re: Amendments to Rule Regulating the Florida Bar 4-7.14 (Potentially
Misleading Advertisements)

Dear Mr. Harkness:

At the direction of the Court, I am writing you following the Court's recent opinion in In re Amendments to the Rules Regulating the Florida Bar (Biennial Petition), No. SC16-1961, (Fla. Nov. 9, 2017) (Slip op.), to ask that you reconsider amendments to Rule Regulating the Florida Bar 4-7.14 (Potentially Misleading Advertisements). A copy of the opinion is enclosed for your convenience.

As you know, in the Court's November 9, 2017, opinion, the Court declined to adopt amendments to rule 4-7.14(a) (Potentially Misleading Advertisements). The Bar proposed the amendments in response to a decision from the United States District Court for the Northern District of Florida, holding that provisions in rule 4-7.14(a) broadly prohibiting lawyers who were not board certified from making truthful statements that they "specialize in" or "have expertise in" a particular field of practice were unconstitutional. In its opinion, the Court expressed concern "that

Mr. John F. Harkness, Jr.

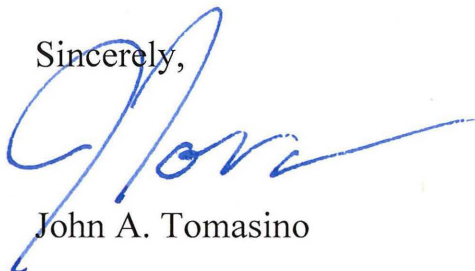
November 17, 2017

Page: 2

the Bar's proposal here does not sufficiently address the district court's decision, and that the language requiring that a lawyer's experience be 'reasonably comparable' to the Florida Certification Plan will prove to be problematic because it could lead to differing and inconsistent applications." Slip op. at 6. Because it concluded that the issue required further study, the Court referred the matter back to the Bar for additional consideration. Id.

Consistent with the Court's direction, The Florida Bar should file a new petition to amend the Rules Regulating the Florida Bar, which will be docketed as a new case, with my office by February 15, 2018, with a copy to Deborah Meyer, the Director of Central Staff. If the Bar needs additional time to develop the requested rule amendments, please submit a request for an extension of time to my office indicating when the petition can be filed. Thank you in advance for your consideration of this matter, and please do not hesitate to contact me, if you have any questions.

Sincerely,



John A. Tomasino

Enclosure

JAT/jb/mc/sb

cc: The Honorable Jorge Labarga, Chief Justice
Ms. Deborah J. Meyer, Supreme Court Director of Central Staff

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

CHRISTIAN D. SEARCY et al.,

Plaintiffs,

v.

CASE NO. 4:13cv664-RH/CAS

THE FLORIDA BAR et al.,

Defendants.

_____/

ORDER ON THE MERITS

This case presents a First Amendment challenge to two Florida Bar rules that govern attorney websites. The case is here on cross-motions for summary judgment. Both sides agree the case should be resolved based on the summary-judgment motions.

The first challenged rule, at least as interpreted by the Bar’s Standing Committee on Advertising, requires any statement on an attorney’s website to be “objectively verifiable.” The Standing Committee says a website thus cannot include a statement such as “tort reform benefits insurers.” The rule as so interpreted would obviously violate the First Amendment, but in this lawsuit the

Bar renounces any such interpretation. The Bar has not, however, renounced application of the rule to at least some truthful statements about an attorney's past results. Under controlling Eleventh Circuit authority, the plaintiffs' challenge to this rule is not yet ripe.

The second rule prohibits a law firm from saying it specializes in, or has expertise in, a given practice area, even if the statement is true. The rule prohibits an individual attorney from truthfully claiming to specialize or have expertise in an area unless the attorney is board-certified in that area. And because certification is not available for some practice areas, the rule prohibits an attorney from claiming to specialize or have expertise in those areas. The challenge to this rule is ripe. The rule, at least as applied to the plaintiffs' website, is unconstitutional.

I

The plaintiff Searcy Denney Scarola Barnhart & Shipley PA is a Florida law firm that handles personal-injury cases. The individual plaintiffs are the firm's five named partners. The firm has included on its website (a term used in this order to include blogs and social-media materials), and wishes to continue to include on its website, some statements that clearly do, and others that may, violate the challenged rules, including, for example, a statement that tort reform benefits insurers and a statement that Searcy Denney specializes in mass-tort and unsafe-

product cases. As is undisputed, the firm has handled many mass-tort and unsafe-product cases.

The defendants are The Florida Bar and, in their official capacities, four Bar officers, including the executive director.

The plaintiffs challenge two rules that are part of the Rules Regulating The Florida Bar (sometimes cited in this order as “Florida Bar Rules”). Rule 4-7.13 prohibits “deceptive and inherently misleading” advertisements, defines that term, and, in Rule 4-7.13(b)(2), gives as a specific example of prohibited material “references to past results unless such information is objectively verifiable.” Rule 4-7.14(a)(4) prohibits “a statement that a lawyer is board certified, a specialist, an expert, or other variations of those terms,” unless the lawyer has been certified under The Florida Bar’s certification plan, another state’s comparable plan, or another certification plan accredited by The Florida Bar or the American Bar Association.

The plaintiffs assert that the rules violate the First Amendment, both on their face and as applied. They also initially asserted that Rule 4-7.13 is unconstitutionally vague. An earlier order rejected the vagueness challenge on the merits.

II

The Bar has established a three-step procedure under which an attorney may obtain an opinion on whether a statement in an advertisement or on the attorney's website violates the rules. The first step is review of the statement by the Bar's Ethics and Advertising Division. The second step is review of the Ethics and Advertising Division's opinion by the Bar's Standing Committee on Advertising. The third step is review by the Bar's Board of Governors.

A favorable opinion at any step creates a "safe harbor"; an attorney cannot be disciplined based on a statement said to be permissible at any step. But only the Board of Governors can establish the Bar's official policy. Thus an opinion of the Ethics and Advertising Division or Standing Committee on Advertising, even when issued as a formal part of the review process, may establish a safe harbor but otherwise is not binding on the Bar or on the attorney.

When invoking this process, an attorney may submit discrete materials from a website but must not submit the entire website. *See* Florida Bar Rule 4-7.19(d). In accordance with these procedures, Searcy Denney submitted 13 pages from its website (from the thousands of pages on the website as a whole), its LinkedIn profile page (which included a client's unsolicited, favorable comments), and materials from the firm's blog.

The Bar's Ethics and Advertising Division and the Bar's Standing Committee on Advertising provided rather remarkable responses, opining, for example, that Searcy Denney could not include on its website the following statements (deemed not to be objectively verifiable and thus to be forbidden): the days "when we could trust big corporations . . . are over"; "Government regulation of Corporate America's disregard of consumer safety has been lackadaisical at best"; and "when it comes to 'tort reform,' there is a single winner: the insurance industry." In defense of this lawsuit, the Bar has backed away from these obviously unconstitutional positions; the Bar no longer asserts it can prohibit an attorney from making political statements like these.

The Ethics and Advertising Division and the Standing Committee on Advertising also said Searcy Denney could not say it has "32 years of experience handling mass tort cases, resulting in justice for clients in a wide variety of circumstances," or that it was "one of the few law firms in the country to successfully represent innocent victims of dangerous herbal supplements." The theory was that "justice" and "successfully" are not objectively verifiable. The Bar has not renounced these positions.

Searcy Denney could have obtained review by the entity that has authority to bind the Bar: the Board of Governors. But Searcy Denney did not do so. Instead, Searcy Denney and its named partners filed this lawsuit.

III

The first issue is the extent to which the plaintiffs' challenge to these provisions is ripe for adjudication despite Searcy Denney's failure to obtain an opinion from the Board of Governors. The law of the circuit on this issue is set out at length in *Harrell v. The Florida Bar*, 608 F.3d 1241, 1261 (11th Cir. 2010). No purpose would be served by repeating here all that was said there.

Harrell establishes that a First Amendment challenge to a Bar rule may go forward on the merits when three things are all true. First, the attorney has made statements, and unless prohibited from doing so will continue to make statements, that may violate the challenged rule. Second, the attorney faces a credible threat of disciplinary action if the attorney continues to make the statements. And third, nothing would be gained by requiring the attorney to obtain a more-definitive administrative interpretation of the rule, because the rule's application is clear on its face. *Harrell*, 608 F.3d at 1261-62.

The opinions of the Bar's Ethics and Advertising Division and Standing Committee on Advertising are enough to show that the first two conditions are met. The critical issue, then, is the third: whether application of the challenged rules to Searcy Denney's statements is clear on the face of the rules. As set out below, this condition is not met for the first challenged rule (Rule 4-7.13) but *is* met for the second (Rule 4-7.14).

IV

Rule 4-7.13, provides in relevant part:

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

(a) Deceptive and Inherently Misleading Advertisements. An advertisement is deceptive and 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 such 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.

Florida Bar Rule 4-7.13 (emphasis added).

On its face, the requirement that a statement be “objectively verifiable” applies only to statements about past results, not to every statement on a website or in other materials. And on its face, the requirement that a statement about past results be “objectively verifiable” does not proscribe—or at least does not necessarily proscribe—a statement that an attorney has achieved justice or successfully represented clients. Nor does the requirement, on its face, proscribe truthful statements about actual results obtained for clients.

The Bar has said in its official comment on the rule that statements about past results can be misleading. And indeed they can. An astute attorney once observed that the easiest way to get a million-dollar verdict is to have a five-million-dollar case and try it poorly. So an attorney’s statement that the attorney has obtained a million-dollar verdict does not necessarily show that the attorney handled the case well. Still, a client faced with a choice between two attorneys might wish to know that one has obtained a million-dollar verdict in a case of the kind at issue and the other has never even tried such a case. The solution to the Bar’s concern is to provide potential clients more information, not less. The Bar has fallen short of justifying a ban on truthful statements along these lines.

The difficulty for the plaintiffs in the current lawsuit, though, is that the rule does not explicitly prohibit such a statement. Even the official comment says only that an attorney’s claim to have “successfully” handled a case “*may or may not* be

sufficiently objectively verifiable.” Florida Bar Rule 4-7.13, Comment (emphasis added). Searcy Denney can hardly be criticized for fearing the worst, based on the Bar’s “long and undeniable trend towards increasingly restrictive measures to control attorney advertising,” *Harrell*, 608 F.3d at 1248, the many inconsistent and sometimes indefensible positions the Bar has taken in other instances, *see id.* at 1255-56, and the opinions of the Bar’s Ethics and Advertising Division and Standing Committee on Advertising in response to Searcy Denney’s inquiry in this very case. But until the Board of Governors interprets the rule in an unconstitutional manner, the challenge is premature. That is the clear import of *Harrell*.

V

The result is different for Rule 4-7.14, which provides in relevant part:

A lawyer may not engage in potentially misleading advertising.

(a) Potentially Misleading Advertisements. Potentially misleading advertisements include, but are not limited to:

. . . .

(4) a statement that a lawyer is board certified, *a specialist, an expert, or other variations of those terms* unless:

(A) the lawyer has been certified under the Florida Certification Plan as set forth in chapter 6, Rules Regulating the Florida Bar and the advertisement includes the area of certification and that The Florida Bar is the certifying organization;

- (B) the lawyer has been certified by an organization whose specialty certification program has been accredited by the American Bar Association or The Florida Bar as provided elsewhere in these rules. A lawyer certified by a specialty certification program accredited by the American Bar Association but not The Florida Bar must include the statement "Not Certified as a Specialist by The Florida Bar" in reference to the specialization or certification. All such advertisements must include the area of certification and the name of the certifying organization; or
- (C) the lawyer has been certified by another state bar if the state bar program grants certification on the basis of standards reasonably comparable to the standards of the Florida Certification Plan set forth in chapter 6 of these rules and the advertisement includes the area of certification and the name of the certifying organization.

Fla. Bar Rule 4-7.14 (emphasis added).

The application of this rule is clear: Searcy Denney cannot say it specializes or has expertise in mass-tort or unsafe-product cases, or even in personal-injury cases, even though the firm undeniably has expertise in these areas. Nor can any individual attorney claim to specialize or have expertise in mass-tort or unsafe-product cases, even if the attorney handles only cases of that kind, and even if the attorney has successfully handled many such cases. The challenge to this rule thus is ripe.

The controlling First Amendment standards have been set out in a series of decisions, many specifically addressing statements by lawyers. "Lawyer

advertising is a constitutionally protected form of commercial speech, but like any other form of commercial speech, a state may regulate it to protect the public.”

Mason v. Fla. Bar, 208 F.3d 952, 955 (11th Cir. 2000) (citing *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383–84 (1977)). Courts review the constitutionality of a state’s restrictions on lawyer advertising based on the test originally adopted by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557, 563–66 (1980).

“Under *Central Hudson*, the government may freely regulate commercial speech that concerns unlawful activity or is misleading.” *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 623-24 (1995). If the commercial speech concerns lawful activity and is not misleading, the government must meet the *Central Hudson* test. *See id.* at 624. Searcy Denney’s proposed statements are lawful and not misleading. So the *Central Hudson* test applies.

Under *Central Hudson*, a restriction on commercial speech is valid only if (1) the asserted governmental interest in restricting the speech is substantial; (2) the challenged restriction directly advances the asserted governmental interest; and (3) the restriction is not more extensive than is necessary to serve that interest. *See, e.g., Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 183 (1999); *Central Hudson*, 447 U.S. at 563-66.

“Unlike rational basis review, the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions.” *Edenfield v. Fane*, 507 U.S. 761, 768 (1993). “Under *Central Hudson*’s second prong, the State must demonstrate that the challenged regulation advances the Government’s interest in a direct and material way.” *Went for It*, 515 U.S. at 625 (internal quotations omitted). “That burden, we have explained, ‘is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.’ ” *Id.* (quoting *Edenfield*, 507 U.S. at 767). To show that a regulation materially advances a substantial interest, a state may present empirical data, studies, and anecdotal evidence. *See id.* at 628. “Courts have generally required the state to present tangible evidence that the commercial speech in question is misleading and harmful to consumers before they will find that restrictions on such speech satisfy [this] prong.” *Borgner v. Brooks*, 284 F.3d 1204, 1211 (11th Cir. 2002).

“The third prong of *Central Hudson* requires that there be an adequate ‘fit between the legislature’s ends and the means chosen to accomplish those ends, a fit that is not necessarily perfect, but reasonable.’ ” *Harrell v. Fla. Bar*, 608 F.3d 1241, 1270-71 (11th Cir. 2010) (quoting *Went for It*, 515 U.S. at 632). While “the

‘least restrictive means’ test has no role in the commercial speech context, . . . the existence of ‘numerous and obvious less-burdensome alternatives to the restriction on commercial speech . . . is certainly a relevant consideration in determining whether the ‘fit’ between ends and means is reasonable.’ ” *Went for It*, 515 U.S. at 632 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993)).

In our case, the Bar’s position rests on two premises, neither of which withstands analysis. First, the Bar speculates that a potential client will be misled into believing that an attorney who “specializes” or has “expertise” in an area is board certified. But the Bar has offered no empirical or even anecdotal evidence in support of the assertion. And if the Bar is really concerned with this possibility, there are narrower ways to attack the problem, including, for example, by educating the public on what it means to be board certified, or by requiring a disclaimer—a statement by the attorney explaining that the attorney specializes or has expertise but is not board certified.

Second, the Bar says:

If the State were prohibited from establishing any standards as a basis for claiming specialization or expertise, lawyers would be able to self-certify and any lawyer could claim to be an expert or specialist in any field. The State has a substantial interest in enabling consumers to determine which lawyers have special training and expertise without having to engage in a degree of research that would be so extensive as to be impracticable for the average consumer.

Def.'s Mot. Summ. J., ECF No. 35, at 6-7.

The easy answer is that nobody has proposed to prevent the Bar from establishing reasonable standards. Nobody has proposed to allow a lawyer to “self-certify” or to claim expertise without a basis for doing so. The Bar can prohibit untrue or misleading claims. But this is not what the Bar has done.

Instead, the Bar prohibits even truthful claims. Searcy Denney has expertise in mass-tort and unsafe-product cases, as well as in personal-injury cases generally. The Bar has not denied it and could not reasonably do so. But Rule 4-7.14 prohibits Searcy Denney from noting on its website that it has expertise in these areas. Indeed, the Bar prohibits every lawyer in the state from claiming expertise in mass-tort or unsafe-product cases, because there is no board certification in these narrow fields. And the Bar prohibits every law *firm* in the state from claiming expertise in personal-injury cases, because law firms, as distinguished from individual lawyers, cannot be board-certified.

It should be noted, too, that the Bar's approach is unlikely to solve the problem it posits. The Bar readily allows a lawyer to assert that the lawyer handles only cases of a specific kind. So a lawyer can say personal-injury cases are all the lawyer handles, or that personal-injury cases are the

lawyer's business. The Bar apparently believes that a potential client will attribute a different meaning to these assertions than to the assertion that a lawyer specializes or has expertise in personal-injury cases. But the Bar has offered no empirical or even anecdotal support for the supposition. When First Amendment rights are at stake, such an unsupported (and indeed unintuitive) supposition will not do.

In sum, the Bar's ban on truthful statements about a lawyer's or law firm's specialty or expertise, at least as applied to websites, fails all three prongs of the *Central Hudson* test.

This analysis is confirmed by *Abramson v. Gonzales*, 949 F.2d 1567 (11th Cir. 1992). When that case was decided, Florida licensed psychologists but did not prohibit the practice of psychology without a license. Even so, a Florida statute prohibited unlicensed psychologists from advertising that they were "psychologists." The state's theory was that the public would wrongly assume that a "psychologist" was licensed—much as the Bar asserts here that the public will assume a "specialist" is board-certified. The Eleventh Circuit held that the advertising restriction violated the First Amendment. The court said that in *Peel v. Attorney Registration & Disciplinary Comm'n of Illinois*, 496 U.S. 91, 110 (1990), "[a] majority of the justices rejected the 'paternalistic assumption' that the 'public would automatically mistake a claim of specialization for a claim of formal

recognition by the State.’ ” *Id.* at 1576 (quoting *Peel*, 496 U.S. at 105). The Eleventh Circuit also said that the “state’s own definition of a specialist—or here a psychologist—cannot bar those who truthfully hold themselves out as specialists or psychologists from doing so.” *Id.* Here, as in *Abramson*, the state cannot prevent a person from advertising a lawful specialty, even if the state’s own definition of the specialty is different.

VI

For these reasons,

IT IS ORDERED:

1. The plaintiffs’ summary-judgment motion, as amended, ECF Nos. 30 & 33, is granted in part and denied in part.
2. The defendants’ summary-judgment motion, ECF No. 35, is denied.
3. The defendants John F. Harkness, Elizabeth Tarbert, James N. Watson, Jr., and Adria E. Quintela, in their official capacities as employees of the Florida Bar, are enjoined from enforcing Rules Regulating The Florida Bar, Rule 4-7.14(a)(4), to prohibit the plaintiffs from making truthful statements on a website, blog, or social medium about their specialty or expertise. This injunction binds these defendants and their officers, agents, servants, employees, and attorneys—and others in active concert or participation with any of them—who receive actual notice of this injunction by personal service or otherwise.

4. The plaintiffs' other claims are dismissed without prejudice for lack of jurisdiction because the claims are not ripe.

5. The clerk must enter judgment and close the file.

6. The court retains jurisdiction to award costs and attorney's fees on a timely motion and to enforce the injunction.

SO ORDERED on September 30, 2015.

s/Robert L. Hinkle

United States District Judge

From: [Steven Rubin](#)
To: [Tarbert, Elizabeth](#)
Cc: [Kellogg, Diana](#); [Tucker, Caroline](#); [Steven Dennis Rubin](#)
Subject: Advertising Rule/Specialization
Date: Saturday, January 27, 2018 11:17:54 AM
Attachments: [BLSEAdvertisingRuleTarbertRevision010218Redlined012418BLSE.docx](#)

Elizabeth,

Thank you for meeting with the BLSE Executive Subcommittee and revising your draft of the Advertising Rule to incorporate some of the comments and concerns of the BLSE. After reviewing the revised draft, the BLSE concluded it cannot support its adoption by the Florida Supreme Court.

As I previously stated in my December 8, 2018, letter to you, the Florida Bar and the BLSE agree that objective verification of a lawyer's claim of specialization or expertise is the goal to achieve. However, while the revised Rule is an improvement, the BLSE has a real concern that the Florida Supreme Court will conclude again that the Rule could still lead to inconsistent and differing applications. A general reference to the minimum standards of certification in Chapter 6 may not satisfy the "reasonable standard" requirement addressed in the Searcy decision. In addition, the language as written seems to water down the concept of a specialist merely as a lawyer with five years of experience, 40% concentration in a practice area, and a certain amount of CLE.

The BLSE considered drafting detailed uniform standards of specialization that could be applied by the Advertising Committee to all practice areas in a consistent manner. It also discussed adapting the advertising rule used by the Florida Board of Medicine for medical specialties, to legal specialization advertising. The medical model should be further explored. There just has not been a sufficient amount of time for the BLSE to thoughtfully prepare its own draft of the Rule which will satisfy the Florida Supreme Court's concerns and distinguish the lawyer who is Board Certified from one who is not.

I have attached a red lined version of your January 2, 2018, Rule draft which contains some minor edits. The submission of this version of the Rule by the BLSE should not be construed by The Florida Bar as BLSE's approval of the draft. Rather, it has been provided to The Florida Bar in the event no further study of this issue will occur before the Rule is submitted to the Florida Supreme Court. The BLSE's position is, as directed by the Florida Supreme Court itself, that this important issue requires further study.

Thank you for the opportunity to provide The Florida Bar with the BLSE's comments. Please contact me at your convenience should you wish to discuss the above or if you have any questions.

Best regards,

Steve
Chair, BLSE

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Please note: Florida has very broad public records laws. Many written communications to or from The Florida Bar regarding Bar business may be considered public records, which must be made available to anyone upon request. Your e-mail communications may therefore be subject to public disclosure.

RULES REGULATING THE FLORIDA BAR
CHAPTER 4 RULES OF PROFESSIONAL CONDUCT

4-7.1 INFORMATION ABOUT LEGAL SERVICES

RULE 4-7.14 POTENTIALLY MISLEADING ADVERTISEMENTS

A lawyer may not engage in potentially misleading advertising.

(a) Potentially Misleading Advertisements. Potentially misleading advertisements include, but are not limited to:

(1) advertisements that are subject to varying reasonable interpretations, 1 or more of which would be materially misleading when considered in the relevant context;

(2) advertisements that are literally accurate, but could reasonably mislead a prospective client regarding a material fact;

(3) references to a lawyer's membership in, or recognition by, an entity that purports to base ~~such~~the membership or recognition on a lawyer's ability or skill, unless the entity conferring ~~such~~the membership or recognition is generally recognized within the legal profession as being a bona fide organization that makes its selections based ~~upon~~ objective and uniformly applied criteria, and that includes among its members or those recognized a reasonable cross-section of the legal community the entity purports to cover;

(4) a statement that a lawyer is board certified, ~~a specialist, an expert,~~ or other variations of ~~these~~that terms unless:

(A) the lawyer has been certified under the Florida Certification Plan as set forth in chapter 6, Rules Regulating the Florida Bar and the advertisement includes the area of certification and that The Florida Bar is the certifying organization;

(B) the lawyer has been certified by an organization whose specialty certification program has been accredited by the American Bar Association or The Florida Bar as provided elsewhere in these rules. A lawyer certified by a specialty certification program accredited by the American Bar

Association but not The Florida Bar must include the statement "Not Certified as a Specialist by The Florida Bar" in reference to the specialization or certification. All such advertisements must include the area of certification and the name of the certifying organization; or

(C) the lawyer has been certified by another state bar if the state bar program grants certification on the basis of standards reasonably comparable to the standards of the Florida Certification Plan set forth in chapter 6 of these rules and the advertisement includes the area of certification and the name of the certifying organization.

In the absence of ~~such~~ certification, a lawyer may communicate the fact that the lawyer limits his or her practice to 1 or more fields of law; ~~or~~

(5) a statement that the lawyer is a specialist or an expert in an area of practice or other variations of those terms unless the lawyer can objectively verify that the lawyer meets or exceeds the minimum standards for certification under the Florida Certification Plan, excluding examination and peer review, and, if the area of claimed specialization or expertise is or falls within an area of practice under the Florida Certification Plan or another certification plan and the lawyer is not board certified in that area of practice, the advertisement includes a reasonably prominent disclaimer that the lawyer is not board certified by The Florida Bar or another [Florida Bar accredited](#) certification program, and the lawyer has not been evaluated for professionalism or ethics by the Florida Bar Board of Legal Specialization and Education;

(6) a statement that a law firm specializes or has expertise in an area of practice, or other variations of those terms unless the law firm can objectively verify that a majority of the lawyers meet or exceed the minimum standards for certification under the Florida Certification Plan, excluding examination and peer review, and, if the area of claimed specialization or expertise is or falls within an area of practice under the Florida Certification Plan or another certification plan and the lawyer or all lawyers in the law firm are not board certified in that area of practice, the advertisement includes a reasonably prominent disclaimer that the lawyer is not board certified by The Florida Bar or another certification program or that all lawyers in the firm are not board certified by The Florida Bar or another [Florida Bar accredited](#) certification program, and the lawyer has not been evaluated for professionalism or ethics by the Florida Bar Board of Legal Specialization and Education; or

(56) information about the lawyer's fee, including those that indicate no fee will be charged in the absence of a recovery, unless the advertisement discloses all fees and expenses for which the client might be liable and any other material information relating to the fee. A lawyer who advertises a specific fee or range of fees for a particular service must honor the advertised fee or range of fees for at least 90 days unless the advertisement specifies a shorter period; provided that, for advertisements in the yellow pages of telephone directories or other media not published more frequently than annually, the advertised fee or range of fees must be honored for no less than 1 year following publication.

(b) Clarifying Information. A lawyer may use an advertisement that would otherwise be potentially misleading if the advertisement contains information or statements that adequately clarify the potentially misleading issue.

COMMENT

Awards, ~~Honors~~honors, and ~~Ratings~~ratings

Awards, honors and ratings are not subjective statements characterizing a lawyer's skills, experience, reputation or record. Instead, they are statements of objectively verifiable facts from which an inference of quality may be drawn. It is therefore permissible under the rule for a lawyer to list bona fide awards, honors and recognitions using the name or title of the actual award and the date it was given. If the award was given in the same year that the advertisement is disseminated or the advertisement references a rating that is current at the time the advertisement is disseminated, the year of the award or rating is not required.

For example, the following statements are permissible:

"John Doe is AV rated by Martindale-Hubbell. This rating is Martindale-Hubbell's highest rating."

"Jane Smith was named a 2008 Florida Super Lawyer by Super Lawyers Magazine."

Claims of ~~Board Certification~~, ~~Specialization~~ or ~~Expertise~~board certification, specialization, or expertise

This rule permits a lawyer or law firm to indicate areas of practice in communications about the lawyer's or law firm's services, provided the advertising lawyer or law firm actually practices in those areas of law at the time the

advertisement is disseminated. If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted to indicate that. A lawyer who is not certified by The Florida Bar, by another state bar with comparable standards, or an organization accredited by the American Bar Association or The Florida Bar may not be described to the public as a ~~"specialist," "specializing," "certified," or "board certified," being an "expert," having "expertise,"~~ or any variation of similar import. A lawyer may indicate that the lawyer concentrates in, focuses on, or limits the lawyer's practice to particular areas of practice as long as the statements are true.

Certification is specific to individual lawyers; a law firm cannot be certified, ~~and cannot claim specialization or expertise~~ in an area of practice per subdivision (c) of rule 6-3.4. Therefore, an advertisement may not state that a law firm is certified, ~~has expertise in, or specializes in~~ any area of practice.

A lawyer can only state or imply that the lawyer is "certified," a ~~"specialist," or an "expert"~~ in the actual area(s) of practice in which the lawyer is certified. A lawyer who is board certified in civil trial law, may ~~so~~ state that, but may not state that the lawyer is certified, ~~an expert in, or specializes in~~ personal injury. ~~Similarly, a lawyer who is board certified in marital and family law may not state that the lawyer specializes in divorce.~~

Fee and Cost Information~~cost information~~

Every advertisement that contains information about the lawyer's fee, including a contingent fee, must disclose all fees and costs that the client will be liable for. If the client is, in fact, not responsible for any costs in addition to the fee, then no disclosure is necessary. For example, if a lawyer charges a flat fee to create and execute a will and there are no costs associated with the services, the lawyer's advertisement may state only the flat fee for that service.

However, if there are costs for which the client is responsible, the advertisement must disclose this fact. For example, if fees are contingent on the outcome of the matter, but the client is responsible for costs regardless of the matter's outcome, the following statements are permissible: "No Fee if No Recovery, but Client is Responsible for Costs," "No Fee if No Recovery, Excludes Costs," "No Recovery, No Fee, but Client is Responsible for Costs" and other similar statements.

On the other hand, if both fees and costs are contingent on the outcome of a personal injury case, the statements "No Fees or Costs If No Recovery" and "No Recovery - No Fees or Costs" are permissible.

AGENDA ITEM SUMMARY

BOG Meeting: March 2018

Item Number: 20c

Substantive Committee: Board Review Committee on Professional Ethics

Narrative Summary: A Florida Bar member requests an amendment to Rule 4-7.13, adding new subdivision (c) and new 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.

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.

Staff Analysis: The Board of Governors should approve an amendment only if the board concludes that the conduct is inherently misleading.

The Board of Governors has previously reviewed this issue 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 are 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.

Committee Recommendation: Unavailable at this time.

Board Action Required: Dependent on committee recommendation.

TIMOTHY P. CHINARIS
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Admitted in AL, FL,
TN, and TX* (*Inactive)

January 22, 2018

Via Electronic Mail and Priority Mail

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

Re: Proposed rule change – use of other lawyers' names in internet advertising

Dear Ms. Tarbert:

I represent Florida Bar member Alex Hanna and the Law Offices of Alex Hanna, P.A. (the "Hanna Firm"). Pursuant to Rule 1-12.1 of the Rules Regulating The Florida Bar, the Hanna Firm respectfully requests that The Florida Bar petition the Florida Supreme Court to amend the Rules Regulating The Florida Bar to prohibit a Florida Bar member from using the name of another lawyer or law firm as a search term that triggers the display of the bar member's advertising on the internet. A copy of the proposed rule change accompanies this letter as Appendix A.

The Hanna Firm believes it is inherently deceptive for a lawyer (the "Advertising Lawyer") to arrange to have his or her ads displayed when a member of the public performs an internet search using the name of another lawyer or law firm (the "Search Term Lawyer").

Internet advertising for products and services – including legal services – has grown exponentially over the past few years. Google and other internet search engines have advertising programs that allow an Advertising Lawyer to "bid on," or pay for, the name of a Search Term Lawyer so that the Advertising Lawyer's ads will be displayed in response to a search for the name of the Search Term Lawyer. Florida Bar rules and ethics opinions currently do not prohibit lawyers from participating in these programs by bidding on other lawyers' names. The Hanna Firm requests that the rules be revised to prohibit this practice.

Real problems are presented when lawyers use other lawyers' names to trigger the display of their own ads. Allowing this practice runs counter to the Florida Supreme Court's increased emphasis on lawyer professionalism. A Search Term Lawyer invests a great deal of time and resources to earn a

distinguished reputation, and the ethical rules should not permit another lawyer to intentionally use the Search Term Lawyer's hard-earned reputation in what often is a confusing or deceptive fashion. Why should an Advertising Lawyer who has little or no experience be allowed to run an advertising campaign using the name of an experienced, respected Search Term Lawyer? When the Advertising Lawyer's ad pops up as a result of a search for the Search Term Lawyer, potential clients may incorrectly think that the displayed ad is an ad for the Search Term Lawyer. Even worse, they may respond to that ad under the mistaken belief that they are contacting the Search Term Lawyer. How does a misleading scenario like this benefit the public? The answer is that it does not.

Mr. Hanna's own experience shows the actual harm that can occur when a Search Term Lawyer's name is used without permission. Advertising Lawyers have used Mr. Hanna's name as a search term without his consent. The Advertising Lawyers' ads induced potential clients into responding to them, thinking that they were contacting Mr. Hanna. When the Advertising Lawyers did not handle the cases to the clients' satisfaction, the clients threatened to file bar complaints against the Hanna Firm. Imagine Mr. Hanna's surprise when he received these threats – because Mr. Hanna did not even know the clients, and was not representing them! Such complaints not only could cost the Hanna Firm time and money, but – even more importantly – the clients are likely to have diminished confidence in the legal system after being duped into hiring a law firm they did not search for and did not knowingly hire.

Allowing a Florida Bar member to use the name of an unaffiliated lawyer as an internet search term that triggers the display of the bar member's advertising does not serve the public. To the contrary, it simply creates an opportunity for the public to be misled.

There is another, practical problem with allowing lawyers to misuse other lawyers' names in this fashion. In contrast with media advertising that is supposed to be filed with the Bar for review, the arrangements that an Advertising Lawyer makes with the search engine entity are hidden from public view and are not subject to Bar scrutiny.

Other states have recognized that Advertising Lawyers' misuse of other lawyers' names as search terms presents ethical problems that warrant regulation. North Carolina has concluded that it is a violation of the Rules of Professional Conduct for a lawyer to select another lawyer's name as a keyword for use in an internet search engine company's search-based advertising program. North Carolina Ethics Opinion 2010-14. This conduct is considered misleading or deceptive in violation of North Carolina Rule of Professional Conduct 8.4(c) because "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" and so is essentially dishonest.

Additionally, the New York lawyer advertising rules indicate that it is misleading or deceptive for a lawyer to intentionally use another lawyer's name as a search term in an advertising campaign. New York Rule of Professional Conduct 7.1(g)(2) provides: "A lawyer or law firm shall not utilize: . . .

Elizabeth Clark Tarbert
January 22 2018
Page 3

meta tags or other hidden computer codes that, if displayed, would violate these Rules.” The fact that the Advertising Lawyer pays for his or her ads to appear when someone searches for the Search Term Lawyer’s name is hidden from the public and so appears to violate this rule.

If the Search Term Lawyer’s name is trademarked, its use can raise additional problems. The practice may be a violation of the federal Lanham Act, also called the Trademark Act of 1946 (15 U.S.C. §§ 1051 *et seq.*). See *North American Medical Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1218 (11th Cir. 2008) (placing a competitor’s trademarks within meta tags, which consumers never view, constitutes a “use in commerce in connection with the advertising of any goods” and so violates the Lanham Act). The practice may also violate Florida consumer protection laws. See Fla.Stat. § 540.08 (prohibiting the unauthorized publication or public use of another’s name or likeness “for purposes of trade or for any commercial or advertising purpose”).

The Hanna Firm believes that these concerns can best be resolved through a change to the Rules Regulating The Florida Bar. Accordingly, we respectfully request that the appropriate committee of the Florida Bar Board of Governors consider this letter as well as the proposed rule change attached as Appendix A.

Of course, we will be glad to cooperate with the Bar and to provide additional information or input as appropriate.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy P. Chinaris", with a long horizontal flourish extending to the right.

Timothy P. Chinaris

cc: Mr. Alex Hanna

Enclosure – Appendix A, Proposed Rule Change

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 such 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"

(c) Using Names of Other Lawyers or Law Firms in Internet Advertising. 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. This prohibition applies regardless of whether the lawyer directly uses the other's name or does so indirectly, such as through participation in a group advertising program.

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. Such 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. Such 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.

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 shall not use the title in any form in a court pleading. If a former or retired judge uses her previous title in a pleading, she could be sanctioned.

Use of Other Lawyers’ Names

The reputation of a lawyer or law firm is valuable and is personal to that lawyer or law

firm. A lawyer's name and reputation may be the lawyer's greatest professional asset. Principles of professionalism, as well as the bar's interest in protecting the public by preventing deceptive advertising, dictate that a lawyer's name should not intentionally be used by another lawyer in an Internet advertising scheme or campaign. A lawyer's intentional use of another's name as keywords or search terms in order to attract prospective clients to the lawyer's advertising is a misuse of the other's name and reputation and is inherently misleading or deceptive.

SUMMARY OF RELEVANT AUTHORITY

Ad Words Purchase

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 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.

Texas Ethics Opinion 661 (2016). 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.

<https://www.legalethictexas.com/Ethics-Resources/Opinions/Opinion-661.aspx>

But See, North Carolina Ethics Opinion 2010-14 (2012). "...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."

<https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2010-formal-ethics-opinion-14/>

Habush v. Cannon, 828 N.W.2d 876 (2013). Law firm's use of 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 granted summary judgment in defendant's favor and did not enjoin the use. Firm paid search engines to have firm appear as first sponsored link whenever 2 competitor's names were searched.

In re Naert, 777 S.E. 2d 823 (S.C. 2015). Lawyer 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.

Article, "Internet keyword advertising," *Your ABA* (July 2017).

<https://www.americanbar.org/publications/youraba/2017/july-2017/internet-keyword-advertising.html>

"Regulation of Lawyers' Use of Competitive Keyword Advertising, 2016 U. Ill. L. Rev. 103.

FLORIDA BAR STANDING COMMITTEE ON ADVERTISING

PROPOSED ADVISORY OPINION A-12-1

March 5, 2013

Note: 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 is permissible as long as the resulting 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 Standing Committee on Advertising has been directed by The Florida Bar Board of Governors to issue an opinion regarding lawyers' use of content and search engine optimization techniques in websites to improve the website's performance in internet search engines. The intent of this opinion is to educate attorneys on the prohibited use of false, deceptive and/or misleading content or techniques in the design and optimization of their websites and to provide some examples. First, it is entirely acceptable to employ website design, content and search engine optimization techniques in law firm websites as a method of marketing legal services and educating the public about a particular law firm, its attorneys, and its practice. In doing so, law firms must take care to comply with the Rules Regulating the Florida Bar in the design, content and optimization of their websites. This advisory opinion is intended to provide some guidance to attorneys in this rapidly changing media.

Websites used to promote the lawyer or law firm are subject to the lawyer advertising rules. Rule 4-7.11(a). Lawyers are prohibited from engaging in "deceptive or inherently misleading advertising." Rule 4-7.13. Included within the prohibition is any advertisement that "implies the existence of a material nonexistent fact." Rule 4-7.13(a)(3). The Committee is of the opinion that certain website content and the use of certain internet search engine optimization techniques can be false, deceptive or misleading conduct that is prohibited by Rule 4-7.13. Examples include "hidden text" or "meta tags" that use another lawyer's or law firm's name without a proper purpose, a false representation that a law firm has an office in a particular location when the lawyer does not have an office at that location, or representing that a lawyer handles cases in an area of practice that the lawyer or firm does not practice.

One specific example of false, deceptive and misleading search engine optimization techniques would be the use of "hidden text" that is not visible to the human eye but is visible to search engines.¹ Such "hidden text" would almost always be inherently false and misleading. Major search engines such as Bing and Google discourage the use of hidden text as a form of spam used to "artificially inflate search engine ranking," consider it a form of deception, and lower the rankings of websites who use hidden text.²

¹ "What is Hidden Text?" *SEO Logic*, <http://www.seologic.com/faq/hidden-text>

² *Id.* See also, "Why is Hidden Text an Unethical SEO Method?" *SEO Consult*, <http://www.seoconsult.com/seoblog/ethical-search-engine-optimisation/why-is-hidden-text-an-unethical-seo->

Another example of a false, deceptive or misleading technique would be the use of another lawyer's name or the name of another law firm in a firm's website when the firm has no legitimate connection, relationship or history with that lawyer or law firm and the reference is purely intended to unfairly manipulate search engines in favor of the firm's website by using the name of another firm or lawyer. Yet another example of prohibited techniques would be the use of false, deceptive or misleading meta tags on a website.³ Like hidden text, meta tags are not visible to viewers, but search engines read meta tags, which are properly used to optimize internet search result positions.⁴ While the use of meta tags is not prohibited, the use of false, deceptive or misleading meta tags is prohibited.

The same analysis applies when lawyers purchase advertising on a search engine keyed to specific words or phrases, e.g. buying Google Adwords. Lawyers may not purchase the name of another lawyer or law firm as a key word in search engines so that the lawyers' advertisement or sponsored website link appears when a person uses the other lawyer or law firm's name as a search term.

The above are merely examples of the type of website design and optimization techniques that are considered false, deceptive and/or misleading. Lawyers may not use any content or text, including but not limited to hidden text or meta tags, to deceive or mislead the public. Because lawyers themselves often do not construct their own websites, lawyers should take steps to assure that their website designers and optimizers are aware of the Rules Regulating the Florida Bar and that they use techniques and content that are neither false nor misleading and that conform to ethical practices. The Committee strongly encourages lawyers to provide copies of the lawyer advertising rules to their website designers.

[method.html](#). For additional information on questionable methods of optimizing search engine results, see "17 Black Hat SEO Techniques to Avoid," *Design Hammer*, <http://designhammer.com/blog/17-black-hat-seo-techniques-avoid>

³ "Death of A Meta Tag," *Search Engine Watch*, September 30, 2002, <http://searchenginewatch.com/article/2066825/Death-Of-A-Meta-Tag>.

⁴ *Id.*

April 29, 2013

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

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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Admitted in Alabama,
Florida, and Texas* (*Inactive)

July 22, 2013

Via Electronic Mail

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

Re: Comments on Proposed Advisory Opinion A-12-1

Dear Ms. Tarbert:

On behalf of the lawyer referral service 1-800-411-Pain, I would like to offer a comment regarding Proposed Advisory Opinion A-12-1.

I apologize for the lateness of this submission. Our comment is very narrow in scope and we would appreciate you providing this to the Board Review Committee on Professional Ethics if you could.

Our comment addresses the issue of using the names of *other* lawyers or law firms in search engine optimization activities. We agree with the principle underlying the position expressed in the advisory opinion. Accordingly, we would request that this language be amended to include lawyer referral services. Below are suggested revisions to the opinion that would accomplish this.

Sentence beginning at line 22. "Examples include 'hidden text' or 'meta tags' that use ~~another lawyers' or law firm's name~~ the name of another lawyer, law firm, or lawyer referral service without a proper purpose . . ."

Sentence beginning at line 32. "Another example of a false, deceptive or misleading technique would be the use of ~~another lawyer's name or the name of another law firm~~ the name of another lawyer, law firm, or lawyer referral service in a firm's website when the firm has no legitimate connection, relationship or history with that ~~lawyer or law firm~~ other person or entity and the reference is purely intended to unfairly manipulate search engines in favor of the firm's website by using the name of ~~another firm or lawyer~~ someone else."

Ms. Elizabeth Clark Tarbert
July 22, 2013
Page 2

Sentence beginning at line 42. "Lawyers may not purchase the name of another lawyer, ~~or law firm, or lawyer referral service~~ as a key word in search engines so that the lawyers' advertisement or sponsored website link appears when a person uses the ~~other lawyer or law firm's name~~ of the other person or entity as a search term."

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy P. Chinaris", with a long horizontal flourish extending to the right.

Timothy P. Chinaris

The Florida Bar News - April 30, 2013

Letters

E-Filing

I've survived Armageddon a/k/a e-filing, but only with some unbelievable luck.

Our firm recently opened a credit card account with our primary bank, and luckily we got MasterCards. I find it almost unbelievable that THE PORTAL does not accept Visa, which I think is the most widely used credit card in this country. I'm sure there are reasons for that, but I do wonder if those reasons outweigh the inconvenience to a host of lawyers who don't have Discover, AmEx, or MC.

I think we need a new rule of civil procedure to cover e-filing — electronic dismissal. What I have, for over 45 years, considered a complaint sufficient to withstand a motion to dismiss is now subject to dismissal (non-accepted filing) by the electronic judge.

William Nussbaum

Jacksonville

Metatags

I commend the opinion issued in March by the Bar's Standing Committee on Advertising regarding the clarification of prohibitions against the deceptive use of metatags and hidden text by Search Engine Optimizers (SEOs) on lawyer and law firm websites. The impact of the opinion, however, will be quite minimal. It's the equivalent of ancient Rome forcing every citizen to attend events at their coliseums. In other words, no one practices these SEO tactics anymore anyway.

The use of hidden text on a website, whether by disguising the text to blend in with a background, or making the font point so small that it's virtually invisible, is a tactic that was once, circa 1999, in practice by "black hat," or unethical SEOs, but swiftly recognized and punished by the major search engines. As the years went on, some SEOs came up with even more clever ways to insert descriptive text into their pages to game the algorithms (using Javascript, Cascading Style Sheets and off-screen text, or hidden text behind images), only to see their rankings pummeled by Google, or banned altogether, when the algorithm inevitably discovered the text on a website.

In an ironic boost of credibility to this "insider" testament, on the very day the committee released their opinion, March 5, 2013, Google was awarded by the U.S. Patent and Trademark Office United States Patent #8,392,823 entitled "Systems and methods for detecting hidden texts and hidden links." Authored in

part by Matt Cutts, Google's de facto head of the search engine's army of anti-spam engineers, the patent was first applied for in August 2009. Reading through the abstract, it's my opinion that this chunk of code is basically Google's final blow to this antiquated and rarely exercised practice.

Why would an experienced, knowledgeable SEO ever attempt to use hidden text anymore? There are literally tens of dozens of other categorical vulnerabilities grey and black-hat SEOs manipulate, with hundreds of far more sophisticated tricks and tactics that are far more effective and with relatively minimal exposure of getting caught. The SEO/Google Spam Team tug-of-war is almost always in the SEOs' favor. The search engines are forever playing catch-up, so by the time the practice is discovered, segregated, and an update to the engine's worldwide digital infrastructure is released, the SEOs have already moved on.

The committee is obviously far behind the curve in their expertise on this cottage industry, evidenced by this late and disconnected effort to curb the threat unethical SEO could potentially pose to the existing constructs of the advertising rules imposed by the Bar.

Peter Blatt

Palm Beach Gardens



Fw: Letter to the editor RE: Ad panel cautions lawyers on the use of website metatags

Mark Killian to: Elizabeth Tarbert

04/08/2013 03:46 PM

History: This message has been replied to and forwarded.

FYI, for what it is worth. . .

Below is a letter to the editor from a non-lawyer -- so we will not be publishing it. I did, however, tell the gentleman I would share it with the staff of the Standing Committee on Advertising.

Mark D. Killian
Managing Editor
The Florida Bar News
(850)561-5683
fax: (850)681-3859
e-mail: mkillian@flabar.org
See the Journal & News online at <http://www.floridabar.org/news>
----- Forwarded by Mark Killian/The Florida Bar on 04/08/2013 03:42 PM -----

From: Tom Copeland <tom@blattfg.com>
To: "mkillian@flabar.org" <mkillian@flabar.org>
Date: 04/08/2013 03:33 PM
Subject: Letter to the editor RE: Ad panel cautions lawyers on the use of website metatags

Hi Mark,

Can I submit this letter to the editor to you regarding an article published in the latest edition of the Florida Bar News? Or is there another procedure for submitting a letter that you prefer? For your convenience, I've attached my letter as a Word document and also pasted the text below my signature for review.

I also understand that the letter needs to be 350 words. Will you typically edit the letter down to 350 or would you prefer me to parse the letter to 350 before re-submitting?

Thanks -- I was compelled to write this and hope it conveys a relevant perspective on the issue at hand.
Tom

--

Tom Copeland
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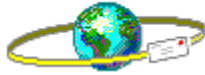
Author: Tom Copeland is the marketing director at Blatt Legal, PLC and Blatt Financial Group, LLC. Tom's background is in website design, development and SEO. Tom graduated with a BSBA from the University of Florida and is the former owner of a press relations and web design company in West Palm Beach.

I commend the opinion issued in early March by the Bar's Standing Committee on Advertising regarding the clarification of prohibitions against the deceptive use of metatags and hidden text by Search Engine Optimizers (SEOs) on lawyer and law firm websites. The impact of the opinion, however, will be quite minimal. It's the equivalent of ancient Rome forcing every citizen to attend events at their coliseums. In other words, no one practices these SEO tactics anymore anyways.

The use of hidden text on a website, whether by disguising the text to blend in with a background, or making the font point so small that it's virtually invisible, is a tactic that was once, circa 1999, in practice by "black hat", or unethical SEOs, but swiftly recognized and punished by the major search engines. As the years went on, some SEOs came up with ever more clever ways to insert descriptive text into their pages to game the algorithms (using Javascript, Cascading Style Sheets and off-screen text, or hidden text behind images), only to see their rankings pummeled by Google, or banned altogether, when the algorithm inevitably discovers the text on a website while crawling it.

In an ironic boost of credibility to this "insider" testament, on the very day the committee released their opinion, March 5th, 2013, Google was awarded by the U.S. Patent and Trademark Office United States Patent #8,392,823 entitled "Systems and methods for detecting hidden texts and hidden links". Authored in part by Matt Cutts, Google's de facto head of the search engine's army of anti-spam engineers, the patent was first applied for in August of 2009. Reading through the abstract, it's my opinion that this chunk of code is basically Google's final blow to this antiquated and rarely exercised practice.

From the SEOs perspective, why bother? Why would an experienced, knowledgeable SEO ever attempt to use hidden text anymore? There are literally tens of dozens of other categorical vulnerabilities grey and black-hat SEOs manipulate, with hundreds of far more sophisticated tricks and tactics that are far more effective and with relatively minimal exposure of getting caught. The SEO/Google Spam Team tug-of-war is almost always in the SEOs favor. The search engines are forever playing catch-up, so by the time the practice is discovered, segregated, and an update to the engine's worldwide digital infrastructure is released, the SEOs have already moved onto something else. The committee is obviously far behind the curve in their expertise on this cottage industry, evidenced by this late and disconnected effort to curb the threat unethical SEO could potentially pose to the existing constructs of the advertising rules imposed by the



Alex Hanna <alex@alexhannalaw.com> on 12/29/2012 03:00:03 PM

Please respond to Alex Hanna <alex@alexhannalaw.com>

To: "'eto@flabar.org'" <eto@flabar.org>

cc:

Subject: RE: Proposed Advisory Opinion A-12-1; to include Google Adword Regulation - Advertising Inquiry No. 32163

Staff: Elizabeth Tarbert/The Florida Bar

Dear Ms. Tarbert and the Standing Committee on Advertising:

Pursuant to adopting a Proposed Advisory Opinion A-12-1 on the use of lawyers' use of metatags - which are hidden text on websites to optimize position in search engine results. Please take into consideration that the Proposed Opinion should also "Prohibit attorneys from purchasing advertising on a search engine which displays their ads when another firm's name or a specific lawyer's name is searched (Ex. Google Adwords)". There are some potential issues concerning the use or misuse of Google Adwords, which may potentially not only solicit internet traffic away from the viewer's intended website but also the lawyers' misuse of the Google Adwords may be conduct engaging in deceit or misrepresentation in violation of Rule 4-8.4 (c).

Rule 4-7.2(c) states that a lawyer may not make or permit to be made a false, misleading, or deceptive communication about the lawyer or the lawyer's services. A communication should violate this rule if the lawyer buys Google Adwords that are deceptive or misleading. For example, lawyer Smith advertises itself via Google Adwords by buying in its Adword campaign the law firm name of "Greenberg Traurig" or the lawyer name of "Alex Hanna". This may be deceptive or misleading since the viewer specifically ran a search for "Greenberg Traurig" (a specific law firm) or "Alex Hanna" (a specific lawyer), yet lawyer Smith's website would be advertised in the sponsored links results or Adword section of the search page results potentially deceiving or misleading the viewer. Moreover, lawyer Smith's buying the Adwords of "Greenberg Traurig" or "Alex Hanna" would advertise to the viewer lawyer Smith's website, thereby, potentially creating an unsolicited basis for purposes of obtaining, or attempting to obtain, legal business or pecuniary gain which may potentially be in violation of Rule 4-7.4(a), which states that "a lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship...when the specific motive...is the lawyer's pecuniary gain." Hence, Google Adwords, like attorney websites, should be distinguished from general advertising because the typical viewer would not type a specific word in a Google search engine by accident, but would be searching for that exact lawyer or law firm.

Therefore, a lawyer's Google Adword (advertising) campaigns should be subject to the same regulations as other forms of media per Rule 4-7.6(d), and should be subject to the advertisement Rules that must be filed with the Bar for review. In addition, the improper use of

December 2, 2013

Eugene Keith Pettis, Esq.
Haliczer Pettis & Schwamm
1 Financial Plaza, 7th Floor
Fort Lauderdale, Florida 33394-0015

Dear Mr. Pettis:

Re: Florida Bar Standing Committee on Advertising Proposed Advisory Opinion A-12-1

We submit this statement regarding Proposed Advisory Opinion A-12-1 drafted by the Florida Bar Standing Committee on Advertising. We focus here on a portion of the Proposed Advisory Opinion that is both unconstitutionally overbroad and unnecessary in light of existing rules and advisory opinions governing attorney advertising.

Lines 41-45 of the Proposed Advisory Opinion ban all advertising using another attorney or law firm's name as a triggering "keyword," regardless whether that advertisement is inherently false or misleading. As discussed below, many keyword advertisements triggered from the name of another attorney or law firm are not inherently false and misleading, and serve an important function in providing consumers of legal services with relevant, useful, and helpful information about the options available to them. "Because of the value inherent in truthful, relevant information, a state may ban only **false, deceptive, or misleading** commercial speech." *Mason v. Florida Bar*, 208 F.3d 952, 955 (11th Cir. 2000) (emphasis added). Since the advertisements banned by the Proposed Advisory Opinion are generally not false, deceptive, or misleading, its blanket ban may not be adopted. Furthermore, to the extent a member of the Florida bar uses keyword advertising in a false or misleading manner, Rule 4-7.13 already prohibits such conduct.

Background on Keyword Advertising

Keyword advertising refers to an advertisement selected for display based on keywords chosen by the advertiser. It has been a well-established method of advertising on the Internet for over 15 years to which users and advertisers are accustomed. It is the most common form of advertising on search engines and also used on social media websites.

An example will help illustrate the practice. When one searches on a search engine for the term “BMW,” one receives a list of web search results accompanied by a number of advertisements (set off in a separate box marked “Ads” as demonstrated by the example in Exhibit A). Many of those ads may be for BMW dealerships; others may be for BMW’s competitors, like Audi or Mercedes-Benz. These ads do not lead anyone to believe that BMW is affiliated with Audi or Mercedes-Benz. Instead, they present the consumer with additional options that may be relevant to them, because someone searching for “BMW” may be interested in the products offered by Audi and Mercedes-Benz. Of course, if Audi purchased an ad linking to its website with the text “Click here to buy a BMW,” that would be misleading. But if Audi’s ad instead says “Click here to buy an Audi,” or otherwise does not indicate that it is affiliated with BMW, the user is not misled, and the ad provides additional information to help the user make an informed choice.

The Proposed Advisory Opinion’s Blanket Ban

The Proposed Advisory Opinion bans all advertising using the name of another lawyer or law firm as a triggering keyword, whether or not it falsely implies an affiliation with that lawyer or law firm. It reads: “Lawyers may not purchase the name of another lawyer or law firm as a key word in search engines so that the lawyers’ advertisement or sponsored website link appears when a person uses the other lawyer or law firm’s name as a search term.” This categorical rule goes too far, because it prohibits not only uses of keyword advertising that are deceptive or inherently misleading, but also all uses of keyword advertising that are factually accurate and relevant to consumers of legal services. To illustrate why this is so, hypothetical advertisements may be helpful.

Any Misleading Keyword Advertisements Are Prohibited by Rule 4-7.13

Suppose there is (i) a prominent Florida lawyer named Harvey Specter, and (ii) an unaffiliated Florida lawyer named Leland McKenzie, a partner in the law firm of McKenzie Brackman LLP, with a website at www.mckenziebrackman.com. A user types “Harvey Specter” into a search engine. The user sees the following advertisement in a portion of the search results page marked “Ads”:

Hire Harvey Specter

www.mckenziebrackman.com

We provide a free case review!

If the user clicks on that advertisement, they will not be taken to a website having to do with Harvey Specter, as they might expect, but will instead be taken to the website of McKenzie Brackman LLP, a competing firm. The advertisement is deceptive, violates Rule 4-7.13 notwithstanding the implementation of the subject Advisory Opinion, and may properly be banned.

Most Keyword Advertisements Are Not Misleading

But there is a wide range of advertisements that Leland McKenzie could run, triggered by searches for “Harvey Specter,” that would not be deceptive or inherently misleading and would in fact be of benefit to consumers.

The most common use of competitive keyword advertising is an advertisement that clearly identifies the advertiser and provides the user information about the advertiser's alternative products and services. For example, consider the following advertisement, triggered by a search for "Harvey Specter":

Hire Leland McKenzie
www.mckenziebrackman.com
Experienced and Effective Litigator
Over 30 Years in Tampa

A lawyer may also wish to make an objectively verifiable comparison between himself and another lawyer, as permitted by Rule 4-7.13(b)(3). Consider the following advertisements, triggered by a search for "Harvey Specter":

More Tampa Trials than Harvey Specter
www.mckenziebrackman.com
Hire Leland McKenzie
Lawyer in Tampa since 1975

Lower Rates than Harvey Specter
www.mckenziebrackman.com
Our attorneys charge only \$100/hr
Contact us for a free consultation

These advertisements do not imply any affiliation with Harvey Specter; instead, they draw a contrast between Harvey Specter and the advertiser, Leland McKenzie, based on objectively verifiable criteria (the number of times each lawyer has tried a case in Tampa or the hourly rate charged).

A categorical bar limiting the manner in which Florida attorneys may provide accurate and non-deceptive ads such as those set forth above goes beyond the scope of the underlying Rule and constitutes an unlawful restraint on commercial speech.

Proposed Amendment

Thus, because keyword advertising triggered from the name of another lawyer or law firm has numerous uses which are not deceptive or inherently misleading, the categorical rule set forth in the Proposed Advisory Opinion does not accurately reflect the scope of the Rule it is intended to interpret.

Furthermore, if keyword advertising is used to make false or misleading advertisements, such advertisements are already prohibited by Rule 4-7.13. There is no need for a separate rule governing keyword advertising, particularly when such a rule would restrict Florida Bar members from engaging in valid commercial speech that provides useful information about alternative legal services to consumers. As a consequence, the discussion of keyword advertising at lines 41-45 of the Proposed Advisory Opinion should be deleted.

We would be happy to provide the Board of Governors or the Standing Committee on Advertising with any further information that would be helpful in considering this important issue.

Sincerely,

A handwritten signature in dark ink, appearing to read "Terri Chen", followed by a horizontal line.

Terri Chen
Director, Trademarks

Exhibit A



Morgan & Morgan



Web Images Maps Shopping News More Search tools

About 1,050,000,000 results (0.40 seconds)

Ads related to **Morgan & Morgan**

Morgan & Morgan Law Firm - ForThePeople.com

www.forthethepeople.com/ 1 (855) 315 8498

Get The Power Of John Morgan On Your Side! Free Immediate Eval

Free Case Review

Personal Injury Advice

Medical Mal Advice

Consumer Alerts

Injury & Accident Lawyers - floridainjuryandaccidentlawyers.com

www.floridainjuryandaccidentlawyers.com/

Car Accidents - Serious Injuries - Millions Paid To Injured Victims

Florida Lawyers has 170 followers on Google+

What Is Your Case Worth? - Car Accidentds

Morgan & Morgan

www.forthethepeople.com/

There's a reason **Morgan & Morgan** is the largest consumer protection and personal injury firm in the Southeast. Our lawyers care about defending your rights.

Our Attorneys

John Morgan - T. Michael Morgan -
Car Accident Lawyers - ...

Office Locations

Morgan & Morgan was founded in
Orlando in 1988. As the firm has ...

Free Case Evaluation

Morgan & Morgan will review any and
every potential claim for ...

More results from forthethepeople.com »

Social Security Disability ...

We know that you and your family rely
on your Social Security ...

Blog

Find consumer alerts and legal
answers from the lawyers at ...

Labor and Employment Lawyers

All employees should be free from
discrimination, harassment and ...

Morgan Morgan

Colonel Morgan Morgan was an American pioneer. He was thought to have founded the first permanent settlement in present day West Virginia at Cool Spring Farm. [Wikipedia](#)

Born: November 1, 1688, Glamorgan, United Kingdom

Died: November 17, 1766, Bunker Hill, WV

Education: University of Cambridge

Children: David Morgan

People also search for: David Morgan, Zackquill Morgan, Levi Morgan, Darryl Rouson

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News for **Morgan & Morgan**

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 661**

July 2016

QUESTION PRESENTED

Does a lawyer violate the Texas Disciplinary Rules of Professional Conduct by using the name of a competing lawyer or law firm as a keyword in the implementation of an advertising service offered by a major search-engine company?

STATEMENT OF FACTS

Recognizing that many potential clients search for a lawyer by using internet search engines, Lawyer A uses various search-engine optimization techniques to try to ensure that his name appears on the first page of the search results obtained when a potential client uses a search engine to seek a lawyer. One way Lawyer A seeks to achieve this goal is by participating in internet search-based advertising programs offered by search engines that are in widespread use by many types of businesses.

These search-based advertising programs allow a business to select specific words or phrases (“keywords”) that will cause the business’s advertisement to pop up in the search results of someone using that keyword in a search. The advertiser does not purchase exclusive rights to specific keywords; the same keywords can be used by a number of advertisers.

Lawyer B is a competing lawyer in Lawyer A’s town. Lawyer B’s area of practice is similar to Lawyer A’s. Lawyer A and Lawyer B have never been law partners or engaged in joint representation in any case.

One of the keywords selected by Lawyer A is the name of Lawyer B. Lawyer A’s keyword selection causes Lawyer A’s name and a link to his website to be displayed on the search engine’s search results page any time an internet user searches for Lawyer B using the search engine. Lawyer A’s advertisement will appear to the side of or above the search results in an area designated for “ads” or “sponsored links.” In addition to displaying Lawyer A’s name and a link to Lawyer A’s website, the ad or sponsored link may contain additional text concerning Lawyer A and his practice. Usually Lawyer B’s name would also be listed in the search results. Moreover, if Lawyer B had also purchased similar advertising services from the search engine and had used his own name as a keyword, Lawyer B’s name would also be listed in the ad or sponsored link section as well as in the regular search results when Lawyer B’s name was used by a potential client as a search term.

Lawyer A's keyword advertisement or sponsored link does not indicate whether or not Lawyer A and Lawyer B are affiliated. Lawyer B did not authorize Lawyer A to use Lawyer B's name in connection with Lawyer A's keyword advertisement.

DISCUSSION

Advertising, including internet advertising, is addressed in Part VII of the Texas Disciplinary Rules of Professional Conduct. The Texas Disciplinary Rules do not specifically address the question of whether it is permissible for a lawyer to use a competitor's name to enhance the lawyer's internet advertising. However, several provisions of the Texas Disciplinary Rules must be considered with respect to this question.

Rule 7.01(d) states that "[a] lawyer shall not hold himself or herself out as being a partner, shareholder, or associate with one or more other lawyers unless they are in fact partners, shareholders, or associates."

Rule 7.02(a) prohibits a lawyer from making or sponsoring "a false or misleading communication about the qualifications or the services of any lawyer or firm." A communication is false or misleading if it "contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading[.]" Rule 7.02(a)(1). Comment 3 to Rule 7.02 explains the standard set forth in Rule 7.02(a)(1) as follows:

"Sub-paragraph (a)(1) recognizes that statements can be misleading both by what they contain and what they leave out. Statements that are false or misleading for either reason are prohibited. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation."

Under these Rules, if Lawyer A's use of Lawyer B's name as a keyword in search-engine advertising results in an advertisement that holds out Lawyer A to be a shareholder, partner, or associate of Lawyer B, then Lawyer A's use of Lawyer B's name would violate Rule 7.01(d). Furthermore, if such use of Lawyer B's name would lead a reasonable person to believe that Lawyer A and Lawyer B are associated in some way, then the use of Lawyer B's name as a keyword would be a misleading communication in violation of Rule 7.02(a).

In the opinion of this Committee, the use of a competitor's name as a keyword in the factual circumstances here considered would not in normal circumstances violate either Rule 7.01(d) or Rule 7.02(a). The advertisement that results from the use of Lawyer B's name does not state that Lawyer A and Lawyer B are partners, shareholders, or associates of each other. Moreover, since a person familiar enough with the internet to use a search engine to seek a lawyer should be aware that there are advertisements presented on web pages showing search results, it appears highly unlikely that a reasonable person using an internet search engine would be misled into thinking

that every search result indicates that a lawyer shown in the list of search results has some type of relationship with the lawyer whose name was used in the search. Compare *Habush v. Cannon*, 828 N.W.2d 876 (Wis. Ct. App. 2013) (finding no violation of Wisconsin right-of-privacy statute when one law firm used the name of a competing law firm as a keyword in search-engine advertising).

In addition to Rules 7.01(d) and 7.02(a), Rule 8.04(a)(3) must also be considered. Rule 8.04(a)(3) prohibits a lawyer from engaging in conduct “involving dishonesty, fraud, deceit or misrepresentation.” In the opinion of the Committee, given the general use by all sorts of businesses of names of competing businesses as keywords in search-engine advertising, such use by Texas lawyers in their advertising is neither dishonest nor fraudulent nor deceitful and does not involve misrepresentation. Thus such use of a competitor’s name in internet search-engine advertising is not a violation of Rule 8.04(a)(3). In reaching this conclusion, this Committee has considered but does not concur with 2010 Formal Ethics Opinion 14 of the Ethics Committee of the North Carolina State Bar (April 27, 2012) (ruling that a lawyer’s use of a competitor’s name as a keyword in a search-engine advertising program violates the equivalent of Texas Disciplinary Rule 8.04(a)(3) because such use constitutes “conduct involving dishonesty” in that the conduct shows “a lack of fairness or straightforwardness”).

It should be noted that this opinion addresses only whether the use of a competitor’s name in internet search-engine advertising programs violates the Texas Disciplinary Rules of Professional Conduct. Although such use of a competitor’s name as a keyword in advertising programs does not in the opinion of the Committee involve a violation of the Texas Disciplinary Rules, a Texas lawyer’s participation in such an advertising program must comply with the other provisions of the Texas Disciplinary Rules applicable to advertising, in particular Disciplinary Rule 7.04 on advertisements in the public media. Moreover, depending on the circumstances, a Texas lawyer advertising through keywords on internet search engines may be subject to other requirements or prohibitions imposed by federal or state law or by professional ethics rules of other jurisdictions.

CONCLUSION

A lawyer does not violate the Texas Disciplinary Rules of Professional Conduct by simply using the name of a competing lawyer or law firm as a keyword in the implementation of an advertising service offered by a major search-engine company. The lawyer’s statements included in this advertising program must not contain false or misleading communications and must comply in all respects with applicable rules on lawyer advertising.

2016 U. Ill. L. Rev. 103

University of Illinois Law Review
2016

Article

Eric Goldman^{a1} Angel Reyes III^{a1}

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REGULATION OF LAWYERS' USE OF COMPETITIVE KEYWORD ADVERTISING

Lawyers have enthusiastically embraced search engine advertisements triggered by consumers' keywords, but the legal community remains sharply divided about the propriety of buying keyword ads triggered by the names of rival lawyers or law firms ("competitive keyword advertising"). This Essay surveys the regulation of competitive keyword advertising by lawyers and concludes that such practices are both beneficial for consumers and legitimate under existing U.S. law--except in North Carolina, which adopted an anachronistic and regressive ethics opinion that should be reconsidered.

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*104 I. LAWYERS' USE OF COMPETITIVE KEYWORD ADVERTISING

Vignette #1: Jill Consumer plans to buy a new car. She holds Mercedes cars in high esteem for their quality construction and reputation for safety. She conducts a keyword search for “Mercedes” in Google. In addition to search results for the official Mercedes website and ads for local dealers, Jill sees the following ad:¹

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

The ad piques Jill’s curiosity, and she test drives both Mercedes and Volvo cars. She concludes the Volvo is a better fit for her lifestyle. As a result, Mercedes does not get thousands of dollars in profit it would have earned if Jill had purchased its car.

Vignette #2: Jill Consumer, driving her new Volvo XC60, gets into a car crash and suffers personal injuries. She wants to hire a personal injury lawyer. She recalls seeing television ads for Joe Bob the Country Lawyer. She conducts a search for “Joe Bob” at Google. In addition to search results for Joe Bob’s official website, Jill sees the following ad:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Jill interviews both Joe Bob and Peggy Sue. She decides that Peggy Sue is a better fit for her, hires Peggy Sue, and receives a large settlement that generates a substantial contingency fee for Peggy Sue--a fee that Joe Bob did not get.

In these vignettes, did either Volvo or Peggy Sue do anything wrong? It is easy to see why Mercedes and Joe Bob may feel like they had a prospective customer “stolen” from them.² After all, they both generated Jill’s interest as a prospective customer through their advertising expenditures; instead, competitors got her business without making commensurate investments. However, given Jill’s research efforts, it’s also easy to see why Volvo and Peggy Sue may feel like Jill’s choices reflect a well-functioning competitive market. And what about Jill? Did *105 she get sidetracked in her quest for her preferred brand, or did she get exactly what she bargained for?

* * *

A. An Introduction to Keyword Advertising

Keyword advertising, which displays ads triggered by consumers’ search queries, has become an enormously popular form of advertising.³ U.S. search advertising revenues in 2013 were about \$20 billion,⁴ which makes keyword advertising bigger than many traditional types of advertising such as radio,⁵ magazine,⁶ and Yellow Pages⁷ advertising.

Over the last dozen years, lawyers have increasingly found keyword advertising to be an important source of prospective new clients.⁸ For example, for many years, one of the highest priced keywords for advertising has been “mesothelioma,”⁹ which have been bid up in search engine ad auctions by lawyers who can bring lucrative lawsuits for mesothelioma victims.¹⁰ For ads triggered by keyword searches including the phrase “mesothelioma,” advertisers have sometimes paid over \$100 for each consumer’s click on their ads.¹¹

*106 Lawyers choose keyword advertising over other advertising options for a number of reasons. First, consumers rely heavily on search engines to find vendors,¹² and lawyers want to be visible where prospective clients are looking. In contrast, print media like newspapers and Yellow Pages are passé as information resources to prospective clients.¹³ Second, keyword ads can be precisely targeted. Rather than having their ads showing up in the newspaper’s sports section or a general Yellow Pages category like “lawyers,” marketing-savvy lawyers can infer keyword searchers’ intent and show ads targeted to that intent.¹⁴ Third, lawyers pay for their keyword ads only when consumers actually respond to the ads. In contrast, print and broadcast ads typically charge advertisers based on the purported number of consumers reached,¹⁵ irrespective of the actual level of consumer interest or response. Thus, keyword ads allow lawyers to advertise in a more targeted and measurable fashion than other advertising options. Finally, keyword ads let lawyers easily track which keywords are profitable, and lawyers can quickly drop unprofitable keywords.¹⁶

Altogether, keyword ads can offer a cost-effective way for lawyers to reach prospective clients at the right time when they might be seeking legal help.¹⁷ Not surprisingly, lawyers are increasingly embracing this advertising option.

B. Looking More Closely at Competitive Keyword Advertising

This essay evaluates the practice of “competitive keyword advertising,” which is when a business purchases a competitor’s trademarks as the triggers for its keyword ads. Thus, when a consumer searches for the competitor’s trademark, the advertiser’s advertisement (“ad copy”) displays *107 in the advertising zone of the search results page. In the two introductory vignettes involving Jill Consumer, both Volvo and Peggy Sue were using competitive keyword advertising. To keep the essay focused, we assume that the lawyer’s ad copy, and all materials presented at any linked website or call center, does not mislead consumers or reference the competing lawyer’s name.¹⁸

Competitive keyword advertising has been a prominent part of the keyword advertising industry for quite some time,¹⁹ so it is not surprising that lawyers would try it too and display ads when consumers search for the names of rival law firms or lawyers.

Advertising by lawyers has been controversial for a long time,²⁰ but progressively we have recognized that lawyer advertising can benefit both the advertiser and prospective consumers of

legal services. As the Supreme Court in *Bates* explained in upholding lawyers' First Amendment rights to advertise their services, "[a]dvertising is the traditional mechanism in a free market economy for a supplier to inform a potential purchaser of the availability and terms of exchange."²¹

Competitive keyword advertising can facilitate that outcome. Some law firms are better known than others, especially those that engage in mass-market broadcast or print advertising. When consumers search for these names at search engines, it creates an opportunity for competing lawyers to make themselves known to those consumers. Thus, competitive keyword advertising can reduce barriers to entry in the legal industry, especially helping new entrants challenge incumbent players.²²

*108 In turn, consumers benefit from advertising-driven competition among lawyers. As the *Bates* court explained, a "ban on advertising serves to increase the difficulty of discovering the lowest cost seller of acceptable ability. As a result, to this extent attorneys are isolated from competition, and the incentive to price competitively is reduced."²³ Competitive keyword advertising helps lawyers cost-effectively compete with each other, which should produce the benefits we expect from enhanced competition, including higher quality legal services at lower prices to prospective clients.²⁴

Thus, competitive keyword advertising by lawyers should be a win for consumers. But is it legal for lawyers to purchase such advertising?

II. INTELLECTUAL PROPERTY REGULATION

Competitive keyword advertising may implicate both trademark and publicity rights law. It has, however, become increasingly clear that competitive keyword advertising violates neither.

A. Trademarks²⁵

Trademark owners have objected to competitive keyword advertising for a long time. Initially, trademark owners principally sued search engines--especially Google--for selling competitive keyword ads.²⁶ However, Google successfully won or settled every case.²⁷ Since settling *109 the *Rosetta Stone* case in 2012, Google has not faced a significant trademark challenge to its competitive keyword ad sales practices.²⁸

Trademark owners also routinely sue advertisers for buying competitive keyword ads triggered by their trademarks.²⁹ However, those lawsuits rarely succeed any more. To our knowledge, no trademark owner has achieved a courtroom victory in a competitive keyword advertising lawsuit since 2011.³⁰

Why are these lawsuits failing in court? The answer is simple: trademarks do not provide their owners with an absolute right to preclude other people from referencing the trademark. Instead,

trademark rights principally protect against consumer confusion about the source of goods and services.³¹ If consumers do not experience confusion about the relationship of vendors in the marketplace, the trademark owner has not been harmed. And we have good reasons to believe that consumers do not experience any confusion about the relationship between advertisers and trademark owners when search results page displays advertisements triggered by a competitor's trademark.

First, we know of three competitive keyword advertising cases that have reached a jury trial. The defense won each of those cases.³² In other words, three different panels of ordinary consumers, from three different parts of the country, have said that competitive keyword advertising did *110 not confuse them. While jury results may not be as statistically rigorous as a well-conducted consumer survey,³³ they still provide highly persuasive evidence of how reasonable consumers see the issue.

Second, when consumers use a trademark as a search query, many of them do not intend to find only search results associated with the trademark owner. For example, Franklyn and Hyman showed that a substantial minority of surveyed consumers who searched for a trademark "usually wanted information about similar products from other brands."³⁴ Franklyn and Hyman also showed that a majority of surveyed consumers who searched for a trademark did not expect to find only "products bearing that brand name."³⁵

So, when prospective clients use a law firm's name as their search query, many of them are expecting--indeed, wanting--to discover other law firms on the search results page. Given those expectations, it makes sense that courts would reject trademark claims over competitive keyword advertising involving lawyers.

Nevertheless, a 2011 ruling in the *Binder* case held that a law firm's competitive keyword advertising created "a strong likelihood of confusion."³⁶ That conclusion is now outdated. It was a bench trial,³⁷ so it is less representative of consumer perceptions than the three jury results discussed above. Furthermore, most of the evidence discussed by the court related to consumer confusion created by the defendant's activities after consumers responded to the keyword ads. Finally, the judge relied on a stripped-down version of trademark law's typical likelihood of consumer confusion test.³⁸ Just two months after the *Binder* ruling, however, the Ninth Circuit's *Network Automation* ruling said the stripped-down test was not appropriate for keyword advertising cases,³⁹ effectively overturning the *Binder* court's ruling. Given the pro-defense results since *Network Automation*,⁴⁰ the *Binder* case is almost certainly no longer good law.

*111 Defendants in competitive keyword advertising trademark infringement cases have a number of strong defenses,⁴¹ but the lack of consumer confusion should be dispositive in most cases. Because future trademark owners probably cannot prove the requisite consumer confusion

from competitive keyword advertising,⁴² the trademark battles over competitive keyword advertising are effectively over.

B. Publicity Rights

Publicity rights restrict the commercialization of a person's name,⁴³ including lawyers' names. Using a person's name in advertising is a paradigmatic publicity rights violation.⁴⁴ Unlike trademark rights, publicity rights do not require plaintiffs to show any consumer confusion.⁴⁵ Thus, for lawyers unhappy about competitive keyword advertising, publicity rights seem tailor made to shut down the practice.

We are aware of only one publicity rights case involving competitive keyword advertising, but it is highly instructive because it involved two personal injury law firms in Wisconsin, Habush Habush & Rottier and Cannon & Dunphy. Cannon & Dunphy bought keyword advertising on names such as "Habush." The plaintiffs alleged that purchasing their last names as keywords for competitive advertising violated Wisconsin's publicity rights law.⁴⁶

The Wisconsin appellate court disagreed.⁴⁷ The court held that buying keyword ads on another lawyer's name, without displaying the name in the ad copy, did not constitute a statutory "use" of the name.⁴⁸ The court analogized competitive keyword advertising to a legitimate offline marketing technique:

[T]he strategy used by Cannon & Dunphy here is akin to locating a new Cannon & Dunphy branch office next to an established Habush Habush & Rottier office when the readily apparent purpose *112 . . . is to take advantage of the flow of people seeking out Habush Habush & Rottier because of the value associated with the names Habush and Rottier.⁴⁹

In this court's view, competitive keyword advertising takes advantage of consumer interest in a person's name, but it does so without actually displaying the name in the ad copy--and if the name is not displayed, then there is no technical violation of publicity rights.⁵⁰ While publicity rights laws vary by state, we expect that publicity rights lawsuits in other states will follow this analysis--and embrace the court's pro-competition conclusion.

C. Conclusion on IP

Consumers are not confused by competitive keyword ads, and purchasing a rival's name does not "use" their name for publicity rights purposes.⁵¹ So long as courts continue to accept these propositions, we do not expect lawyers will win future intellectual property lawsuits over competitive keyword advertising.

III. STATE BAR REGULATION

Even if intellectual property law does not restrict competitive keyword advertising, professional responsibility rules may nevertheless apply. Bar regulations restrict advertising by lawyers in a variety of ways. Several rules require lawyers to advertise truthfully. For example, the Model Rules of Professional Conduct⁵² Rule 7.1 says:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.⁵³

Additionally, Model Rules of Professional Conduct Rule 8.4(c) says a lawyer shall not “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”⁵⁴

As we explained in Part II, competitive keyword advertising should not constitute an intellectual property violation. Similarly, competitive keyword advertising by lawyers does not violate the Model Rules of Professional Conduct provisions because it does not communicate anything “false” or “misleading” to consumers. The ad copy displayed in response to the purchased keyword might mislead consumers, but the process of displaying the ad itself does not create any false impressions about the respective lawyers’ relationships or associations. Instead, because many prospective clients want and expect competitive ads when searching for a lawyer’s name,⁵⁵ competitive keyword advertising is fully consistent with their search expectations.

Despite the inapplicability of intellectual property law and the Model Rules of Professional Conduct, North Carolina nevertheless banned competitive keyword ads by lawyers. Citing Rule 8.4(c), the North Carolina State Bar adopted an ethics opinion that concludes: “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.”⁵⁶ The State Bar has enforced this opinion at least once: a 2013 public censure of North Carolina lawyer David J. Turlington III.⁵⁷

The North Carolina ethics opinion, and the enforcement action, does not make sense. The rule exceeds the boundaries of existing trademark and publicity rights law,⁵⁸ and it effectively creates a new intellectual property right in lawyers’ names. Creating new intellectual property rights should be the province of elected legislators and subject to careful public scrutiny, neither of which occurred with the North Carolina opinion.

Meanwhile, as discussed above, competitive keyword advertising improves competition and benefits consumers. Advertising practices that enhance competition cannot be “unfair” or “not straightforward.” Indeed, as the trial court explained in *Habush v. Cannon*, marketing based on rival lawyers’ names “is consistent with the principles of energetic business competition in our state and is not unreasonable.”⁵⁹ The trial court continued:

The time may come when a legislature, regulatory board, or supreme court determines that [competitive keyword advertising] is deceptive and misleading and therefore improper Considering the analysis in the preceding sections of this decision, *the trend may be toward increased freedom and reduced regulation or restriction.*⁶⁰

To our knowledge, only one other state bar regulatory body has explicitly considered the propriety of competitive keyword advertising, and it disagreed with North Carolina's conclusion.⁶¹ In 2013, the Florida Bar's Standing Committee on Advertising approved an advisory opinion that competitive keyword advertising is "deceptive and inherently misleading."⁶² The Florida Bar's Board of Governors vacated that opinion because: "The purchase of ad words is permissible as long as the resulting sponsored links clearly are advertising."⁶³

In other words, after the Florida Bar carefully reviewed competitive keyword advertising, it reversed its initial reservations and instead expressly authorized competitive keyword advertising by lawyers.

In light of the Florida Bar's conclusion, the *Habush v. Cannon* court's analysis about competition, and the absence of consumer confusion, it has become apparent that competitive keyword advertising is fair and straightforward--exactly the opposite of the conclusions reached by the North Carolina bar. And without any support from existing intellectual property rules or protecting consumers from deception, restrictions on lawyers' use of competitive keyword advertising seem especially vulnerable to First Amendment challenges. For these reasons, we do not expect other state bar regulators will follow North Carolina's footsteps, nor do we think that the North Carolina opinion could withstand careful reconsideration or a courtroom challenge.

*115 IV. CONCLUSION

Lawyers are notorious laggards when adopting and embracing emerging technological developments. Thus, even as the wars over competitive keyword advertising wind down everywhere else, it is not surprising that the legal industry is still working through its own (delayed) catharsis about the legitimacy of competitive keyword advertising. But other than the North Carolina ethics opinion, competitive keyword advertising by lawyers is not restricted by intellectual property law or attorney advertising rules. As a result, it seems that North Carolina's rule is an outlier that needs to be fixed, and North Carolina bar regulators should reconsider the matter. We also hope other bar regulators will affirmatively acknowledge, like the Florida bar did, that competitive keyword advertising is permissible.⁶⁴

Footnotes

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¹ This is based on an actual search result Eric Goldman received when he searched for “Mercedes” at Google.com in June 2009. Screenshot on file with Eric Goldman.

² See, e.g., Sen. Dan Eastman, *Identity Theft: The Next Generation*, THE SENATE SITE (Apr. 5, 2007), <http://senatesite.com/blog/2007/04/identity-theft-next-generation.html> (calling competitive keyword advertising the equivalent of “carjacking” someone’s mark and saying consumers exposed to such advertising were being “shanghaied by a pirate”).

³ See REBECCA TUSHNET & ERIC GOLDMAN, *ADVERTISING & MARKETING LAW: CASES & MATERIALS*, ch. 1 (2014 ed.).

⁴ See, e.g., INTERNET ADVERTISING BUREAU, *IAB INTERNET ADVERTISING REVENUE REPORT: 2013 FULL YEAR RESULTS* (APR. 2014), available at http://www.iab.net/media/file/IAB_Internet_Advertising_Revenue_Report_FY_2013.pdf (reporting Q4 2013 revenue of \$5 billion); Mobile Gains Greater Share of Search, Display Spending, *EMARKETER* (Aug. 21, 2013), <http://www.emarketer.com/Article/Mobile-Gains-Greater-Share-of-Search-Display-Spending/1010148#sthash.C1qPcVEu.dpuf> (reporting \$19.6 billion in 2013); Tim Peterson, *Digital to Overtake TV Ad Spending in Two Years, Says Forrester*, *ADVERTISING AGE* (Nov. 4, 2014), <http://adage.com/article/media/digital-overtake-tv-ad-spending-years-forrester/295694/> (estimating “search marketing” 2014 revenues of nearly \$28 billion).

⁵ The U.S. radio industry’s ad revenue in 2013 was about \$16 billion. Radio Advertising Expenditure in the U.S. from 2010 to 2017, *STATISTA* (2015), <http://www.statista.com/statistics/272412/radio-advertising-expenditure-in-the-us/>.

⁶ The U.S. consumer magazine industry’s ad revenue in 2013 was about \$13 billion. IAB INTERNET ADVERTISING REVENUE REPORT, *supra* note 4, at 19.

⁷ The U.S. Yellow Pages industry’s ad revenue in 2011 was about \$7 billion. Karen Weise, *The Golden Allure of the Yellow Pages*, *BLOOMBERG BUSINESSWEEK* (Mar. 22, 2012), <http://www.businessweek.com/articles/2012-03-22/the-golden-allure-of-the-yellow-pages>.

⁸ See Alison Frankel, *Plaintiffs' Lawyers Spend Millions in Online Ads. Should We Care?*, REUTERS (Mar. 1, 2012), <http://blogs.reuters.com/alison-frankel/2012/03/01/plaintiffs-lawyers-spend-millions-in-online-ads-should-we-care/>; cf. Avi Goldfarb & Catherine Tucker, *Search Engine Advertising: Channel Substitution When Pricing Ads to Context*, 57 MGMT. SCI. 458 (2011), <http://dspace.mit.edu/openaccess-disseminate/1721.1/65335>.

⁹ Carl Bialik, *Lawyers Bid Up Value Of Web-Search Ads*, WALL ST. J., Apr. 8, 2004, <http://www.wsj.com/articles/SB108137355250477123>; Barry Schwartz, *Some Of Google's Most Expensive Keywords*, SEARCH ENGINE WATCH (Mar. 27, 2006), <http://searchenginewatch.com/sew/news/2059302/some-of-googles-most-expensive-keywords>.

¹⁰ Ben Berkowitz, *The Long, Lethal Shadow of Asbestos*, REUTERS (May 11, 2012), <http://www.reuters.com/article/2012/05/11/us-usa-asbestos-lawsuits-idUSBRE84A0J920120511>.

¹¹ For example, in 2012, “mesothelioma settlement” had an average cost per click of \$142.67. Barry Schwartz, *Mesothelioma, Asbestos, Annuity: Google's Most Expensive Keywords*, SEARCH ENGINE LAND (Nov. 9, 2012), <http://searchengineland.com/mesothelioma-asbestos-annuity-googles-most-expensive-keywords-139295>.

¹² Amy Gesenhues, *Study: Organic Search Drives 51% of Traffic, Social Only 5%*, SEARCH ENGINE LAND (Aug. 28, 2014), <http://searchengineland.com/study-organic-search-drives-51-traffic-social-5-202063> (“[O]rganic search traffic accounted for 73 percent of all traffic to business services sites.”); Will Scott, *The Verdict Is In: Internet Searches Gaining Traction In Legal Referrals*, SEARCH ENGINE LAND (Oct. 8, 2015), <http://searchengineland.com/verdict-internet-searches-gaining-traction-legal-referrals-230533>; see also Nathan Safran, *Update: Organic Search Is Actually Responsible for 64% of Your Web Traffic*, CONDUCTOR BLOG (July 10, 2014), <http://www.conductor.com/blog/2014/07/update-organic-search-actually-responsible-64-web-traffic/>.

¹³ *Perspectives on Finding Personal Legal Services: The Results of a Public Opinion Poll*, A.B.A. STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES (Feb. 2011), http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/20110228_aba_harris_survey_report.authcheckdam.pdf (“Use of print directories, such as the Yellow Pages, as the primary way to find a lawyer for a personal legal matter appears to be eroding.”).

¹⁴ Eric Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 EMORY L.J. 507, 521-22 (2005).

¹⁵ This is called “CPM” advertising, or cost per thousand ad exposures to consumers (where the M represents the Roman numeral for 1,000). See TUSHNET & GOLDMAN, *supra* note 3, ch. 16.

¹⁶ See Jacob Baadsgaard, *5 Mistakes Law Firms Make When Advertising Online*, DISRUPTIVE ADVERTISING (Apr. 22, 2015), <http://www.disruptiveadvertising.com/adwords/5-mistakes-law-firms-make-when-advertising-online/>.

¹⁷ Connor Mullin, *Regulating Legal Advertising on the Internet: Blogs, Google & Super Lawyers*, 20 GEO. J. LEGAL ETHICS 835, 838 (2007) (“[A] dvertising on Google is a superior alternative that may be better received by the user. This is because, given the way AdWords works, the user is the one who initiates the process by seeking information related to the legal advertisements that appear.”).

¹⁸ As a practical matter, courts are becoming increasingly skeptical of competitive keyword advertising lawsuits based on allegedly deceptive ad copy. See, e.g., Eric Goldman, *Suing Over Keyword Advertising Is A Bad Business Decision For Trademark Owners*, FORBES (May 14, 2013, 10:15 AM), <http://www.forbes.com/sites/ericgoldman/2013/05/14/suing-over-keyword-advertising-is-a-bad-business-decision-for-trademark-owners/> [hereinafter Goldman, *Bad Business Decision*]. We also do not discuss the use of keyword metatags, a coding technique designed to influence the listings of organic search results. Keyword metatags are technologically irrelevant and have been for many years. See, e.g., Eric Goldman, *Google Confirms That Keyword Metatags Do Not Matter*, TECH. & MARKETING L. BLOG (Sept. 22, 2009), http://blog.ericgoldman.org/archives/2009/09/google_confirms.htm; Eric Goldman, *Keyword Metatags are Back ... Will Judicial Freakouts Continue?*, TECH. & MARKETING L. BLOG (Oct. 20, 2011), http://blog.ericgoldman.org/archives/2011/10/keyword_metatag_2.htm.

¹⁹ See generally Ted Ives, *The Complete Guide To Bidding On Competitor Brand Names & Trademarked Terms*, SEARCH ENGINE LAND (Apr. 26, 2012), <http://searchengineland.com/the-complete-guide-to-bidding-on-competitor-brand-names-trademarked-terms-118576>. An early competitive keyword advertising case dates back to 2004. See *Gov’t Emps. Ins. Co. (GEICO) v. Google, Inc.*, 330 F. Supp. 2d 700 (E.D. Va. 2004).

²⁰ ASS’N OF PROF’L RESPONSIBILITY LAWYERS, 2015 REPORT OF THE REGULATION OF LAWYER ADVERTISING COMMITTEE (June 22, 2015), available at http://www.aprl.net/publications/downloads/APRL_2015_Lawyer-Advertising-Report_06-22-15.pdf; Elizabeth Stawicki, *Lawyer Advertising Still Controversial After 30 Years*, MPRNEWS (July 9, 2007), http://www.mprnews.org/story/2007/07/05/lawyer_advertising.

²¹ Bates v. State Bar of Ariz., 433 U.S. 350, 376 (1977).

²² See *id.* at 378 (explaining that banning lawyer advertising “serves to perpetuate the market position of established attorneys. Consideration of entry-barrier problems would urge that advertising be allowed so as to aid the new competitor in penetrating the market”).

²³ *Id.* at 377.

²⁴ See David S. Evans & Elisa Mariscal, *The Role of Keyword Advertising in Competition Among Rival Brands* 13 (Inst. for Law and Econ. Working Paper No. 619, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2142692 (“[K]eyword advertising likely benefits consumers because it: offers consumers more information, reduces their search costs and gives them ready access to competitive alternatives; lowers the cost to firms of reaching their customers and thereby lowers the cost of doing business, making it easier to enter and challenge existing brands; and, intensifies competition between name brands and their rivals and thereby likely lowers prices and improves quality.”).

²⁵ Law firms usually can obtain protectable trademark rights in their firm name, with or without registration. Individual lawyers can obtain protectable trademark rights in their names if the name achieves “secondary meaning”—that is, it acquires sufficient consumer recognition that the name uniquely identifies a specific business. See 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 13:2 (4th ed. 2014).

²⁶ Eric Goldman, *With Rosetta Stone Settlement, Google Gets Closer to Legitimizing Billions of AdWords Revenue*, FORBES (Nov. 1, 2012), <http://www.forbes.com/sites/ericgoldman/2012/11/01/with-rosetta-stone-settlement-google-gets-closer-to-legitimizing-billions-of-adwords-revenue/> [hereinafter Goldman, *Rosetta Settlement*].

²⁷ Eric Goldman, *Google And Yahoo Defeat Last Remaining Lawsuit Over Competitive Keyword Advertising*, TECH. & MARKETING L. BLOG (June 8, 2015), <http://blog.ericgoldman.org/archives/2015/06/google-and-yahoo-defeat-last-remaining-lawsuit-over-competitive-keyword-advertising-forbes-cross-post.htm>. One case of particular note is *Stratton Faxon v. Google, Inc.*, which involved a law firm suing Google for selling competitive keyword advertising. *Stratton Faxon v. Google, Inc.*, No. NNH-CV-09-5031219-S (Conn. Super. Ct. Mar. 8, 2010). That case was quietly dismissed. See Case Detail - NNH-CV09-5031219-S, STATE OF CONN. JUD. BRANCH, CIV. AND FAM. INQUIRY (Mar. 11, 2010), <http://civillinquiry.jud.ct.gov/CaseDetail/PublicCaseDetail.aspx?DocketNo=NNHCV09503121S>.

²⁸ See Goldman, *Rosetta Settlement*, *supra* note 26.

²⁹ See Eric Goldman, *Confusion from Competitive Keyword Advertising? Fuhgeddaboudit*, TECH & MARKETING L. BLOG (July 8, 2015), <http://blog.ericgoldman.org/archives/2015/07/confusion-from-competitive-keyword-advertising-fuhgeddaboudit.htm> [hereinafter Goldman, *Confusion from Competitive Keyword Advertising*].

³⁰ See Goldman, *Bad Business Decision*, supra note 18; see also Eric Goldman, *More Defendants Win Keyword Advertising Lawsuits*, TECH. & MARKETING L. BLOG (Feb. 11, 2015), <http://blog.ericgoldman.org/archives/2015/02/more-defendants-win-keyword-advertising-lawsuits.htm>.

³¹ The trademark dilution doctrine does not require consumer confusion, but defendants have routinely defeated dilution claims for competitive keyword advertising. See *Allied Interstate LLC v. Kimmel & Silverman P.C.*, No. 12 Civ. 4204, 2013 WL 4245987 (S.D.N.Y. Aug. 12, 2013) (referential/fair use of trademark); *Designer Skin, LLC v. S & L Vitamins, Inc.*, 560 F. Supp. 2d 811 (D. Ariz. 2008) (nominative use); see also *Nautilus Group, Inc. v. Icon Health & Fitness, Inc.*, No. C02-2420RSM, 2006 WL 3761367 (W.D. Wa. Dec. 21, 2006) (relying on pre-Trademark Dilution Revision Act provisions); *Edina Realty, Inc. v. TheMLSonline.com*, No. Civ. 04-4371JRTFLN, 2006 WL 737064 (D. Minn. Mar. 20, 2006) (same). But see *Scooter Store, Inc. v. SpinLife.com, LLC*, No. 2:10-cv-18, 2011 WL 6415516 (S.D. Ohio Dec. 21, 2011) (bizarrely finding potential dilution in a generic term).

Several competitive keyword advertising dilution claims have failed because the trademark lacked the requisite fame, defined as “widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark’s owner.” 15 U.S.C. §1125(c)(2)(A) (2012); see *Parts.com v. Yahoo*, 996 F. Supp. 2d 933 (S.D. Cal. 2013); *Jurin v. Google, Inc.*, No. 2:09-cv-03065-MCE-CKD, 2012 WL 5011007 (E.D. Cal. Oct. 17, 2012); *S & L Vitamins, Inc. v. Austl. Gold, Inc.*, 521 F. Supp. 2d 188 (E.D.N.Y. 2007); *Google, Inc. v. Am. Blinds & Wallpaper Factory, Inc.*, No. C 03-5340 JF, 2007 WL 1159950 (N.D. Cal. Apr. 18, 2007).

In practice, the fame requirement will be an insurmountable barrier for federal dilution claims by almost every lawyer. Through heavy advertising, some law firms achieve widespread recognition in their local community, but very few (if any) law firm trademarks achieve national consumer recognition.

³² *Coll. Network, Inc. v. Moore Educ. Publishers, Inc.*, 378 Fed. App’x 403 (5th Cir. 2010); *Consumerinfo.com, Inc. v. One Techs., LP*, No. CV-09-3783-VBF (MANx) (C.D. Cal. Jan. 12, 2011); *Fair Isaac Corp. v. Experian Info. Solutions Inc.*, Civil No. 06-4112 ADM/JSM, 2009 WL 4263699 (D. Minn. 2009).

³³ At minimum, juries are too small to achieve meaningful confidence intervals. Then again, conducting a rigorous consumer survey on trademarks is really hard, and trademark jurisprudence is littered with poorly executed surveys. *See generally* WILLIAM G. BARDER ET AL., TRADEMARK AND DECEPTIVE ADVERTISING SURVEYS: LAW, SCIENCE AND DESIGN (Shari Seidman Diamond & Jerre B. Swann eds., 1st ed. 2012). So, perhaps this data from juries is not materially less reliable than the surveys courts consider.

³⁴ David J. Franklyn & David A. Hyman, *Trademarks As Search Engine Keywords: Much Ado About Something?*, 26 HARV. J. L. & TECH. 481, 517 (2013).

³⁵ Although their survey focused on products, we believe consumer searches for services would follow the same dynamic.

³⁶ *Binder v. Disability Grp.*, 772 F. Supp. 2d 1172, 1176 (C.D. Cal. 2011).

³⁷ *Id.* at 1174.

³⁸ The test was called the “Internet trinity” or “Internet troika.” *See Brookfield Commc’ns, Inc. v. W. Coast Entm’t Corp.*, 174 F.3d 1036 (9th Cir. 1999).

³⁹ *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1148 (9th Cir. 2011) (“Given the multifaceted nature of the Internet and the ever-expanding ways in which we all use the technology, however, it makes no sense to prioritize the same three factors for every type of potential online commercial activity. The ‘troika’ is a particularly poor fit for the question presented here” [i.e., keyword advertising].).

⁴⁰ Goldman, *Confusion from Competitive Keyword Advertising*, *supra* note 29.

⁴¹ Defenses include the lack of enforceable trademark rights, unclean hands (because plaintiffs often engage in competitive keyword advertising themselves), and nominative use (i.e., the advertiser is using the trademark to refer to the trademark owner).

⁴² That is not to say consumers do not experience confusion about the keyword ads they see. *See, e.g.*, Ronald C. Goodstein et al., *Using Trademarks as Keywords: Empirical Evidence of Confusion*, 105 TRADEMARK REP. 732 (2015) (suggesting that consumers may not understand the relationship between trademark owner and advertiser when they click on a keyword ad based on 2008 surveys prepared by plaintiff-hired consultants); Franklyn & Hyman, *supra* note 34 (stating that consumers are confused about the differences between organic and paid search results). Instead, consumers routinely experience all types of confusion during their shopping experiences, but trademark law only protects against very specific types of confusion.

⁴³ See generally DAVID S. WELKOWITZ & TYLER T. OCHOA, *CELEBRITY RIGHTS: RIGHTS OF PUBLICITY AND RELATED RIGHTS IN THE UNITED STATES AND ABROAD* (2010).

⁴⁴ See TUSHNET & GOLDMAN, *supra* note 3, ch. 13.

⁴⁵ WELKOWITZ & TYLER, *supra* note 43, at 114.

⁴⁶ Complaint, *Habush v. Cannon*, No. 09CV018149, 2011 WL 2477236 (Milwaukee Cir. Ct. June 8, 2009), available at <https://www.scribd.com/doc/23670849/Habush-Habush-Rottier-v-Cannon-Dunphy-Complaint>.

⁴⁷ *Habush v. Cannon*, 828 N.W.2d 876 (Wis. Ct. App. 2013).

⁴⁸ *Id.*

⁴⁹ *Id.* at 883-84; see also Eric Goldman, *Brand Spillovers*, 22 HARV. J. L. & TECH. 381 (2009).

⁵⁰ *Habush*, 828 N.W.2d at 883-84.

⁵¹ See *supra* Parts II.A-B.

⁵² The American Bar Association's Model Rules of Professional Conduct have been adopted, with some modifications, in forty-nine states (California is the outlier). See *State Adoption of the ABA Model Rules of Professional Conduct*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Aug. 30, 2015).

⁵³ MODEL RULES OF PROF'L CONDUCT R. 7.1 (2013).

⁵⁴ *Id.* at R. 8.4(c).

⁵⁵ See *supra* Part II.A.

⁵⁶ North Carolina State Bar, Formal Ethics Op. 14 (Apr. 27, 2012), <http://www.ncbar.com/ethics/ethics.asp?page=2&keywords=engine>.

⁵⁷ Grievance Comm. of the North Carolina State Bar, *In re David J. Turlington, III*, Censure No. 13G0121 (2013), <http://www.ncbar.com/orders/turlington,%20iii%C20david%2013g0121.pdf>. The key part of the censure reads: "Prior to April 27, 2012, you employed other attorneys' names and names of law firms in a keyword advertising campaign through Google's AdWords program. On April 27, 2012, the North Carolina State Bar Ethics Committee published 2010 Formal Ethics Opinion 14, which states that an attorney's purchase or use of another attorney's name in an Internet search

engine's keyword-advertising program is dishonest and therefore violates Rule 8.4(c) of the Rules of Professional Conduct. After the publication of this ethics opinion, you continued to intentionally add inappropriate keywords to your Google AdWords advertising campaign; your inappropriate keywords consisted of other individual attorney names (including attorney nicknames), names of law firms, and names of judicial officials. Although you claimed that any inclusion of inappropriate keywords in your advertising campaign was inadvertent and was the result of your bulk-purchase of keywords suggested by Google, your history of keyword purchases demonstrates that you specifically selected and approved a number of these keywords for inclusion in your advertising campaign. It is your duty to scrutinize all keywords prior to adding the keyword to your advertising campaign, regardless of whether you created the keyword or whether the keyword was suggested to you. Your intentional inclusion of other attorneys' names and law firms in your keyword advertising campaign is dishonest and therefore violates Rule 8.4(c). Furthermore, you knowingly made a false statement of material fact in violation of Rule 8.1(a) by claiming in your response to the letter of notice in this matter that your inclusion of inappropriate keywords in your advertising campaign was inadvertent."

⁵⁸ See *supra* Parts II.A-B.

⁵⁹ *Habush v. Cannon*, No. 09-CV-18149, 2011 WL 2477236, at *20 (Wis. Cir. Ct. June 8, 2011), available at http://media.jsonline.com/documents/Habush_v_Cannon_Kahn+decison.pdf.

⁶⁰ *Id.* at *25 (emphasis added).

⁶¹ Prof. Goldman submitted a letter to the Florida Bar advocating for withdrawal of the draft opinion. Letter from Eric Goldman et al., to Elizabeth Clark Tarbert, Ethics Counsel, Florida Bar (Apr. 29, 2013), *available at* <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1363&context=historical>. Prof. Goldman also appeared telephonically at two meetings of the Standing Committee on Advertising to advocate against the draft opinion.

⁶² Florida Bar Standing Comm. on Adver., Proposed Advisory Op. A-12-1 (2013), *available at* [https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/A102C89590562DF385257B2B0063900B/\\$FILE/A-12-1%20PAO%C20approved%C20for%C20publication%203-5-13.pdf?OpenElement](https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/A102C89590562DF385257B2B0063900B/$FILE/A-12-1%20PAO%C20approved%C20for%C20publication%203-5-13.pdf?OpenElement).

⁶³ Eric Goldman, *Florida Allows Competitive Keyword Advertising By Lawyers*, FORBES (Dec. 18, 2013), <http://www.forbes.com/sites/ericgoldman/2013/12/18/florida-allows-competitive-keyword-advertising-by-lawyers/>; see also Advertising Rules, THE FLORIDA BAR (Dec. 11, 2015), <http://www.floridabar.org/TFB/TFBLawReg.nsf/e0f40af2c23904c785256709006a3713/f0f34cea87853cc85256b2f006c8848?OpenDocument>.

⁶⁴ Affirmative authorization of competitive keyword ads will avoid future murky and inscrutable opinions like the South Carolina disciplinary action in *In re Naert*, No. 2015-001244, 2015 WL 5722624 (S.C. Sup. Ct. Sept. 30, 2015), which said that buying another lawyer's names to display "derogatory" Internet marketing violated the Lawyer's Oath. For criticism of the Naert opinion, see Eric Goldman, *Another Murky Opinion on Lawyers Buying Keyword Ads on Other Lawyers' Names-In re Naert*, TECH. & MARKETING L. BLOG ((Oct. 3, 2015), <http://blog.ericgoldman.org/archives/2015/10/another-murky-opinion-on-lawyers-buying-keyword-ads-on-other-lawyers-names-in-re-naert.htm>).

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Referral to Citizens Advisory Committee for comment – suggestion: *“Show details” link to go directly to the reference number*

From: Vanstrum, Arne Carl
Sent: Tuesday, February 20, 2018 10:08 AM
To: Walker, Francine <fwalker@floridabar.org>
Subject: FW: Peter Todd Kennedy discipline

Arne C. Vanstrum
Associate Director of Lawyer Regulation
The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300
(850)561-5604

From: Barbara Parker [<mailto:bshulg@gmail.com>]
Sent: Tuesday, February 20, 2018 10:04 AM
To: Vanstrum, Arne Carl <avanstru@floridabar.org>
Subject: Re: Peter Todd Kennedy discipline

Thank you so much for your prompt reply.
I would like to suggest to The Bar a small adjustment to its website configuration with reference to his it presents disciplinary information. If The Bar wants the public to go straight to the information they are seeking, it makes no sense to provide the following when “Show Details” is clicked:

"Discipline cases that are public record are posted to the attorney's individual profile at FloridaBar.org. Select the reference number to view the Supreme Court Order and other related documents. [Detailed instructions to view discipline documents.](#)"

The "Detailed instruction to view discipline documents" link certainly suggests that hitting this link will “show the details” promised.

Most readers, like myself, will look no farther for the smaller, light typeface below that says “admonishment.” It would make far more sense for the “Show details” link to go directly to the reference number, as this is what people are actually looking for.

Thank you for your time.

Sincerely,

Barbara Parker

On Feb 20, 2018, at 4:44 AM, Vanstrum, Arne Carl <avanstru@floridabar.org> wrote:

Good morning Ms. Parker:

I was asked to look into your query. I just checked and the discipline is on our website. After you click on Show Details, the admonishment pops up and there is a new link that appears as a reference number. By clicking on the reference number you will see all the pertinent documents from the case. I hope this information is helpful.

Arne C. Vanstrum
Associate Director of Lawyer Regulation
The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300

From: Barbara Parker [<mailto:bshulg@gmail.com>]
Sent: Monday, February 19, 2018 6:00 PM
To: Scott, Rosalyn <rscott@floridabar.org>
Subject: Peter Todd Kennedy discipline

Hi.

I filed a complaint against Peter Todd Kennedy of Palm Beach County and The Florida Bar disciplined him and forced him to pay me a nominal reparation. That is in addition to the settlement he defaulted on when our law suit against him was settled.

I was told that there would be a notation that he was disciplined by the Bar on its website. However, when I look him up and click on Show Details I am sent in a circular manner to a page that says:

HOW TO FIND PUBLIC RECORD ATTORNEY DISCIPLINE INFORMATION

The Florida Bar posts public record attorney discipline documents for the past 10 years. Follow these steps:

1. Click on Find A Lawyer.
2. Enter first and last name of the lawyer. You may also enter a city, if you know it. Click Search.
3. Click on the name you've entered and you'll be taken to the attorney's page. Directly under the name you'll see the status of the attorney, e.g., **Member in Good Standing, Disbarred—Not eligible to practice, etc.** You'll also see attorney number, contact information and year of admittance to the Bar.
4. **10-Year Discipline History** will indicate None or Show Details. Click on Show Details, and the sanction, action date and reference number will come up. Click on the green reference number.

That will open a page with court documents, e.g., Supreme Court Order or Report of Referee. Click on each court document and you'll find the details of the attorney's case.

For public record discipline information for an attorney that occurred **more than 10 years ago**:

- Members of the **public** are asked to contact The Florida Bar via email at LRInfo@floridabar.org.
- The **Media** should call Public Information and Bar Services at 850-561-5666. The public information office is open Monday – Friday, 8 a.m. – 5:30 p.m.

I get no information. So when I start again and click on Find a Lawyer, the same thing happens. No information.

And the exact same thing happens when you click on the profile of the other attorney in that firm we complained against, Paul Trinley, who also was forced by The Bar to make a payment to me.

This is not acceptable. As someone who was wronged by both of these attorneys their firm to the tune of more than \$600,000, and given that despite my first filing a complaint in 2010 the Bar did nothing until 2016, the very least it could do is allow innocent potential clients to see a detailed list of their offenses so they know not to hire them. If attorneys have Bar disciplines on their records it should be EASY for the public to find, not hidden by The Bar.

I had to go to the Florida Supreme Court website to find this:

The Court approves the uncontested referee's report and hereby admonishes respondent for professional misconduct. Respondent is further directed to attend The Florida Bar's Ethics School under the terms and conditions set forth in the report and consent judgment. Respondent shall pay restitution in the amount of \$25,000.00 to Barbara Shulgasser-Parker under the terms and conditions set forth in the report and consent judgment. Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from Peter Todd Kennedy in the amount of \$3,166.68, for which sum let execution issue.

When potential clients go looking up a lawyer's record on The Bar's website, this is exactly the kind of information they are trying to find, or hoping not to find. Who would ever think to go to the trouble of searching the Florida Supreme Court website?

Why not make it available where potential clients might actually be able to see it and make their own informed judgments?

Sincerely,

Barbara Shulgasser-Parker