



Ethics Advisory Opinion 20-01

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY.

S.C.R. Prof. Conduct: Rules 7.1, 8.4(c), 8.4(d)

Factual Background: A lawyer seeks to enhance her internet presence with the use of keyword advertising. The lawyer inquires whether she may engage in keyword advertising by using her competitors' names as search terms for placement of her advertisement.

Question Presented: May a lawyer bid on and use the names of other lawyers and law firms as part of a competitive keyword advertising strategy?

Summary: A lawyer may use internet competitive keyword advertising that includes the names of competing lawyers and law firms. The lawyer should be mindful of all additional advertising rules and should avoid any tactics where use of competitive keyword advertising would create an ad that contained or implied derogatory or uncivil statements.

Response:

The Ethics Advisory Committee is asked to consider the permissibility of competitive keyword advertisements in specific online search engine platforms. A lawyer pays a search engine entity to insert her ads when a searcher types a competitor's name into an internet search engine. Advertisements may appear to the right of the page on certain search engines, or they may appear marked as an "ad" above the returned organic search results on other search engines.

For example: a searcher/potential client would type "John Doe" into a search engine in an attempt to locate the website of, or other information regarding John Doe, the lawyer. As a result of her payment for the advertising and her choice of certain specific words including the name "John Doe", Jane Roe's advertisement would appear on the same page as John Doe's as a "sponsored" entry or "ad" when the searcher received the results. While Jane Roe's advertisement would be marked as such, placement of the ad could vary depending upon the search engine and the price paid.

For clarity, Competitive Keyword Advertising is distinct from Search Engine Optimization (SEO). SEO may be defined as the process of increasing the visibility of a web page by users of a search engine. SEO is a process directed at optimization of unpaid placement results, referred to as "organic" results or hits, and is distinct from

paid placement or keyword advertising placement. This opinion is limited to discussion of Competitive Keyword Advertising.

There are several aspects of law that are to be considered in a discussion on this topic, including trademark law [*Rosetta Stone v. Google*, 676 F3d 144 (US Ct. App. 4th Cir. 2012)]. and publicity rights law [*Habush v. Cannon*, 828 NW 2d 876 (Wis Ct. App. 2013)]; While this Committee's task is to opine on lawyer keyword advertising relevant to the SC Rules of Professional Conduct, Committee considered these cases in debate and discussion on the matter. See also *Regulation of Lawyers' Use of Competitive Keyword Advertising* U. Ill. L. Rev. (2016).

In 2019, the New Jersey Advisory Committee on Professional Conduct received nearly the identical inquiry as is posed to the SC Bar's Committee. The issue has also been addressed by Texas, Wisconsin, and North Carolina.¹

In New Jersey, the inquirer asked whether the purchase of a competitor's name as a keyword would violate Rule 7.1. That Advisory Committee decided that the purchase does not violate the Rule, because the Rule applies to lawyers' communications and, "the keyword purchase of a competitor lawyer's name is not, in itself, a 'communication.'" <https://www.njcourts.gov/notices/2019/n190806c.pdf>

The New Jersey Committee also addressed purchase of a competitor lawyer's name as it relates to Rule 8.4(Misconduct). The Committee looked to existing similar opinions from both Texas and Wisconsin, concurred in their reasoning, and determined that the purchase of a competitor's name as an advertising keyword is not conduct that involves dishonesty, fraud, deceit, or misrepresentation. They said:

The websites of the keyword purchasers' law firm and the competitor's law firm will, presumably, both appear in the resulting search. The keyword purchaser's website ordinarily will appear as a paid or "sponsored" website, while the competitor lawyer's website will appear in the organic results (unless the competitor has purchased the same keyword, in which case it will also appear as a paid or "sponsored" website.) The user can choose which website to select and the search engine ordinarily will mark the keyword-purchased website as paid or "sponsored." This is not deceptive, fraudulent or dishonest conduct within the meaning of Rule 8.4(c).

The Texas State Bar Professional Ethics Committee, to which the New Jersey opinion refers, found that keyword advertising is a business practice used by many different commercial endeavors, and "such use by Texas Lawyers in their advertising is neither dishonest nor fraudulent nor deceitful and does not involve misrepresentation." State Bar of Texas Professional Ethics Committee [Opinion No. 661](#) (July, 2016).

Wisconsin's opinion, from the Appellate Court, found that a lawyer's purchase of competitor lawyer's name for use in internet advertising does not violate the Wisconsin

¹ North Carolina State Bar 2010 Formal Ethics Opinion 14 (April 27, 2012) (purchasing another lawyer's name as a keyword for an internet search is "neither fair nor straightforward" and therefore is dishonest conduct that violates Rule 8.4(c)).

privacy statute because the “use” of the competitor’s name is not visible to the consumer. While this is a court’s decision, and not an ethics opinion, New Jersey applied the Wisconsin Court’s reasoning to its opinion. *Habush v. Cannon*, 828 N.W.2d 876, 346 Wis. 2d 709, 2013 WI App. 34 (Wis. Ct. App. 2013).

Florida Bar’s Board of Governors reversed an earlier opinion from its Standing Committee on Ethics and opined that, “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.... may be dealt with via existing rules prohibiting misleading forms of advertising.” (<https://www-media.floridabar.org/uploads/2017/04/bog-dec13-2013-meeting.pdf> at p. 6).

In addition, a concern raised during the SC Ethics Committee’s consideration and drafting process was that a potential client could be misled by the appearance of an advertisement for one lawyer on the page where the “organic” search results for another lawyer were located. Texas apparently had similar discussions, and opined that, “...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.” We concur.

Finally, the SC Committee, consistent with Texas, has determined that a lawyer’s use of a surreptitious direct link that would “pose” as a competitor’s internet location but would reroute a user to the lawyer’s own website would be deceitful conduct in violation of Rule 8.4 (d). *Committee note: In TX, the Rule subsection cited is Rule 8.4(c), in SC, the corresponding Rule subsection is 8.4(d).*

The SC Ethics Advisory Committee concurs with the reasoning of New Jersey, Texas and Wisconsin. Accordingly, and consistent with those states’ opinions and with our SC Rules of Professional Conduct, a lawyer may purchase an internet competitive advertising keyword that is the name of another lawyer or law firm, in order to display a “sponsored” website advertisement. The lawyer should be mindful to comply with all advertising rules and should use care to ensure that no derogatory or uncivil message is conveyed. In addition, surreptitious redirection from a competitor’s website to a lawyer’s own web page via a hyperlink is prohibited under our Rules.