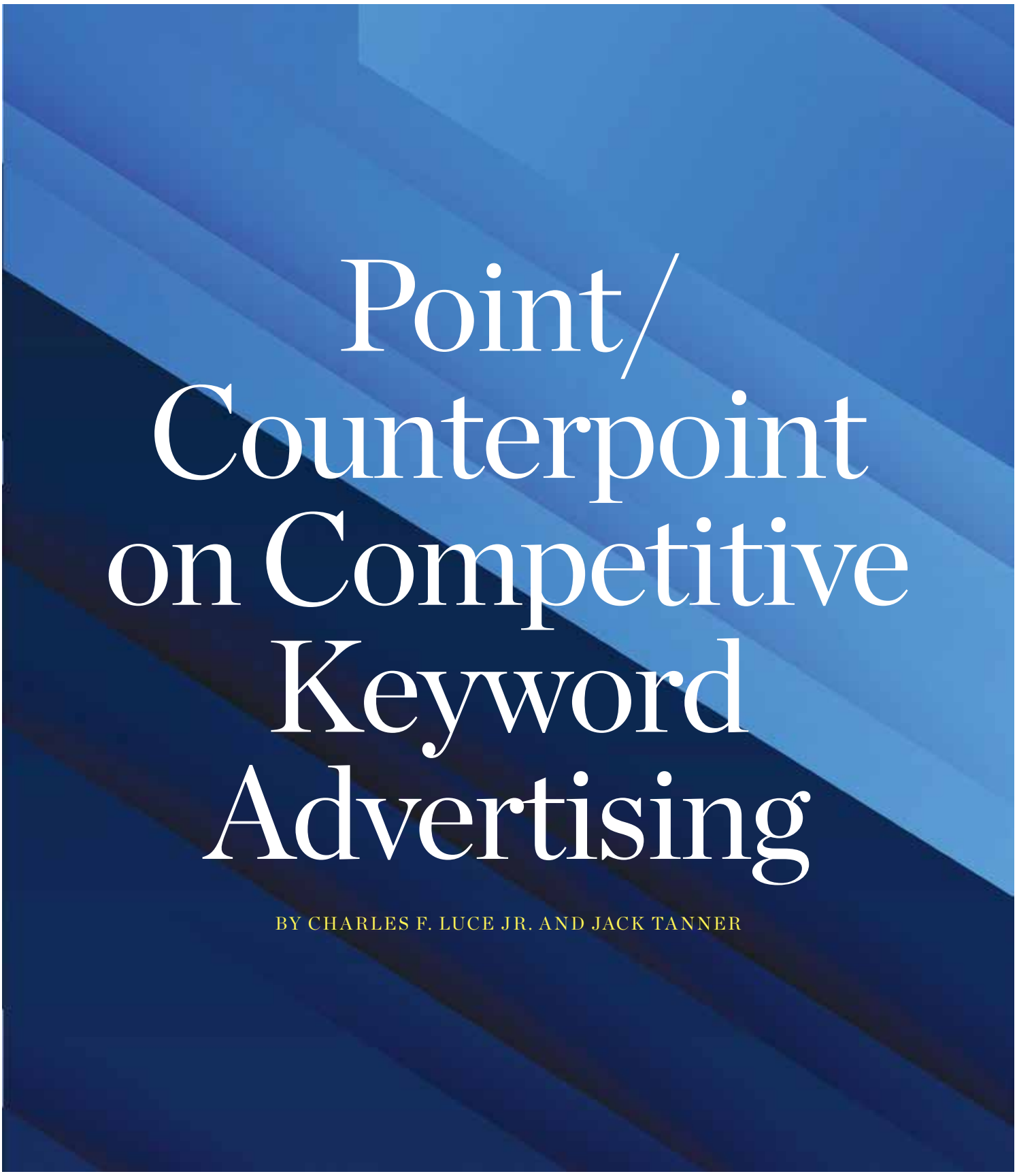


Point/ Counterpoint on Competitive Keyword Advertising

BY CHARLES F. LUCE JR. AND JACK TANNER

This article discusses the ethical issues involved with competitive keyword advertising in legal marketing.

Editors' Note: *This article presents two sides of the issue in a point/counterpoint format reflecting each author's opinion. Any statements of opinion are the authors' own and do not necessarily reflect the views of* Colorado Lawyer *editors or the Colorado Bar Association.*

Lawyers' avenues for advertising have drastically changed with increased use of, and reliance on, the Internet. But, as with advertising responsibilities before the Internet, lawyers are prohibited from creating improper or misleading advertisements. One advertising method that's been garnering a lot of attention lately is where Lawyer A buys the search term "Lawyer B," so that Lawyer A's name appears first when a potential client searches for Lawyer B. The question Colorado lawyers now face, and with which this article wrestles, is whether this type of advertising is ethical under Colorado's Rules of Professional Conduct. As of the writing of this article, the Colorado Supreme Court has not weighed in on this issue and other states are divided, so there is no current clear guidance and lawyers must proceed cautiously.

This article provides a point/counterpoint discussion of the applicable rules and considerations. In part 1, Charles F. Luce Jr., a frequent author on the impact of technology on legal ethics and the practice of law, argues that truthful competitive keyword advertising is not prohibited by the Rules of Professional Conduct,[1] and that it benefits consumers by offering them choices. And in part 2, Jack Tanner, a frequent lecturer on legal ethics and former chair of the CBA Ethics Committee, takes the view that purchasing a competitor's name as a "keyword" for a search engine is deceitful conduct (even if it does not actually fool anyone) and is therefore an ethical violation.

Part 1: This Way to the Egress, by Charles F. Luce Jr.

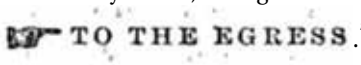
On July 4, 1842, P.T. Barnum's American Museum in New York City was packing them in. With its unique collection of oddities that included exotic animals, a wax museum, and biological rarities, attracting paying customers at 25 cents a head was not a problem. Getting them *to leave* was the problem.

On that day, the museum "was so densely crowded that [it] could admit no more visitors, and [it was] compelled to stop the sale of tickets."[2] Barnum rushed to the roof of the museum where he beheld a sad sight: "thousands of people who stood ready with their money to enter the Museum, but who were actually turned away."[3]

To make room for more visitors, Barnum hastily constructed a rear exit, but to little avail:

> Further investigation showed that pretty much all of my visitors had brought their dinners with the evident intention of literally "making a day of it." No one expected to go home till night; the building was overcrowded, and meanwhile hundreds were waiting at the front entrance to get in when they could.[4]

Desperate to increase visitor flow, Barnum happened upon a scene painter he had hired to create dioramas for the museum and had a masterstroke:

> "Here," [Barnum] exclaimed, "take a piece of canvas four feet square, and paint on it, as soon as you can, in large letters—
>
> 
>
>
> Seizing his brush [the painter] finished the sign in fifteen minutes, and [Barnum] directed [him] to nail it over the door leading to the back stairs [exit].[5]

Those unfamiliar with the word "egress," and believing it must be some new attraction, followed the sign through the door and down the stairs, only to find themselves out on the street, creating room for more paying customers.

The World's Greatest Search Engine

In the modern era, Google likewise is packing them in—in numbers that would exceed Barnum's wildest dreams. In 2022, Google averaged 8.5 billion searches per day.[6] With infinitely scalable servers, visitor capacity is not the problem it was for Barnum. Generating revenue to pay for all that bandwidth is.

Fortunately for Google, a seemingly insatiable appetite for Internet information provides a ready means to monetize the world's most popular search engine[7]—the leasing of "keywords."

Using a playbook invented by advertising pioneer DoubleClick Inc.,[8] Google offers preferred-placement advertising to all comers. An advertiser's "sponsored ad" is triggered when a user searches a certain word or phrase, called a "keyword." Reflecting the popularity and effectiveness of keyword advertising, in 2022 "Google Ads" generated $162.45 billion, the primary source of revenue for Google's parent company, Alphabet Inc.[9]

Competitive Keyword Advertising: This Way to the Egress

Using Google Ads, a pet shop in Boulder hoping to attract business might lease the keywords "best pet shop Boulder." Following a policy change by Google in 2004,[10] online advertisers learned they needed not be so generic—Google would happily lease the names of their competitors as keywords too. Well-recognized brands like PetSmart,® Petco,® and Woof Gang Bakery® were all now available to rent. The ability to "free ride" on a competitor's brand and redirect a potential customer's searches to the ad-purchaser's business proved irresistible to merchants.

As one might imagine, companies whose brands were used as keywords without their consent were not happy. Some took legal action against both Google and the businesses that usurped their names as keywords. Almost without exception, the trademark owners lost, regardless of whether they framed their claims as trademark infringement, unfair competition, or something else, and regardless of whether their suit was brought against Google or one of the keyword advertisers.[11]

These defeats should not have been a surprise. Under trademark law, the use of a competitor's mark to trigger a sponsored ad that does not itself include the competitor's mark does not constitute "use of a mark in commerce" under the Lanham Act.[12] Moreover, competitors have always been free to use another's mark—registered or not—"nominatively," that is, to identify the competitor or its brand in truthful comparative advertising. Practically speaking, unless a competitor's mark is actually used in the text of a sponsored ad or in material linked from a sponsored ad, trademark law usually has been a legal dead end for trademark owners seeking to block the competitive use of their names and brands as keywords.[13]

Lawyers Get Into the Game

With Google and its keyword advertisers piling up wins in court, it was not long before lawyers realized that they too could use competitive keywords to attract business.

A comprehensive legal marketing campaign—complete with television and radio spots, billboards, bus wraps, sports team sponsorships, social media campaigns, and print advertising—can cost millions of dollars a year.[14] By comparison, leasing the name of a well-known lawyer or law firm as a keyword is a veritable bargain.

Query the name of almost any well-known lawyer or law firm, and you will likely encounter multiple sponsored ads for *other* lawyers or firms. You may even find a sponsored ad for the well-known lawyer herself—but only if she has paid the search engine for the privilege. In the age of keyword advertising, a search engine result for Saul Goodman, the fictional star of *Better Call Saul*, might look something like the fictional screenshot shown here.[15]

In this example, above the link to the website for "Saul Goodman Attorney at Law" are two paid advertisements clearly marked as "Sponsored" (Google's euphemism for "paid"—that is, non-organic search results). The text of these sponsored ads does not contain Saul's name or suggest any association with Saul Goodman. The ads simply appear above the "organic search results," which is the information about Saul Goodman that the user actually sought; they are non-organic results because Saul's competitors have paid to have them appear first.

Unsurprisingly, attorneys whose fame and marketing campaigns have thus been leveraged by other lawyers are not amused. And, being lawyers, some have sued (see "Strong Arm Tactics" on page 36).[16] However, unlike other businesses, attorneys whose names have been exploited as keywords have an additional weapon in their legal arsenal: the Rules of Professional Conduct.

Can the RPC Defeat the Key[word]?

Ethics codes governing attorney advertising and solicitation have trod a long and winding road. The former ABA Code of Professional Responsibility enumerated, in great and specific detail, limited information an attorney was permitted to communicate publicly.[17] In contrast, Colorado's Rules of Professional Conduct (Rules) have a simple prime directive: don't lie and don't mislead.[18]

In the ongoing war against competitive keyword advertising, the Rules provide attorneys with two primary lines of attack: Rule 7.1 and Rule 8.4(c).

Rule 7.1 is simple and direct in its commandments:

> 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.

Rule 8.4(c) is considerably broader:

> It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . .

Thus far, attempts to use the Rules, or any state's rules, to squelch competitive keyword advertising have been met with mixed results.

Two ethics opinions in other states have concluded that unauthorized use of another lawyer's or law firm's name in keyword advertising is unethical. For example, in the earliest opinion, the North Carolina State Bar determined:

> 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 [North Carolina] Rule 8.4(c) for a lawyer to select another lawyer's name to be used in his own keyword advertising.[19]

The North Carolina opinion encompasses one paragraph of legal analysis. Nine years later, Ohio followed suit. The Ohio Board of Professional Conduct concluded that "[t]he purchase and use of a competitor lawyer's or law firm's name as a keyword for advertising is an act that is designed to deceive an Internet user and thus contrary to [Ohio Rule] 8.4(c)."[20]

Four other jurisdictions—Texas, New Jersey, South Carolina, and Florida—have reached the opposite conclusion, finding that attorney competitive keyword advertising violates neither Rule 7.1 nor 8.4.[21] The Texas opinion, for example, explained that 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."[22] The New Jersey opinion concluded that merely using a competitor's name as a keyword "does not involve dishonesty, fraud, deceit, or misrepresentation, and is not conduct prejudicial to the administration of justice."[23]

Reviewing earlier judicial and ethics opinions, the South Carolina Bar concurred with the reasoning of the New Jersey and Texas opinions:

> [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.[24]

The South Carolina opinion notes that Florida reached the same conclusion:

> 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."[25]

In addition to these opinions, barrels of digital ink have been spilt debating the issue.[26]

Reap Not Where You Have Not Sown

Emotions run high among those who would ban attorney competitive keyword advertising. Arguments against it are delivered with almost evangelical zeal, not surprisingly since they are rooted in a fundamental commandment of capitalism: "If thou dost not sow, thou shalt not reap."[27]

To the prohibitionists, free-riding on another lawyer's fame, reputation, and marketing investment is viscerally distasteful, indecorous, and unsporting. It rings of unjust enrichment to harvest clients by exploiting another lawyer's marketing efforts and name recognition. As the North Carolina State Bar proclaimed, "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."[28]

Viewed by opponents as a modern adaptation of Barnum's "This Way to the Egress" ruse, competitive keyword advertising is unquestionably intended to divert and redirect a search engine user to the sponsored ad. To cause an advertisement to appear in a superior position, above the information a user was actually searching for, in the hope they will click on it and thus be diverted to the advertising lawyer's website, certainly seems sneaky, misleading, and deceitful. In their view, it cannot possibly be ethical.

And yet it is. How can this be?

Framing the Issue and Defining Terms

First, we must define terms. When most lawyers ask whether something is "ethical," what they really mean is, "if I do this can I be disciplined?" The professional standards governing lawyers are named the "Rules of Professional *Conduct*," not the "Rules of Professional *Ethics*." The Rules establish baseline standards of conduct. Professional *ethics* are something different—hopefully higher and more aspirational than the minimum standards of conduct prescribed by the Rules, but also more amorphous.

A violation of the Rules subjects one to professional discipline. A breach of attorney ethics that does not also violate a Rule is sanctionable only in the court of public opinion. This distinction is more than simple semantics. Properly framed, the question presented is not "is attorney competitive keyword advertising *unethical*," but rather "should attorney keyword advertising subject an advertising attorney to professional discipline under the Colorado Rules of Professional Conduct?" An affirmative answer to the former does not axiomatically yield an affirmative answer to the latter. Indeed, it does not.

Second, we must be both clear and precise in what is meant by "competitive keyword advertising." As used in this article, the term "competitive keyword advertising" does *not* include using a competitor's name in the text of a sponsored ad or using a competitor's name in a misleading manner[29] in material linked from a sponsored ad. Rather, competitive keyword advertising is using a competitor's name or trademark to trigger a sponsored ad that does *not* include the competitor's name or falsely suggest an association between the advertiser and the competitor.

Bates v. State Bar of Arizona

Though decided 46 years ago—when the World Wide Web was not even a twinkling in Timothy John Berners-Lee's eye[30]—the Supreme Court's reasoning in striking down the State of Arizona's

blanket ban on attorney advertising remains relevant not merely to the question presented but also to the standard by which attorney advertising regulation must be constitutionally measured:

> [A]dvertising does not provide a complete foundation on which to select an attorney. But it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision. The alternative—the prohibition of advertising—serves only to restrict the information that flows to consumers. Moreover, *the argument assumes that the public is not sophisticated enough to realize the limitations of advertising,* and that the public is better kept in ignorance than trusted with correct but incomplete information. *We suspect the argument rests on an underestimation of the public.* In any event, we view as dubious any justification that is based on the benefits of public ignorance. . . . Although, of course, the bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, the preferred remedy is more disclosure, rather than less. If the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective.[31]

In rejecting Arizona's prohibitionist stance on attorney advertising, the Court demonstrated its faith in the ability of the American public to discriminate between advertising information and mere puffery.

Colorado's Rules adhere to *Bates*'s philosophy and guidelines. Rule 7.2(a) expressly authorizes an attorney to "communicate information regarding the lawyer's services through any media." The comments to this Rule, and the history of its adoption, make clear that "any media" includes "Internet-based advertisements."[32] However, neither the Colorado Rules nor their comments provide specific guidance regarding competitive keyword advertising. We therefore must consider the text of the Rules themselves[33] in the context of *Bates*.

STRONG ARM TACTICS

On Valentine's Day 2022, Denver attorney Frank Azar filed suit in Pueblo County District Court against attorney Michael Slocumb, the Slocumb Law Firm, and others for alleged violations of the Colorado Consumer Protection Act, as well as trademark infringement, unjust enrichment, intentional interference with prospective business relations, and civil conspiracy.[1]

According to the complaint, defendants purchased the Google keywords "Frank Azar," "Franklin D. Azar & Associates," and other trademarks of Azar. When these keywords were entered as search terms, defendants' ads triggered by these keywords produced generic, nondescript, sponsored ads inducing consumers to a call center operated by defendant The Injury Solution (TIS). TIS purportedly employed deceptive tactics designed to trick consumers into engaging the Slocumb Law Firm by making them believe they were actually engaging the Azar firm.

Although the ethical propriety of the defendant attorneys' actions was not an issue before the court, one of its preliminary rulings demonstrates that conduct going beyond the purchase and use of competitive keywords to generate truthful, non-misleading, sponsored ads may result in liability. Denying a motion to dismiss Azar's Amended Complaint, the court held that "[b]idding on or purchasing keywords, in and of itself, does not constitute misappropriation of [a] name."[2]

The court further observed that:

> Plaintiff asserts a scheme of not merely purchasing the Azar Marks as keywords, but in combination with the use of generic advertising, click to call advertising, and the call center evading questions about whether they were speaking with a representative from Plaintiff Law Firm.[3]
>
> . . . .
>
> It is true that most courts have found that purchasing [Google] AdWords alone does not constitute trademark infringement. However, Plaintiff here alleges conduct beyond purchasing the AdWords, to include generic banner advertising, click to call advertisements, and deceptive call center practices, causing consumer confusion about the source of the services.[4]

As of January 2024, the case is ongoing; a 10-day trial previously set to commence on February 20, 2024, has been vacated.[5]

NOTES

1. See Complaint and Jury Demand, *Franklin D. Azar & Assoc., P.C. v. Slocumb L. Firm*, No. 022-CV-030071 (Pueblo Cnty. Dist. Ct. filed Feb. 14, 2022).
2. Order Re: Defendants Slocumb Law Firm and Miranda Yancy's Motion to Dismiss Plaintiff's Amended Complaint and Defendant DC Injury Solutions, LLC's Motion to Dismiss at ¶ 99, *id.* (entered May 22, 2023) (citing *Habush v. Cannon*, 828 N.W.2d 876, 880 (Wis.Ct.App. 2013)).
3. *Id.* at ¶ 30.
4. *Id.* at ¶ 73.
5. Amended Order Re: Plaintiff's Motion to Vacate and Reset Trial Date, *id.* (entered Oct. 30, 2023).

Rule 7.1: Attorney Keyword Advertising Is Not a "Communication"

Those hoping to use the Rules to ban attorney competitive keyword advertising find no support in Rule 7.1. Even the Ohio Board of Professional Conduct—one of the two bars disapproving of the practice—rejected the argument that keyword advertising, in and of itself, is a "communication":

> The simple act of purchasing a keyword, including another lawyer's name, does not communicate anything *about* the purchasing lawyer or his or her services. The purchase and use of a keyword in advertising does not result in the dissemination of any information about the lawyer or by the lawyer that is not already publicly available. Thus, so long as the information on the purchasing lawyer's own website is not false, misleading, or nonverifiable, the communication complies with Prof.Cond.R. 7.1.[34]

The New Jersey Advisory Committee on Professional Ethics agrees, recognizing that "[t]he keyword purchase of a competitor lawyer's name is not, in itself, a 'communication.'"[35]

Contending that the unseen, automated, and largely algorithmic process by which an Internet ad server[36] selects and displays a competitive advertisement in response to a user query is a "false or misleading communication about the lawyer or the lawyer's services" tortures the English language and the plain meaning of the Rule 7.1.

Imagine, for example, a sponsored ad, triggered by a user's search for Saul Goodman, that consists solely of the following text: "THIS IS A SPONSORED ADVERTISEMENT FOR BEN MATLOCK[37] LAW FIRM, WHICH IS NOT AFFILIATED IN ANY MANNER WITH SAUL GOODMAN ATTORNEY AT LAW. IF YOU ARE LOOKING FOR INFORMATION ABOUT SAUL GOODMAN, SCROLL DOWN."[38] If the display of this sponsored ad constitutes a proscribed "communication" under Rule 7.1, then Ben Matlock must be subject to discipline. But no one would accuse Andy Griffith of being unethical on such a basis. Even Ohio, again one of the only two states to conclude that attorney competitive keyword advertising is unethical, dismissed this argument out of hand.[39]

For a real-world example illustrating the absurdity of equating the placement of a sponsored ad with a violation of Rule 7.1, one need only recall the days before *Video Killed the Radio Star*[40] and the Internet killed printed telephone directories. Before its business model was displaced by online directories, *Yellow Pages*[41] publishers aggressively solicited business owners to purchase preferred placement print advertising. For a higher fee, a law firm or any other business could have its advertisement appear anywhere in the *Yellow Pages* directory, including on the same page as a competitor's advertisement. The first several pages of the "Attorneys" section of any large city's *Yellow Pages* were crammed full of display ads, each trying to muscle out others for readers' attention. As long as the content—that is, the "communication about the lawyer or the lawyer's services"—did not create a false or misleading impression that the advertiser was affiliated with its competitor, no one ever suggested or even imagined that paying to improve and control one's advertisement's placement in *Yellow Pages* listings constituted a "false or misleading communication."[42]

Other examples can be readily imagined. Would a law firm that strategically erects billboards touting its services on every major road leading to a competitor's office be guilty of making a "false or misleading communication?" What if the same firm paid to have its television advertisements run immediately before its competitor's (with the goal of thereby upstaging a competitor's ad), a practice that is *de rigueur* in the Denver market?

The self-evident absurdity of labeling such examples of advertising strategies as "false or misleading communication[s] about the lawyer or the lawyer's services" *explains why even* those ethics opinions finding attorney keyword advertising improper have not rested their conclusion on Rule 7.1.

Rule 8.4(c): Attorney Keyword Advertising Does Not Involve Dishonesty, Fraud, Deceit, or Misrepresentation

Jon Jacobson, my contracts professor at Oregon, called promissory estoppel "the Vice-Grips of contract law." "It will get the job done," he quipped, "but like Vice-Grips it will mangle everything in the process." Yet promissory estoppel has nothing on Rule 8.4(c) when it comes to its ability to mangle ethics analysis. Rule 8.4(c) is probably the most overused charge[43] in attorney ethics complaints. If patriotism is the "last refuge of a scoundrel,"[44] Rule 8.4(c) must be the last refuge of an attorney regulation prosecutor. However, not even Rule 8.4 supports a credible argument that attorney competitive keyword ads constitute unethical conduct.

At the outset, one must admit that those who would ban attorney competitive keyword advertising stand on (slightly) firmer syntactical ground in championing Rule 8.4(c), since at least this rule *uses* the word "conduct" in prohibiting "conduct involving dishonesty, fraud, deceit or misrepresentation." The argument is that—just as P.T. Barnum's "This Way To the Egress" ploy was purposely intended to divert unwitting patrons out of the American Museum and put them back out on the street—so too competitive keyword ads, by appearing above the organic search result, are inherently deceitful because they are deliberately designed to trick users into clicking on the competitor's ad instead of scrolling further. The problems with this argument are myriad.

First, as the New Jersey Committee on Professional Ethics found, the act of "*purchasing* keywords of a competitor lawyer's name is not *conduct* that involves dishonesty, fraud, deceit, or misrepresentation."[45] This is in no small part because (1) the keyword purchaser's law firm and the competitor lawyer's law firm will both appear in the returned results *and* (2) the purchaser's information will include a notation that it is "sponsored" or an ad.[46] Google certainly is not fooled by this conduct. Nor is the advertising lawyer.

Second, the argument—without proof—assumes an improper motive, namely that an advertising attorney is trying to trick someone into using their legal services, rather than simply using preferred placement advertising as a means of alerting potential clients to alternatives. This pay-for-placement advertisement is no different than the *Yellow Pages* approach comfortably nestled in accepted practices. Yet, this presumption that the sole intent of a keyword advertiser

must be to deceive is the foundation and analytic Achilles' heel of the Ohio opinion.[47] The argument further presumes that search engine users are irrevocably committed to engaging only the attorney whose name they searched, and would not conduct any due diligence, including whether other attorneys offer similar or superior services for more advantageous fees, or otherwise be amenable to alternate options.

The selection of an attorney is a considerably more complicated—and hopefully a more thorough and reflective process—than buying a toilet plunger from Amazon, where options also abound. Simply because a potential client generally recalls the name of an advertising attorney does not mean they are determined, come hell or high water, to engage only that particular attorney whose name was recalled—just as they are not devoted to buying a toilet plunger from the first sponsored ad presented to them. If a keyword advertising lawyer offers similar or better services than the lawyer whose name was initially searched, what possible public interest does the bar have in preventing a consumer from being fully informed of all options?

The Preamble to the Colorado Rules of Professional Conduct states that "[t]he Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself."[48] Interpreting Rule 8.4(c) in a way that presumes only improper motives by keyword advertising lawyers, and on that basis alone would foreclose the availability of comparative information to consumers, is unreasonable and inconsistent with the policy expressed by the Supreme Court in *Bates*, as well as by the plain expression of the Rules' preamble as being rules of reason.

Moreover, such protectionism is not merely misguided, it is insultingly patronizing. It assumes that in 2024 the general public has no familiarity with search-engine sponsored ads and thus must be protected from truthful comparative advertising at all costs. The Ohio opinion buys into this *if-it-would-save-only-one-ignorant-consumer* argument wholesale.[49] In doing so, it demonstrates an obliviousness to the real world, to real consumers, and to the fact that search engine advertising has existed in some form for nearly 30 years. But that is not and should not be the standard. Rather, as the Texas and South Carolina opinions observed, keyword advertising is a practice used by numerous businesses.[50] Indeed,

> 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.[51]

The prohibitionists of attorney keyword advertising also disregard how keyword advertisements are presented, namely that they are clearly labeled as "sponsored." As the New Jersey opinion recognized, the identifying tag of "sponsored" clearly distinguishes the returned search results from solely organic results and amply alerts the searcher:

> 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."*[52]

To suggest this preferred placement advertising "involve[es] dishonesty, fraud, or misrepresentation" requires practiced myopia to ignore that the word "Sponsored" appears in bold lettering, set off on a line by itself, immediately above every Google keyword ad. As the Supreme Court observed in *Bates* over 45 years ago, "We suspect the argument rests on an underestimation of the public."[53] Members of the bar should not project their own naivety, ignorance, or trepidation about how the Internet works upon the consuming public in the name of "consumer protection." The vast majority of the public does not need or want their protection and is sufficiently Internet savvy to recognize a paid or sponsored ad when it sees one.

North Carolina's view that prohibition of keyword advertising is essential for the protection of the public has been roundly criticized by scholars, most notably by Skylar Croy:

> The conclusory nature of the [North Carolina] opinion and censure has made them easy punching bags. Professor Goldman and Mr. Reyes, for example, called them "anachronistic and regressive." To them, competitive keyword advertising "improves competition and benefits consumers." They felt that "[a] dvertising practices that enhance competition cannot be 'unfair' or 'not straightforward.'" Furthermore, they argued the opinion and censure created "a new intellectual property right in lawyers' names."[54]

Even assuming that some consumers will click on a sponsored ad actually believing it is a link to the attorney they searched for, there is a simple and expedient technological solution known to all—the browser's "back" button. As the Tenth Circuit opined over a decade ago in rejecting the proposition that keyword advertising, without more, constitutes trademark infringement:

> Perhaps in the abstract, one who searches for a particular business with a strong mark and sees an entry on the results page will naturally infer that the entry is for that business. But that inference is an unnatural one when the entry is clearly labeled as an advertisement and clearly identifies the source, which has a name quite different from the business being searched for.[55]

Key[word] Takeaway

In 1992, Colorado's regulation of attorney advertising was transformed from the prescriptivist approach of the ABA Code of Professional Responsibility to a clear and simple "prime directive": don't lie and don't mislead the public.

Unfortunately, that simple, easy-to-follow commandment did not last long. Over the following 28 years, Rule 7.1 became weighted down with ad hoc prohibitions at the urging of various segments of the bar—generally couched as being in the interest of "consumer protection"—until Rule 7.1 was barely recognizable. In 2020, the Colorado Supreme Court adopted the ABA's changes to the advertising rules, restoring Rule

7.1 to its easy-to-understand-and-follow prime directive.[56]

The debate over attorney competitive keyword advertising has the potential to reanimate the process of special interest groups lobbying the court to again adorn the elegant simplicity of the reclaimed Rule 7.1 with one-off "ornaments." Pray that the court resists.

Part 2: Purchasing A Competitor's Name Is Deceitful Conduct and Therefore Unethical, by Jack Tanner

Colorado's Rules of Professional Conduct (Rules) unequivocally prohibit lawyers from making false or misleading statements or engaging in conduct involving dishonesty, deceit, and misrepresentation (absent specific exceptions).[57] Taken together, these Rules prohibit a lawyer from paying a search engine to return the buyer's name when the search term used is a competitor's name.

Rule 7.1(a) prohibits a lawyer from making a "false or misleading communication about the lawyer . . . ." Rule 8.4(c) provides that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . ." While Rule 1(d) defines "fraud," the Rules do not define "dishonesty," "deceit," and "misrepresentation," so they should be given their ordinary meanings.[58] *Black's Law Dictionary* defines those terms as follows: (1) "Deceit" is the act of intentionally leading someone to believe something that is not true; an act designed to deceive or trick;[59] (2) "Dishonesty" is deceitfulness as a character trait; behavior that deceives or cheats people; untruthfulness, untrustworthiness;[60] and (3) "Misrepresentation" is the act or an instance of making a false or misleading assertion about something, usually with the intent to deceive.[61]

In sum, then, a lawyer who engages in conduct that is designed to mislead or trick someone violates Rules 7.1(a) and 8.4(c), even if that conduct does not rise to the level of actual fraud and even if the conduct is unsuccessful in actually deceiving someone. This is true because neither Rule 7.1(a) nor 8.4(c) requires the deception to succeed for a breach of the Rule to occur; the focus, rather, is on the lawyer's conduct in attempting to deceive potential clients.

"A lawyer who buys a competitor's name on a search engine does so in the hope that the searcher will be misled by the results, and that that searcher will click on the buyer's name rather than the name actually sought."

A lawyer who buys a competitor's name on a search engine does so in the hope that the searcher will be misled by the results, and that that searcher will click on the buyer's name rather than the name actually sought. That is the whole goal of the purchase. In other words, the lawyer who purchased the competitor's name is purchasing a misrepresentation that is intended to manipulate the searcher to select the purchaser as their lawyer, rather than the competitor the searcher initially sought. In many searches, only the paid advertisements show up on the first page of the results, and the searcher has to scroll down to page two or beyond to get to the organic results—that is, to the name the searcher originally entered. At a minimum, the paid advertisements almost universally return at the top of the search results. Human nature fundamentally dictates that the first results are the results that command the searcher's attention;[62] the searcher thus must make a concerted effort to avoid the purchased ads and find the organic results, something few will do.

Indeed, it would be rare for a person who searched for a specific name on the Internet to scroll past the paid advertisements, click on the name searched for in the organic results, and then go back to the paid results. In fact, it would be so rare that no rational lawyer would pay for the advertisement expecting that the searcher will do that. Rather, the buyer of a competitor's name as a keyword does so hoping that the consumer will simply click on the first names that pop up (i.e., the purchased advertisements), rather than those actually searched for. Thus, the buyer is hoping the search engine will successfully deceive and trick the searcher.[63]

Let's examine an analogous hypothetical outside the world of virtual advertising to illuminate this misdirection. Suppose I am standing in front of my office building, and Ms. Prospective Client approaches me and asks, "Do you know where Charles Luce of Moye White's offices are?" I say, "Sure, go right in this building, and go up to the 26th floor." She does so and finds the receptionist for Fairfield and Woods—my firm— rather than Moye White. Upon asking for Charles, she is told, "He doesn't work here, but we have many capable lawyers who are talented in the areas of intellectual property law, aviation, and obscure-yet-surprisingly-relevant-and-instructive allusions to classic literature. Can one of them help you?" Ms. Prospective Client leaves that office, finds me still on the street in front of the building and says: "You tricked me! You misled me! You knew I was looking for another lawyer, but you sent me to your own firm instead."

And she'd be right. I had misled her, hoping she would hire my firm. Trying to trick her for my own enrichment or to enhance my chances for engagement would be the only motivation for my conduct. It would certainly be an ethical violation by me, even if she wasn't fooled, didn't hire me, found out where Charles worked, and hired him. Further, if she had been tricked and hired my firm, then my deceit would have directly operated to fatten my wallet (and lighten Charles's). I would thus be financially motivated

to continue this practice, potentially undermining both my individual reputation as well as the greater profession's integrity as a whole, while simultaneously harming Charles.

Some state bar associations have so found. For example, one of the first opinions in this area was that of the North Carolina State Bar.[64] In 2012, it explained that "[t]he 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."[65] The opinion is not much longer than those two sentences. One is tempted to imagine that an early draft had a note at the end: "This is not rocket science."

More recently, Ohio's Board of Professional Responsibility went through a more robust rules-oriented analysis and came to the same conclusion.[66] The Ohio Board focused on the lawyer's intent, rather than on any results that may or may not be achieved.[67] It explained that "[t]he purchase and use of a competitor lawyer's or law firm's name as a keyword for advertising is an act that is *designed to deceive* an Internet user and thus contrary to [Rule] 8.4(c)."[68] More specifically, the board reasoned that "[t]he advertising lawyer is attempting to deceive the consumer into selecting the advertising lawyer or law firm's website, as opposed to the intended lawyer or law firm."[69] Thus whether or not the trick works is irrelevant to the analysis—if the lawyer intends to deceive, then the lawyer has violated the professional rules by engaging in deceitful conduct.

The various reasons given to justify this behavior as not deceitful fail to do so. For instance, the argument provided by the Texas State Bar's Professional Ethics Committee that most people who use Internet searches would understand the difference between a paid advertisement and organic search results[70] fails for two reasons. First, it is little more than an unsupported assumption that a searcher understands the difference between a paid advertisement versus organic search results; the opinion provides no data to support it.[71] This author's experience, as well as that gathered from conversations with others, indicates that many people who do searches simply click on the first link that appears, without pausing to note whether it is an organic result or a sponsored advertisement (even if, as many paid returns have, there is an "ad" designation beside paid results).[72] But even more important, again, the Rules do not limit prohibition of deceitful conduct to only instances when it is effective. The fundamental goal of anyone purchasing the names of competitors as search terms on a search engine is to mislead searchers into clicking on the purchased link to the detriment of the searched term.

Another argument, one the New Jersey Advisory Committee on Professional Ethics recognizes, concerns the "ad" designation and focuses on that as a meaningful distinction. In endorsing this distinction, New Jersey's opinion states that "[t]he user can choose which website to select[,] and the search engine ordinarily will mark the keyword purchased website as paid or 'sponsored.'"[73] But this raises a totally different issue, one apart from the baseline question of deceit: now the lawyer's conduct is or is not an ethical violation depending on the behavior of the search engine company in identifying, or not identifying, the search return as an "ad" or something analogous. Under the New Jersey approach, if the search return designation of "sponsored" does not occur or is insufficiently prominent, then behavior that is acceptable becomes an ethical violation—irrespective of the fact that the lawyer's conduct has not changed. In other words, New Jersey focuses on the result, not on the intent. But surely a lawyer's ethics should not turn on the behavior of third parties over whom the lawyer has no control, especially when it is the lawyer in the first instance initiating the deceit by purchasing the advertisement using another lawyer's name to redirect to the purchaser's name.

Another argument proposes that the purchase of a keyword is not a "communication"; but this contention likewise fails because the "communication" in question is the generated response to the search query keyed in by the person doing the search, not the purchase of the keyword itself. By purchasing the keywords, the lawyer is, in effect, paying another to engage in the misleading communication, which is not a defense to an ethical violation. Rule 8.4(a) prohibits a lawyer from using agents to engage in conduct the lawyer could not engage in.[74] As the lawyer cannot mislead the searcher (like me in the hypothetical of me standing in front of my building and ushering Ms. Prospective Client away from the lawyer she was seeking), there is no principled reason allowing a lawyer to pay the search engine to do so. In other words, just as me paying someone else to stand in front of my building and mislead Ms. Prospective Client (instead of personally doing it myself) would not be an adequate defense if she filed a grievance against me, it is also not an adequate defense to say the generated response based on the misleading domain name search term was not the lawyer's communication.[75]

The fact that many consumers might be alerted by the "ad" or "sponsored" tag next to the search return (and therefore realize it is not, in fact, the website of the attorney being searched for) does not change the fact that the lawyer was trying to mislead the prospective clients in the first instance. That merely shifts responsibility to the searcher to identify the misrepresentation; but that does not change the lawyer's intention. A lawyer who falsely overbills a client via a fabricated bill cannot defend against a subsequent grievance by noting that the client caught the overbilling and did not pay the bill[76] or by suggesting that if the client had not caught the overbilling then the lawyer would not have violated any ethics rule. Either way, it is still deceitful conduct and an ethical violation, even if it did not have the desired effect.

Some defend the practice of purchasing a competitor's name as a keyword on the grounds that the practice does not violate trademark law, but this is a red herring because the tests are different. To prevail in a trademark suit, the plaintiff must prove that there was a likelihood of consumer confusion.[77] The query there is on the behavior of the recipients of the communication: were the consumers likely confused?

But under Rule 8.4(c), the focus is on the lawyer's conduct, not the "consumer's," the searcher's, or the prospective client's. And this

makes sense, since the purpose of the Rules is to instill public confidence in the integrity of the profession,[78] not to suggest the onus is on the consumer/potential client to suss out deceptive conduct. So the fact that the attempt to confuse consumers may rarely succeed does not relieve the lawyer of liability for deceitful conduct, even if it could relieve the lawyer of liability for trademark infringement.

In sum, paying someone else to trick prospective clients is inherently deceitful conduct, irrespective of whether the trick actually works. The fact that many, most, or even nearly all Internet users may not be fooled does not change the fact that some will be fooled. Nor, more important, does it change the purchasing attorney's intent to deceive. Such conduct should not be tolerated by the bar. CL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NOTES

1. Except as noted or where the context otherwise indicates, throughout this article the Rules of Professional Conduct or "Rules" refer to Colorado's enactment of the Model Rules of Professional Conduct published by the American Bar Association (ABA).

2. Barnum, *Struggles and Triumphs: Or, Forty Years' Recollections of P.T. Barnum* 138 (American New Company 1871).

3. *Id.*

4. *Id.* at 140.

5. *Id.*

6. Mohsin, "10 Google Search Statistics You Need to Know," Oberlo (Jan. 13, 2023), https://www.oberlo.com/blog/google-search-statistics.

7. Google consistently commands more than 90% of the search engine market. *See* Search Engine Market Share Worldwide Dec. 2022–Dec. 2023, statcounter GlobalStats, https://gs.statcounter.com/search-engine-market-share.

8. *See* https://en.wikipedia.org/wiki/DoubleClick. DoubleClick was acquired by Google in March 2008. *Id.*

9. *See* Bianchi, Annual Revenue of Alphabet From 2017 to 2022, by Segment, Statista (Feb. 2023), https://www.statista.com/statistics/633651/alphabet-annual-global-revenue-by-segment.

10. *See Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 151 (4th Cir. 2012).

11. *See* Goldman and Reyes, "Regulation of Lawyers' Use of Competitive Keyword Advertising," 2016 *U. Ill. L. Rev.* 103, 108–11 (2016).

12. 15 USC §§ 1114(1) and 1125(a).

13. Where a competitor does use another's trademark in the actual sponsored ad text, a remedy may exist. *See* Complaint, *Tipsy Elves LLC v. Ugly Christmas Sweater, Inc.*, No. 3:17-cv-00890 (S.D.Cal. filed May 2, 2017). *See also* Wright and Jardine, "Is Trademark Use in Google AdWords Trademark Infringement?," Patexia (June 6, 2017), https://services.patexia.com/feed/is-trademark-use-in-google-adwords-trademark-infringement-20170605.

14. Told that it was rumored he spent $12 million a year on marketing, attorney Frank Azar laughed, "Let them think that . . . It's a lot more than that." Campbell, "Is Frank Azar Colorado's Greatest Lawyer?," *5280 Magazine* (Jan. 2003), https://www.5280.com/is-frank-azar-colorados-greatest-lawyer.

15. Created by Tyson Dewey, Moye White's in-house graphic artist.

16. In a local cause célèbre, Denver attorney Frank Azar filed suit in Pueblo County District Court against attorney Michael Slocumb, the Slocumb Law Firm, and others for, among other things, engaging in a civil conspiracy that involved purchasing the Google keywords for "Frank Azar" and "Franklin D. Azar & Associates." *See* "Strong Arm Tactics" sidebar.

17. *See* ABA Model Code of Pro. Resp., DR 2-101 and DR 2-102 (Aug. 1980).

18. For a short history of Colorado's attorney advertising rules, *see* Luce Jr., "It's Open Season on Soliciting Business Owners," *Law Wk. Colo.* (Aug. 27, 2021), https://www.lawweekcolorado.com/article/its-open-season-on-soliciting-business-owners.

19. N.C. State Bar, Formal Ethics Op. 14, *Use of Search Engine Company's Keyword Advertisements* (Apr. 27, 2012) (hereafter, "North Carolina Opinion"), https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2010-formal-ethics-opinion-14.

20. Ohio Bd. of Pro. Conduct, Op. 2021-04, *Competitive Keyword Online Advertising* (June 11, 2021) (hereafter, "Ohio Opinion"), https://ohioadvop.org/wp-content/uploads/2021/06/Adv.-Op.-2021-04-FInal.pdf.

21. *See, e.g.*, Tex. Ctr. for Legal Ethics, Op. 661 (July 2016) (hereafter, "Texas Opinion"), https://www.legalethicstexas.com/resources/opinions/opinion-661; N.J. Advisory Comm. on Prof'l Ethics, Op. 735, *Lawyer's Use of Internet Search Engine Keyword Advertising* (June 5, 2019) (hereafter, "New Jersey Opinion"), https://www.njcourts.gov/sites/default/files/notices/2019/08/n190806c.pdf; S.C. Bar, Ethics Advisory Op. 20-01 (2020) (hereafter, "South Carolina Opinion"), https://www.scbar.org/media/filer_public/3d/b4/3db47492-87cc-4384-8291-ee0441b557d6/eao_20-01.pdf. *See also* Fla. Bar Bd. of Governors, Meeting Minutes at 6 ¶ 17 (Dec. 13, 2013), https://www-media.floridabar.org/uploads/2017/04/bog-dec13-2013-meeting.pdf) (Board of Governors approved withdrawing proposed advisory opinion that had concluded that lawyers cannot "use another lawyer's or law firm's name without a proper purpose" or in a "deceptive manner" or that a "lawyer may not purchase another lawyer's name as an ad word," which the Board Review Committee on Professional Ethics concluded is permissible as long as the "resulting sponsored links clearly are advertising based on their placement and wording").

22. Texas Opinion, *supra* note 21 at Conclusion.

23. New Jersey Opinion, *supra* note 21 at 4.

24. South Carolina Opinion, *supra* note 21 at 2–3.

25. *Id.* at 3 (quoting Fla. Bar Bd. of Governors, *supra* note 21 at 6).

26. *See, e.g.*, Goldman and Reyes, *supra* note 11 at 103; Croy, "Leave Me My Name!": Why Competitive Keyword Advertising Is an Ethical Landmine for Attorneys," 103 *Marq. L. Rev.* 627 (Winter 2019).

27. Carnegie, "The Gospel of Wealth," *North American Rev.* (June 1889). Carnegie's gospel is itself rooted in biblical gospel: Galatians 6:7 ("A man reaps what he sows.").

28. *See* North Carolina Opinion, *supra* note 19.

29. A discussion of lawful use of a competitor's name in a nominative manner, such as in comparative advertising, is beyond the scope of this article.

30. Timothy John Berners-Lee is widely considered to be the inventor of the World Wide Web. *See* https://en.wikipedia.org/w/index.php?title=Tim_Berners-Lee&oldid=1184143063.

31. *Bates v. State Bar of Ariz.,* 433 U.S. 350, 374–75 (1977) (emphasis added) (citing *Va. Pharm. Bd v. Va. Consumer Council*, 425 U.S. 748, 769–70 (1976)).

32. *See* Colo. RPC 7.2, cmt. 3.

33. *See* Colo. RPC, Preamble and Scope [14]. ("The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.").

34. Ohio Opinion, *supra* note 20 at 2.

35. New Jersey Opinion, *supra* note 21 at 2.

36. "An ad server is a piece of advertising technology (AdTech) that is . . . responsible for making instantaneous decisions about what ads to show on a website, then serving them." Zawadziński and Sweeney, "What Is an Ad Server and How Does It Work?," Clearcode blog (Mar. 7, 2018), https://clearcode.cc/blog/what-is-an-ad-server/#The-first-ever-ad-server.

37. "Benjamin Leighton Matlock is a fictional character from the television series, *Matlock*, played by Andy Griffith." *See* https://

en.wikipedia.org/w/index.php?title=Ben_Matlock&oldid=1164737703.

38. This example calls to mind a lawsuit brought in the early days of the Internet by the Colorado law firm Oppedahl & Larson, *Oppedahl & Larson v. Advanced Concepts*, No. 97-Z-1592, 1998 U.S. Dist. LEXIS 18359 (D.Colo. decided Feb. 6, 1998). The firm contended that defendants used the words "Oppedahl" and "Larson" in website metatags to wrongfully cause their business to be ranked high in searches for Oppedahl & Larson's actual website. *See* "Denver Law Firm Alleges 'Meta-Tagging' Violates Lanham Act," 4 (4) *Andrews Intell. Prop. Litig. Rep.* 13 (Sept. 17, 1997). To demonstrate how search engines might be confused by such tricks, but a person conducting the search might not be, "someone . . . anonymously set up the 'This Has Nothing to Do with Carl Oppedahl or Oppedahl & Larson Page' . . . This page discusses ad nauseam how it has no connection with the aforementioned lawyers and law firm, and is likely to rate as very highly relevant in any Web search for the law firm." Loundy, "Hidden Code Sparks High-Profile Lawsuit," 143 (178) *Chi. Daily L. Bull.* (Sept. 11, 1997), https://cyber.harvard.edu/property00/metatags/meta7.html.

39. Ohio Opinion, *supra* note 20 at 3.

40. *See* The Buggles, *The Age of Plastic* (Island Records 1979).

41. The *Yellow Pages* were telephone advertising directories limited to businesses listings. The directories were arranged by business category, and alphabetically within each category. Though widely and freely distributed to consumers, publishers charged businesses to be included and aggressively upsold large display advertisements and preferred placement within business categories.

42. An apocryphal tale from the days of *Yellow Pages* advertising involves an ethics complaint filed about a Colorado law firm that successfully improved its placement in *Yellow Pages'* alphabetic listings by identifying itself "Affordable Smith and Jones." As the story goes, the Ethics Committee member assigned to investigate the complaint reported that a review of the Colorado Supreme Court's Roll of Attorneys confirmed that there was no "Affordable" attorney in Colorado.

43. Vying for second place, probably only because it appears further down the list of Rule 8.4's catch-all offenses, is Rule 8.4(h) ("conduct . . . that adversely reflects on a lawyer's fitness to practice law"), which the Ohio Opinion reached for to buttress its conclusion that attorney competitive keyword advertising violated Ohio's Rule 8.4(c). *See* Ohio Opinion, *supra* note 20 at 3–4.

44. Attributed to Samuel Johnson (Apr. 1775).

45. New Jersey Opinion, *supra* note 21 at 3 (emphasis added). The New Jersey opinion flagged its agreement with Texas and Wisconsin on this issue. *See id*.

46. *Id.*

47. "The purchase and use of a competitor lawyer's or law firm's name as a keyword for advertising is an act that is designed to deceive an Internet user and thus contrary to Prof. Cond.R. 8.4(c)." Ohio Opinion, *supra* note 20 at 2.

48. Colo. RPC, Preamble and Scope [14].

49. *See* Ohio Opinion, *supra* note 20 at 3: "It is possible that an unsophisticated consumer will not realize that the top search result is not that of the intended lawyer or law firm." Apparently uncertain of its argument, the opinion quickly adds, "Even when the consumer is not deceived into selecting the advertising lawyer's website, that lawyer has at the very least violated Prof. Cond.R. 8.4(a) by *attempting* to violate Prof. Cond.R. 8.4(c)." *Id.*

50. Texas Opinion, *supra* note 21 at Discussion and Conclusion; South Carolina Opinion, *supra* note 21 at 2.

51. Texas Opinion, *supra* note 21 at Discussion (citation omitted).

52. New Jersey Opinion, *supra* note 21 at 3 (emphasis added).

53. *Bates*, 433 U.S. at 375.

54. Croy, *supra* note 26 at 644 (citations omitted).

55. *1-800 Contacts, Inc. v Lens.com, Inc.*, 722 F.3d 1229, 1245 (10th Cir. 2013).

56. *See* Luce Jr., "Colorado Attorney Advertising Rules Updated," Colorado Legal Ethics blog (Oct. 10, 2020), https://coloradolegalethics.blogspot.com/2020/10/colorado-attorney-advertising-rules.html.

57. *See* Colo. RPC 8.4(c).

58. *See In re People v. Lucy*, 2020 CO 68, ¶ 31 (when a word is not defined, courts discern its "plain and ordinary meaning by consulting a recognized dictionary"). *See also People v. Baker*, 2019 CO 97M, ¶ 14 (noting that "same principles of statutory interpretation" apply to interpretation of rules).

59. *Black's Law Dictionary* (11th ed. Thomson West 2019).

60. *Id.*

61. *Id.*

62. *See generally* Southern, "Over 25% of People Click the First Google Search Result," Search Engine J. (July 14, 2020), https://www.searchenginejournal.com/google-first-page-clicks/374516/#close. By the time a searcher gets down even to the fourth result, the "click-through rate" has fallen to 8%, while the tenth result yields a lowly 2.5% click-through rate. *Id.* And it is "well known users rarely venture into the second page of search results" at all. *Id.*

63. It would be different if the keyword search were for something other than the name of a competing lawyer. I agree that one inputting generic search terms such as "will drafting," "corporate formation," or "divorce lawyers" might well scroll back and forth between the organic results and the paid advertisements. Thus the purchase of those terms does not raise any ethical issue. That's because the searcher is not seeking a particular attorney or firm, but instead trying to amass results for a particular area. But where the searcher is looking for a specific person or firm, it is highly unlikely such back-and-forth scrolling would occur.

64. *E.g.*, North Carolina Opinion, *supra* note 19.

65. North Carolina's Rule 8.4(c) provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit[,] or misrepresentation that reflects adversely on the lawyer's fitness as a lawyer." N.C. RPC 8.4(c). The core of this Rule prohibiting "dishonesty, fraud, deceit[,] and misrepresentation" is identical to Colorado's Rule 8.4(c). Arguably, though, North Carolina's Rule 8.4(c) imposes a more stringent standard for misconduct, given the added requirement of the misconduct needing to "reflect adversely on the lawyer's fitness as a lawyer," making the North Carolina State Bar opinion even more notable.

66. *See* Ohio Opinion, *supra* note 20.

67. *Id.* at 2–3.

68. *Id.* at 2 (emphasis added). Like Colorado's Rule 8.4(c), Ohio's Rule 8.4(c) provides that it is misconduct to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Ohio RPC 8.4(c).

69. *Id.*

70. *See, e.g.*, Texas Opinion, *supra* note 21.

71. *See id.* at 1–2.

72. *See generally* Southern, *supra* note 62 (click-through rate of 28.5% for first organic result, 15.7% for the second, 11.0% for the third, 8.0% for the fourth, and less than 5% for the seventh through tenth).

73. New Jersey Opinion, *supra* note 21.

74. Specifically, Rule 8.4(a) provides that it is misconduct to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or *do so through the acts of another*." (emphasis added).

75. *See also* Colo. RPC 5.3 (imposing ethical responsibility on lawyers for non-lawyer assistants, including paralegals and administrative staff). Because a lawyer is held accountable for the ethical behavior of their non-lawyer staff, the lawyer's ethical responsibilities also extend to search results triggered by the advertisement that the lawyer paid for, intending to redirect attention to the lawyer, rather than to the intended target of the search.

76. *See, e.g., People v. Calvert*, 280 P.3d 1269 (Colo. O.P.D.J. 2011) (lawyer who attempted to convince clients to give him a deed of trust on their house pursuant to an unethical fee agreement disbarred, even though client never actually signed the deed of trust and lawyer never successfully foreclosed on client's house). Of course, the hearing board's rationale in a particular case does not serve as stare decisis precedent or establish ironclad law for the jurisdiction (*see In re Roose*, 69 P.3d 43, 48 (Colo. 2003)), but it remains noteworthy–particularly in this context, where the opinion focuses on the lawyer's intention rather than the actual result.

77. *E.g., Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228, 1238 (10th Cir. 2006).

78. *See generally* Colo. RPC Preamble [1], [6]–[7], [12].