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"Leave Me My Name!": Why Competitive Keyword Advertising is an Ethical Landmine for Attorneys

Skylar R. Croy

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“LEAVE ME MY NAME!”: WHY COMPETITIVE KEYWORD ADVERTISING IS AN ETHICAL LANDMINE FOR ATTORNEYS

SKYLAR REESE CROY*

Search engine providers, like Google and Yahoo!, make money by allowing advertisers to bid on keywords. When a user enters the keyword, the advertisement is prominently displayed, typically toward the top of the results.

States are divided on whether to allow attorneys to bid on the names of other attorneys—a practice known as competitive keyword advertising. On one hand, just this summer, a New Jersey ethics panel took the position that competitive keyword advertising does not, generally, violate of the rules of professional conduct. However, the advertisement may not include text with the searched-for attorney’s name that is hyperlinked to the advertising attorney’s website. Similarly, the Florida Bar Board of Governors recently passed a limited form of regulation, which awaits the Supreme Court of Florida’s approval before taking effect. Texas has held competitive keyword advertising is ethical as long as a reasonable person would not believe the advertising attorney is associated with the searched-for attorney. Kentucky has not taken a stance per se but it did not discipline a lawyer for participating. On the other hand, South and North Carolina have disciplined attorneys for bidding on another attorney’s name.

Those in favor of allowing attorneys to bid on other attorneys’ names have argued that a prohibition would effectively create a new intellectual property right in attorney names. They argue competitive keyword advertising does not violate trademark law or publicity rights.

This Article argues in favor of regulation. It shows the debate is more complicated than the scholarly literature currently acknowledges and, in

* J.D., University of Wisconsin Law School; Law Clerk to the Honorable Patience Drake Roggensack, Chief Justice of the Wisconsin Supreme Court. The author thanks Professor BJ Ard, who teaches intellectual property at the University of Wisconsin Law School, for thoughtful feedback. The author also thanks Timothy Pierce, the Ethics Counsel for the Wisconsin State Bar and an adjunct professor at the University of Wisconsin Law School, for helpful insight and advice. The author thanks Elizabeth Clark Tarbert, Ethics Counsel for the Florida Bar, for speaking with him about the issues discussed in this Article, and specifically for insightful comments regarding *In re Naert*. A draft of this Article was sent to the Florida Bar’s Ethics Counsel on April 13, 2019, for consideration in the Florida Bar Board of Governors’ May 2019 vote, discussed *infra*.

particular, questions the way in which intellectual property has been used as a framework.

First, a violation of a disciplinary rule does not depend upon a violation of civil law. Neither a violation of trademark law nor publicity rights is necessary for the imposition of discipline.

Second, search engine providers, and their customers that purchase keywords, have a pecuniary interest in making keyword advertisements look like organic results: Consumers trust organic results more. Indeed, substantial empirical evidence, in numerous studies, demonstrates consumers struggle to identify which results of a search are advertisements. This kind of confusion should be of concern to regulators because it suggests all keyword advertising (even keyword advertising that does not involve the purchase of another attorney's name) is manipulative and inherently misleading. Trademark law is not concerned with this kind of confusion: It merely cares about whether consumers are confused as to source, sponsorship, or affiliation.

Third, some evidence suggests consumers are confused in the trademark sense: At least when the advertisement uses the searched-for attorney's name, some clients have actually hired attorneys thinking they were someone else. Even more have probably clicked on a link for one attorney only to realize it was someone else, unaffiliated with the attorney they searched for. This causes frustration and distrust of the legal profession. Furthermore, competitive keyword advertising is a dishonorable attempt by attorneys to piggyback on the reputation of another attorney, implicating the attorney's oath. Competitive keyword advertising is thus worse than non-competitive keyword advertising.

Fourth, the proposition that attorney participation does not violate publicity rights stems from a single case—Habush v. Cannon. This was a case decided by the Wisconsin Court of Appeals—an intermediate appellate court—and the court stated the decision was “a close one.” Furthermore, the case's reasoning had little to do with consumer confusion, making it of little value for regulators given that they are primarily concerned with protecting the public.

In summary, regulation is justified.

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I. INTRODUCTION

High school English teachers across the country assign their students *The Crucible*. In this 1953 play, Mary Warren, John Proctor’s servant, accuses Mr. Proctor of witchcraft during the infamous Salem Witch Trials. Mr. Proctor, under duress, verbally confesses. However, when the judge asks him to sign a confession, he becomes distressed and refuses. He exclaims: “Because it is my

name! Because I cannot have another in my life! . . . I have given you my soul; *leave me my name!*”¹

In early 2018, Alex Hanna, a Florida attorney, had a similar concern about his name. He alleged that other Florida attorneys had purchased his name as a keyword from search engine providers, such that when a user searched his name, the advertisements from the other attorneys appeared²—a practice known as competitive keyword advertising.³ Moreover, Mr. Hanna alleged that users hired the advertising attorneys under the false impression that they had some connection to Mr. Hanna.⁴ Mr. Hanna’s attorney wrote in a letter to the Florida bar that:

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.⁵

“The Ticket Clinic” had purchased Mr. Hanna’s name given his reputation as a traffic ticket specialist.⁶ A search for “Alex Hanna” led to a results page with an advertisement stating, “Alex Hanna from \$49 – Solution for Traffic, DUI and Speeding Tickets,” and immediately below was a link, “www.theticketclinic.com,” and a “phone number 877 – CITATION.”⁷ Figure 1 shows the advertisement.

1. ARTHUR MILLER, *THE CRUCIBLE* 133 (Penguin Books 1995) (emphasis added).

2. Letter from Timothy P. Chinaris, Att’y for Alex Hanna, to Elizabeth Clark Tarbert, Ethics Counsel, Fla. Bar 2 (Jan. 22, 2018), <https://www-media.floridabar.org/uploads/2018/03/CAC-Meeting-Materials-March-20-2018-Teleconference-108-pages.pdf> [<https://perma.cc/MYE4-S7VG>].

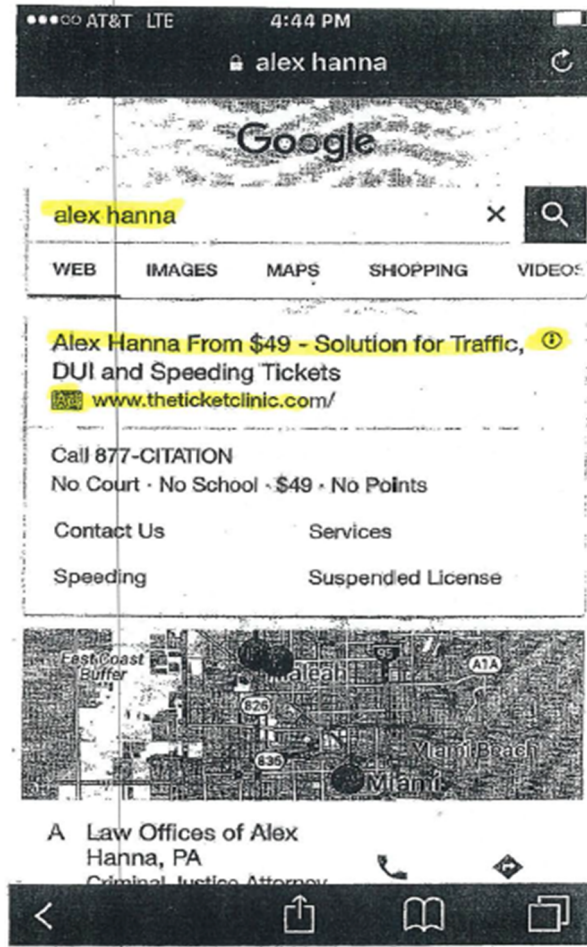
3. See generally Eric Goldman & Angel Reyes III, *Regulation of Lawyers’ Use of Competitive Keyword Advertising*, 2016 U. ILL. L. REV. 103; Teresa Shaw, *Should Your Firm Engage in Competitive Keyword Advertising?*, AGILELAW (last visited Nov. 19, 2019), <https://www.agilelaw.com/blog/should-your-firm-engage-in-competitive-keyword-advertising/> [<https://perma.cc/4XW7-CYBN>] (“Competitive keyword advertising (CKA) is when you use the name of your competitor for your own PPC [pay-per-click] ads so your firm is displayed whenever users search for your competition.”).

4. Letter from Timothy P. Chinaris to Elizabeth Clark Tarbert, *supra* note 2, at 2.

5. *Id.*

6. See Letter from Richard J. Ovelmen, Att’y for Alex Hanna, to Elizabeth Clark Tarbert, Ethics Counsel, Fla. Bar, Exhibit A (Sept. 21, 2018) (on file with the *Marquette Law Review*).

7. Memorandum from Precise Protective Research, Inc. to Client 1 (Oct. 22, 2015) (on file with the *Marquette Law Review*).

Figure 1: The Advertisement Mr. Hanna Complained About⁸

An investigation revealed multiple confused clients:

Client Alain Dominguez was under the impression that he had retained Alex Hanna's Law Firm and only realized he was being represented by the Ticket Clinic when he called Alex Hanna's Law Firm to check on the status of his case. . . . Bryan Rodriguez who had also suffered a similar confusion . . . found

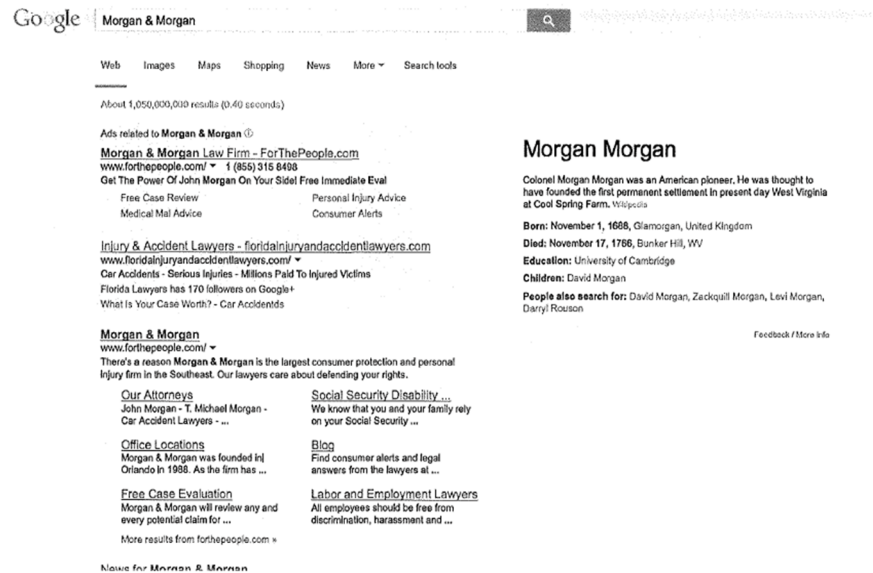
8. Presentation to BRC: Rule Banning Use of Other Lawyers' Names as Search Terms 2 (May 2018) (on file with the *Marquette Law Review*).

out that he had hired The Ticket Clinic when he called the offices of Alex Hanna. In reviewing court records the attorney of record is Ted Hollander for both [the] Mr. Dominguez and Rodriguez cases.⁹

Three more clients expressed similar confusion.¹⁰ The report suggested the confusion is particularly problematic for one set of vulnerable clients: those “not proficient in the English language.”¹¹

The Florida Bar’s record also contains another screenshot, which shows a competitive keyword advertisement that does not directly use another attorney’s name, shown in Figure 2.

Figure 2: The Morgan & Morgan Screenshot from the Florida Bar’s Record¹²



The second result, “Injury & Accident Lawyers,” is a competitive keyword advertisement. Had someone not purchased the right to display the advertisement so prominently, it would not be the second result. Despite not

9. Memorandum from Precise Protective Research, Inc. to Client, *supra* note 7, at 1–2.

10. *Id.* at 2 (“[The investigator] also contacted Karla Hufford, Jakhia R. Lawrence and Orlando Paz, these clients expressed that they were confused by the add [sic] . . .”).

11. *Id.*

12. BD. REVIEW COMM. ON PROF’L ETHICS, FLA. BAR, AGENDA ITEM SUMMARY Item No. 20c, Exhibit A (Mar. 2018), <https://www-media.floridabar.org/uploads/2018/03/CAC-Meeting-Materials-March-20-2018-Teleconference-108-pages.pdf> [<https://perma.cc/AUD4-ZD5X>].

using the name of another attorney, some confusion still comes from the advertisement being sandwiched between two results that say “Morgan & Morgan” and not having any responsible attorney designated in the advertisement.

Florida went on to allow competitive keyword advertising by a narrow 4–5 vote in mid-2018.¹³ Notably, Florida had considered and rejected a ban in 2013.¹⁴ In May of 2019, however, the Florida Bar Board of Governors passed a limited version of regulation, which awaits approval from the Supreme Court of Florida.¹⁵ This limited regulation requires the keyword advertisement “clearly indicate” who it is advertising for, so that situations like Mr. Hanna’s do not arise again.¹⁶

Other states have taken similar stances—but some have outright banned competitive keyword advertising. On one hand, just this past summer, a New Jersey ethics panel held competitive keyword advertising is generally allowed, but doing what the Traffic Clinic did is misconduct.¹⁷ Texas took a similar stance in 2016, noting competitive keyword advertising would be unethical if a reasonable person might believe the advertising attorney was associated with the searched-for attorney.¹⁸ Texas assumed that competitive keyword advertising would not create a false impression of association if the advertisement merely included the advertising attorney’s name and a link.¹⁹ Kentucky has not taken a stance per se, but it did not discipline an attorney who bid on another’s name.²⁰ On the other hand, South and North Carolina have not allowed the practice.²¹

13. Jim Ash, *Proposal to Address Internet Advertising Tactic off the Table*, FLA. B. (June 15, 2018), <https://www.floridabar.org/the-florida-bar-news/proposal-to-address-internet-advertising-tactic-off-the-table/> [https://perma.cc/EJJ7-4KXN].

14. *Id.*

15. *See infra* Section II.H.

16. *See infra* Section II.H.

17. Advisory Comm. on Prof’l Ethics Appointed by the Supreme Court of N.J., ACPE Op. 735 (2019), <https://www.njcourts.gov/notices/2019/n190806c.pdf> [https://perma.cc/A4J6-U764].

18. Prof’l Ethics Comm. for the State Bar of Tex., Op. 661 (2016), <https://www.legalethicstexas.com/getattachment/fl62e1-011b-44b8-b4b7-d6924681d354/Opinion-661> [https://perma.cc/X9RZ-NX6Y].

19. *Id.*

20. Brief of Defendants-Respondents at 20, *Habush v. Cannon*, 2013 WI App 34, 346 Wis. 2d 709, 828 N.W.2d 876 (No. 2011AP001769) (on file with the *Marquette Law Review*).

21. *In re Naert*, 777 S.E.2d 823 (S.C. 2015) (per curiam); Grievance Comm. of the N.C. State Bar, *In re Turlington*, Op. 13G0121 (2013), <http://www.ncbar.com/orders/turlington,%20iii%20david%2013g0121.pdf> [https://perma.cc/YR5Y-

The division among states reflects the division among attorneys on this topic. On one hand, Will Hornsby, an attorney in the American Bar Association's ("ABA") Division of Legal Services, who "has been described as 'the king of legal ethics and lawyer marketing on the Internet,'" defended the practice.²² Additionally, Professor Eric Goldman, a prominent law and technology scholar, has essentially called supporters of regulation stupid.²³ On the other hand, Professor David L. Hudson, Jr. described attorney participation in competitive keyword advertising as a "seedy world."²⁴ Monroe Freedman, a "nationally known authority on lawyer ethics . . . likened it to putting one's name on another lawyer's door and labeled it as 'wrong.'"²⁵ Thomas Basting, the former President of the Wisconsin State Bar, also denounced the practice.²⁶ In summary, the issue has a tendency to raise attorneys' blood pressure, regardless of which side they fall on.

Those in favor of allowing attorneys to participate in competitive keyword advertising improperly rely on, and to some extent incorrectly apply, intellectual property theories. Many times, they expressly rely on trademark law and publicity rights to support their positions. For example, three law professors and a law student wrote to the Florida Bar when it considered a ban in 2013 arguing,

[C]ourts 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. With respect to publicity rights,

TDY]; N.C. State Bar, 2010 Formal Ethics Op. 14 (2012), <https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2010-formal-ethics-opinion-14/> [<https://perma.cc/CPC4-RNFM>].

22. Brief of Defendants-Respondents, *supra* note 20, at 20–21.

23. Eric Goldman, *The Florida Bar and Competitive Keyword Advertising: A Tragicomedy (in 3 Parts)*, TECH. & MARKETING L. BLOG (Aug. 8, 2018), <https://blog.ericgoldman.org/archives/2018/08/the-florida-bar-and-competitive-keyword-advertising-a-tragicomedy-in-3-parts.htm> [<https://perma.cc/DW9B-QJET>] ("In 2013, the Florida Bar considered a proposal to ban competitive keyword advertising by lawyers. . . . [H]ere we are in 2018, and the issue has risen from the dead. . . . I submitted a short letter to the Florida Bar explaining why this topic remains stupid."). Notably, Professor Goldman felt it necessary to poke fun at supporters of bar regulation with a grumpy cat meme stating, "EVEN GRUMPY CAT LOVES SEARCH ADVERTISING." *Id.*

24. David L. Hudson, Jr., *Attorney Advertising in The Litigators and Modern-Day America: The Continued Importance of the Public's Need for Legal Information*, 48 U. MEM. L. REV. 959, 965 (2018).

25. Combined Reply Brief and Supplemental Appendix of Plaintiffs-Appellants at 10, app. at 52–54, *Habush*, 2013 WI App 34 (No. 2011AP001769).

26. *Id.* at 10, app. at 89–91.

the Wisconsin Appeals Court recently held that purchasing another lawyer’s name as a keyword trigger did not violate Wisconsin’s publicity rights. *In light of these rulings, the Proposal effectively would create a new, dangerous and unnecessary intellectual property right.*²⁷

Indeed, when Google weighed in on the issue in 2013, it was through its Director of Trademarks, Terri Chen, who analogized to trademark rationales to argue that competitive keyword advertising does not mislead consumers.²⁸ Somewhat ironically, proponents of regulation argue the opposite: that competitive keyword advertising violates trademark law.²⁹ A staff analysis of the Florida Bar noted, “The proponent’s reliance on trademark . . . laws are misplaced” because a violation of trademark law is not necessary for discipline.³⁰ However, both trademark law and attorney advertising regulations are concerned with protecting the public. Therefore, analogies to trademark law cannot be completely dismissed merely because a violation of trademark law is not an independent ground for discipline. Arguments grounded in trademark law are problematic, however, for a more fundamental reason: Trademark law has a narrow focus.

Confusion in the context of trademark law, generally, refers to confusion about source, sponsorship, or affiliation.³¹ A consumer that clicked on an

27. Letter from Faye E. Jones, Lyrisa B. Lidsky, Eric Goldman, & Jake McGowan, to Elizabeth Clark Tarbert, Ethics Counsel, Fla. Bar 2 (Apr. 29, 2013) (emphasis added) (footnotes omitted), <https://www-media.floridabar.org/uploads/2018/03/CAC-Meeting-Materials-March-20-2018-Teleconference-108-pages.pdf> [<https://perma.cc/22SY-8HMZ>].

28. Letter from Terri Chen, Dir. of Trademarks, Google, to Eugene Keith Pettis, Att’y (Dec. 2, 2013), <https://www-media.floridabar.org/uploads/2018/03/CAC-Meeting-Materials-March-20-2018-Teleconference-108-pages.pdf> [<https://perma.cc/GY3G-34MM>]. Ms. Chen’s argument was that competitive keyword advertising is not misleading. *Id.* While she did not expressly reference trademark law, her understanding of what is misleading clearly follows trademark rationales. *Id.* at 2 (“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 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.”).

29. *E.g.*, Letter from Richard J. Ovelmen to Elizabeth Clark Tarbert, *supra* note 6 (“The majority of courts that have addressed whether the use of a competitor’s name for purposes of online advertising (whether through keywords, metatags, etc.) constitutes a trademark ‘use’ have held that it does either expressly or by implication Likewise, many courts that have addressed the issue of consumer confusion in this context have held that such a use is, indeed, likely to cause confusion.”) (citations omitted).

30. BD. REVIEW COMM. ON PROF’L ETHICS, *supra* note 12.

31. *E.g.*, David J. Franklyn & David A. Hyman, *Trademarks as Search Engine Keywords: Much Ado About Something?*, 26 HARV. J.L. & TECH. 481, 497–98 (2013) (“To establish liability, the plaintiff must show the defendant’s use of a trademark leads to confusion as to source (i.e., some

attorney's competitive keyword advertisement thinking the advertisement was for a different attorney, for example, would be a concern of trademark law. Studies vary, but generally suggest this kind of confusion is minimal for competitive keyword advertising.³² The above example of Mr. Hanna is merely anecdotal, and Mr. Hanna's example is an extreme case given that the advertisement actually used his name. However, consumers are confused in other ways. For example, a 2013 article published in the *Harvard Journal of Law & Technology* found that twenty-seven percent of consumers did not know search providers were paid to run advertisements.³³ A 2012 study found that between thirty-seven percent and fifty-five percent of internet searchers could not identify the multiple advertisements contained within a single search.³⁴

Competitive keyword advertising is purposefully manipulative and misleading. Consumers trust natural search results significantly more. One poll asked consumers, "If you knew/know exactly which . . . [search results] are sponsored, would/do you treat them with more caution, having more confidence in the organic search results?"³⁵ Over one-third said definitely, and an additional thirty-seven percent said probably.³⁶ Almost an additional fifth said maybe.³⁷ A mere 8.3 percent said no or probably no.³⁸ In summary, search engine providers have an interest in confusing consumers into clicking on keyword advertisements.³⁹

consumers think the defendant's goods actually are those of the plaintiff, sponsorship (i.e., that plaintiff has endorsed the defendant's goods), or affiliation (i.e., that the plaintiff and defendant are legally related entities).").

32. *Id.* at 536 ("To summarize, we find little evidence of confusion in the traditional sense, but there is plenty of uncertainty about other matters.").

33. *Id.* at 513.

34. Ronald C. Goodstein, Gary J. Bamossy, Basil G. Englis, & Howard S. Hogan, *Using Trademarks as Keywords: Empirical Evidence of Confusion*, 105 TRADEMARK REP. 732, 744 (2015) (citing Aaron Wall, *Consumer Ad Awareness in Search Results*, SEOBOOK (Apr. 15, 2012), <http://www.seobook.com/consumer-ad-awareness-search-results> [<https://perma.cc/7UWL-CYUB>]).

35. EVGENII "GENO" PRUSSAKOV, ONLINE SHOPPING THROUGH CONSUMERS EYES: A STUDY OF ONLINE USERS' RESPONSES TO 107 QUESTIONS 17 (2008). Note that others have described the author of the poll, Evgenii Prussakov, in the search engine optimization business as "a renowned affiliate marketing specialist." Ravi Venkatesan, *Do Users Trust Organic or Paid Results More on Search Engines*, NAT. SEARCH BLOG (Aug. 9, 2009), <http://www.naturalsearchblog.com/archives/2009/08/09/do-users-trust-organic-or-paid-results-more-on-search-engines/> [<https://perma.cc/4ZNA-3PJ5>].

36. PRUSSAKOV, *supra* note 35, at 17.

37. *Id.*

38. *Id.*

39. See Goodstein, Bamossy, Englis, & Hogan, *supra* note 34, at 732–33 (explaining a "seminal paper" by Google founders that admitted the business goals of Google do not always align with the goal of providing quality search results).

Three professors of marketing and a partner at Gibson Dunn & Crutcher LLP wrote:

Search engine companies might . . . note that they “set apart” sponsored results through the use of color shading or the use of small bullet points or other designators to the left of the abstract. Nevertheless, such efforts are weak, vary by search engine and are likely not sufficient to clearly indicate to users the distinction between sponsored results and organic results. In one review, *Consumer Reports WebWatch* concluded that search engines have made the distinctions between paid and natural results less conspicuous to consumers and thereby increased confusion. For example, one report noted that Yahoo! had changed “[o]nce bright red headings” of “sponsor results” to “light gray,” removed hyperlinks to web pages that explained its paid placement and paid inclusion programs, and that its remaining disclosure was “easy to miss.” Since then, Yahoo! has made further changes to its results page that make it more difficult to distinguish between paid and organic results. Yahoo! formerly used bullet points for certain sponsor results and numbering to denote algorithmic results. It has removed those additional distinctions in what may be a calculated move to confuse more consumers into clicking on the sponsored results.⁴⁰

Professor Goldman and Angel Reyes III, a prominent attorney, have actually noted, “[C]onsumers routinely experience all types of confusion during their shopping experience, but trademark law only protects against very specific types of confusion.”⁴¹ They then argue that bars need not worry about competitive keyword advertising because “[t]he 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.”⁴² Their reasoning, however, rings hollow for the potential clients confused by the ad copy. It seems

40. *Id.* at 745–46 (citing JØRGEN J. WOUTERS, CONSUMER REPORTS WEBWATCH, STILL IN SEARCH OF DISCLOSURE: RE-EVALUATING HOW SEARCH ENGINES EXPLAIN THE PRESENCE OF ADVERTISING IN SEARCH RESULTS (2005), <https://advocacy.consumerreports.org/wp-content/uploads/2013/05/search-engine-disclosure.pdf> [<https://perma.cc/38TW-CUYD>]; JØRGEN J. WOUTERS, CONSUMER REPORTS WEBWATCH, SEARCHING FOR DISCLOSURE: HOW SEARCH ENGINES ALERT CONSUMERS TO THE PRESENCE OF ADVERTISING IN SEARCH RESULTS (2004), https://advocacy.consumerreports.org/press_release/searching-for-disclosure-how-search-engines-alert-consumers-to-the-presence-of-advertising-in-search-results/ [<https://perma.cc/N3KN-GFRL>]).

41. Goldman & Reyes III, *supra* note 3, at 111 n.42.

42. *Id.* at 113.

somewhat ridiculous to argue that an attorney can benefit from an ad copy that is misleading and that the attorney is ultimately responsible for posting and escape responsibility merely because the process of displaying the ad can (debatably) be separated from the ad itself.

Attorney advertising has long been regulated both as a means of protecting the public and as a means of ensuring the dignity of the profession.⁴³ As others have suggested, these concerns are actually linked: As the dignity of the profession is hindered, so is the protection of the public.⁴⁴ Indeed, states have promulgated rules of professional conduct against misleading and even potentially misleading advertisements⁴⁵ and at least one state has required, “Every advertisement . . . be labeled ‘Attorney Advertising’ on the first page, or on the home page in the case of a web site.”⁴⁶ Florida has also banned unduly manipulative advertising.⁴⁷ States have every reason to be concerned about competitive keyword advertising and mere analogies to trademark law should not negate this concern.

Reliance on publicity rights is equally problematic. A single case, *Habush v. Cannon*, has somehow sprung up in these various conversations about professional ethics, and yet, no one has been forthright enough to point out that:

- (1) the court stated it was a “close one”;⁴⁸
- (2) the court found a broader interpretation of the relevant statute “reasonable”;⁴⁹
- (3) the court certified the question to the Wisconsin Supreme

43. See RUSSELL G. PEARCE, RENEE NEWMAN KNAKE, BRUCE A. GREEN, PETER A. JOY, SUNG HUI KIM, M. ELLEN MURPHY, & LAUREL S. TERRY, *PROFESSIONAL RESPONSIBILITY: A CONTEMPORARY APPROACH* 180 (3d ed. 2017) (“To succeed in private practice, a lawyer needs to find clients Different types of lawyers will approach these tasks differently Whatever these differences, though, lawyers are subject to the same ethical framework. First, the ethics rules seek to protect clients and the public as consumers. Second, they seek to protect the professional identity of lawyers.”).

44. Daniel Callender, Comment, *Attorney Advertising and the Use of Dramatization in Television Advertisements*, 9 *UCLA ENT. L. REV.* 89, 92–93 (2001).

45. RULES REGULATING THE FLA. BAR r. 4-7.14 (2019), https://www-media.floridabar.org/uploads/2019/03/2019_09-Mar-2019-RRTFB.pdf [<https://perma.cc/2L9Q-PFD7>].

46. N.Y. RULES OF PROF’L CONDUCT r. 7.1(f) (2018), <https://www.nysba.org/DownloadAsset.aspx?id=50671> [<https://perma.cc/YCY5-6D3C>].

47. RULES REGULATING THE FLA. BAR r. 4-7.15, https://www-media.floridabar.org/uploads/2019/03/2019_09-Mar-2019-RRTFB.pdf [<https://perma.cc/6M49-3ULR>].

48. *Habush v. Cannon*, 2013 WI App 34 ¶ 29, 346 Wis. 2d 709, 828 N.W.2d 876.

49. *Id.* ¶ 20.

- Court, which rejected it;⁵⁰
- (4) the trial court and appellate court, while reaching the same decision, had contrary rationales;⁵¹ and
 - (5) the *Restatement (Second) of Torts* has a broader cause of action than Wisconsin’s statute.⁵²

In summary, the court acknowledged, and the procedural history shows, the decision could have gone the other way. Furthermore, the case is a decision of a mere intermediate appellate court. Perhaps more importantly, it is axiomatic to professional responsibilities law that a violation of an ethics rule does not depend upon a violation of civil law.⁵³ While trademark law at least has analogous concerns to attorney advertising regulations (protecting the public), these concerns are almost entirely absent from *Habush*.

In large part, this Article serves to show how complex the debate is and how some states and scholars have oversimplified it by improper and sometimes overstated reference to trademark law and publicity rights. It argues attorney participation in competitive keyword advertising is ethically problematic (or at least should be).

The body of this Article proceeds in three Parts. Part II gives a comprehensive overview of bar regulation of competitive keyword advertising. It explains the arguments for and against competitive keyword advertising made to date. Part III explains the problems with some of these arguments, focusing on those arguments that use intellectual property as a starting point. In particular, it walks through various surveys that show consumers are confused by keyword advertising. It also explains *Habush* in more detail in order to show reliance on it is overstated. Part IV argues regulation is constitutional. Advocates of competitive keyword advertising, such as Google, are quick to raise First Amendment arguments with bar associations.⁵⁴ However, these advocates fail to acknowledge that the U.S. Supreme Court has

50. *Habush v. Cannon*, No. 2011AP1769, 2012 WL 2345137, *petition denied*, 2012 WI 115, 344 Wis. 2d 306, 822 N.W.2d 883.

51. *Compare Habush v. Cannon*, No. 09-CV-18149, slip op. at 1 (Milwaukee Cty. Cir. Ct. June 8, 2011) (holding that competitive keyword advertising constituted a “use” of another’s name but not an unreasonable use), *with Habush*, 2013 WI App 34 ¶ 35 (holding that competitive keyword advertising did not constitute a “use” of another’s name).

52. *See infra* Section III.C.

53. *E.g.*, *Office of Lawyer Regulation v. Marks (In re Disciplinary Proceedings Against Marks)*, 2003 WI 114, ¶ 50, 265 Wis. 2d 1, 665 N.W.2d 836 (per curiam) (citing *In re Disciplinary Proceedings Against Schalow*, 131 Wis. 2d 1, 13, 388 N.W.2d 176 (1986)).

54. *See* Letter from Annabelle DanielVarda, Dir. of Trademarks, Google, to Elizabeth Clark Tarbert, Ethics Counsel, Fla. Bar, at 1 (July 16, 2018) (on file with the *Marquette Law Review*).

expressly concluded that state bars can regulate activities that have “proved to be misleading in practice.”⁵⁵ Nor do these advocates point out that the purchase of a keyword is arguably not “speech.”⁵⁶ Even if it is speech, the U.S. Supreme Court has found that not even the news media can assert First Amendment protection against publicity rights.⁵⁷ In summary, constitutional arguments against regulation are overstated. Indeed, when imposing discipline on attorneys for competitive keyword advertising, neither South nor North Carolina ever considered constitutional arguments.

II. MOOCHING OFF THE SUCCESS OF BETTER ATTORNEYS: AN OVERVIEW OF THE STATE OF REGULATION OF COMPETITIVE KEYWORD ADVERTISING

The 21st Century ambulance chasers⁵⁸ use the internet.⁵⁹ Competitive keyword advertising is one practice they engage in.⁶⁰ This Part walks through the regulatory history of attorney participation in competitive keyword advertising chronologically. This chronological approach shows how certain arguments and themes reoccur. It begins first, however, with a brief overview of some of the rules implicated by the practice.

A. An Overview of Relevant Rules

Competitive keyword advertising implicates multiple rules. First, Rule 8.4(c) states, “It is professional misconduct for a lawyer to engage in conduct involving dishonestly, fraud, deceit or misrepresentation.”⁶¹ In reference to

55. *In re R.M.J.*, 455 U.S. 191, 207 (1982).

56. *Habush*, slip op. at 6.

57. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 574–75 (1977).

58. The use of the phrase ambulance chaser in this Article is not intended to refer generally to personal injury attorneys. The phrase should be given its technical meaning: “a lawyer who approaches victims of street accidents in hopes of persuading them to sue for damages.” *Ambulance chaser*, A DICTIONARY OF MODERN LEGAL USAGE (2001).

59. See Hudson, *supra* note 24, at 965 (quoting Bob Buckley, *Lawyers Hustling Work Online a New Low*, EXAMINER, Dec. 7, 2011, at B7) (“Hungry lawyers . . . are now using the Internet to hustle cases.”).

60. *Id.*

61. MODEL RULES OF PROF’L CONDUCT r. 8.4(c) (AM. BAR ASS’N 2018). Rule 8.4(c) has been critiqued as vague. *E.g.*, Sean Keveney, Note, *The Dishonesty Rule: A Proposal for Reform*, 81 TEX. L. REV. 381, 382 (2002). For example, one attorney referee noted the rule was unclear and at odds with attorneys’ obligation to be zealous advocates:

[The attorney] was faced with a difficult decision, with concurrent and conflicting obligations: should he zealously defend his client, fulfill his constitutional obligation to provide effective assistance of counsel, and risk breaking a vague ethical rule . . . ? . . . [The attorney] had to choose, and he chose reasonably, in

competitive keyword advertising, Timothy Pierce, Ethics Counsel to the Wisconsin State Bar, noted, “I do think the practice is really intended to at least create an impression, in the minds of some searchers, that connection exists when it does not.”⁶² This Article argues, additionally, the way in which competitive keyword advertisements are displayed is problematic because search engine providers seek to trick consumers into thinking the advertisements are organic results.⁶³ Under a similar rationale, North Carolina relied on 8.4(c) to discipline an attorney for competitive keyword advertising.⁶⁴

Competitive keyword advertising also implicates Rule 7.1:

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.⁶⁵

Mr. Pierce has stated the inability of consumers to distinguish competitive keyword advertisements from other search results raises Rule 7.1 concerns.⁶⁶ Lastly, South Carolina has used the attorney oath to impose discipline.⁶⁷ While the oath can vary significantly from state to state, it generally requires attorneys to show respect for opposing counsel and the legal system more generally.⁶⁸ The Preamble to the Model Rules supports that attorneys should act respectfully toward other members of the legal profession.⁶⁹

On a final note, many of the debates discussed in this Part center around whether an attorney violated a disciplinary rule. While relevant to

light of his obligations and the vagueness of the Rules.

Referee’s Report and Recommendation, Office of Lawyer Regulation v. Hurley (*In re Disciplinary Proceedings Against Hurley*), No. 07 AP 478-D, 2008 Wisc. LEXIS 1181, at 36 (Wis. 2008). The author of this Article agrees with the referee *as applied to the facts of that particular case*. In reference to attorney advertising, however, an attorney’s obligation to be a zealous advocate is not implicated.

62. Email from Timothy Pierce, Ethics Counsel to the State Bar of Wis., to Skylar Reese Croy, author (Mar. 6, 2019) (on file with the *Marquette Law Review*). Note that Mr. Pierce is quoted with his permission.

63. *See infra* Section III.A.

64. *See infra* Section II.C.

65. MODEL RULES OF PROF’L CONDUCT r. 7.1 (AM. BAR ASS’N 2018).

66. Email from Timothy Pierce to Skylar Reese Croy, *supra* note 62.

67. *In re Naert*, 777 S.E.2d 823, 824 (S.C. 2015) (per curiam).

68. *E.g.*, *Lawyer’s Oath*, S.C. BAR, https://www.scbare.org/media/filer_public/6c/82/6c82017a-a0a5-416b-beae-03b2dc2bcf94/oath.pdf [<https://perma.cc/J4WM-Z87X>]. For specific examples of attorney oaths of office by state, see *Professionalism Codes*, A.B.A. (Mar. 12, 2019), https://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes/ [<https://perma.cc/8U4L-T7LT>].

69. MODEL RULES OF PROF’L CONDUCT pmb1. (AM. BAR ASS’N 2018).

understanding the issue of competitive keyword advertising, this is a separate question from whether states *should* regulate competitive keyword advertising. This Article is primarily concerned with the latter.

B. *How a Kentucky Legal Ethics Attorney Walked on Thin Ice*

“In 2004, a Kentucky legal ethics attorney, Benjamin Cowgill, bid on a Google keyword coinciding with the name of a competitor attorney, Peter Ostermiller.”⁷⁰ Mr. Ostermiller believed the practice was deceptive and complained.⁷¹ Specifically, Mr. Ostermiller suggested some users might think that he sponsored Mr. Cowgill because the advertisement said, “sponsored link.”⁷² Mr. Cowgill took the advertisement down one day after being called by a local reporter.⁷³ Mr. Cowgill defended himself by suggesting he was just making a good business decision.⁷⁴ One commentator compared Mr. Cowgill’s advertisement to “standing in front of another lawyer’s office with a sandwich board saying, ‘Would you consider coming down to my office instead?’”⁷⁵ Not all, however, were so quick to condemn Mr. Cowgill. Mr. Hornsby, an ABA attorney, stated,

So I go to Google and type in lawyer ethics Ostermiller. The search comes up with sites to . . . some blog about law firm marketing . . . , along with Peter Ostermiller. On the other side of the page, in a shaded area that *I know to include advertisements*, is a link to the site of Ben Cowgill, apparently another lawyer who is also an expert on disciplinary matters.

From my point of view, this search has now given me a choice. One lawyer may be too expensive, not available, or subjectively just not a good fit for me. *I don’t see it as misleading. To me, it’s a matter of obtaining more information about an issue of critical importance. It is from this perspective that lawyers have the First Amendment right to*

70. Brief of Defendants-Respondents, *supra* note 20, at 20.

71. Jacob Jacoby & Mark Sableman, *Keyword-Based Advertising: Filling in Factual Voids* (GEICO v. Google), 97 TRADEMARK REP. 681, 710 (2007).

72. Kevin O’Keefe, *Lawyer Buys Competitor’s Name as Google Adword, Other Lawyer Cries Foul*, REAL LAW. (July 6, 2004), <https://kevin.lexblog.com/2004/07/06/lawyer-buys-competitors-name-as-google-adword-other-lawyer-cries-foul/> [<https://perma.cc/9ETE-FRGC>]; *see also* Jacoby & Sableman, *supra* note 71, at 710.

73. O’Keefe, *supra* note 72; *see* Jacoby & Sableman, *supra* note 71, at 709–10.

74. Jacoby & Sableman, *supra* note 71, at 710 (quoting *Web Ad for Lawyer Linked to Competitor Spurs Dispute*, LOUISVILLE COURIER-J., July 6, 2004).

75. *Id.*

*advertise.*⁷⁶

The legal ethicists that weighed in at the time generally assumed consumers could recognize advertisements and were not confused.⁷⁷ Notably, they merely assumed this without any empirical evidence. Indeed, the key words in the above quote may very well be “I know to include advertisements.” Mr. Hornsby might have known how to spot advertisements but that says little about the public’s ability.

Notably, Google abandoned the term “sponsored links” in favor of “ads” in 2010.⁷⁸ Some commentators have suggested that the switch was caused by an internal report that suggested the term “sponsored links” confused “even well-educated, seasoned Internet consumers.”⁷⁹ Indeed, the report admitted that these consumers “are sometimes even unaware that sponsored links are, in actuality, advertisements.”⁸⁰ An incorrect reoccurring theme of regulation in this area is the assumption that typical consumers are familiar with search engine practices.

“The Kentucky Advertising Commission, an agency of the Kentucky Supreme Court and Bar Association, which enforces attorney advertising rules and regulations, . . . took no action following its review of [Mr.] Cowgill’s sponsored link.”⁸¹ However, the record does not explain why.⁸² Notably, Mr. Cowgill was the “former Chief Bar Counsel for the Kentucky Bar Association.”⁸³ To add to the irony, he also taught professional responsibilities at the University of Louisville Brandeis School of Law.⁸⁴

Mr. Cowgill may have been the first to be caught with his hands in the internet cookie jar,⁸⁵ but he is not the last.

76. Brief of Defendants-Respondents, *supra* note 20, at 20–21 (first emphasis added).

77. See O’Keefe, *supra* note 72.

78. Goodstein, Bamossy, Englis, & Hogan, *supra* note 34, at 740 n.30.

79. *Id.* (quoting *Rosetta Stone v. Google, Inc.*, 676 F.3d 144, 160 (4th Cir. 2012)).

80. *Id.* (quoting *Rosetta Stone*, 676 F.3d at 160).

81. Brief of Defendants-Respondents, *supra* note 20, at 20.

82. Combined Reply Brief and Supplemental Appendix of Plaintiffs-Appellants, *supra* note 25, at 10.

83. *Ben Cowgill Booked for Kentucky AAML/LBA April Seminar*, DIVORCE L.J. (Jan. 31, 2007), https://louisvilledivorce.typepad.com/info/2007/01/benjamin_cowgil.html [<https://perma.cc/5EGE-S9RZ>].

84. *Id.*

85. See O’Keefe, *supra* note 72 (“Representatives of the American Bar Association, as well as lawyer-marketing professionals who the reporter talked to never heard of a lawyer acquiring a link to a competing lawyer’s name. I am not so sure it does not happen though – especially in the personal injury area where things get pretty competitive on the search engines.”).

C. North Carolina's Infamous Ethics Opinion

The next key event in the history of competitive keyword advertising regulation came in 2012. That year, North Carolina issued what has become an infamous ethics opinion.⁸⁶ This opinion has been deeply criticized in the scholarly literature and disregarded by other bar associations.⁸⁷

The problem with the opinion is its brevity. After the opinion explains the inquiry, its reasoning section is mere few sentences:

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. *See In the Matter of Shorter*, 570 A.2d 760, 767—68 (DC App. 1990). 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.⁸⁸

In 2013, the North Carolina Bar censured Attorney David J. Turlington III for participating in competitive keyword advertising.⁸⁹ The censure, however, did little more than cite the 2012 opinion and declare competitive keyword advertising was dishonest.⁹⁰

The conclusory nature of the opinion and censure has made them easy punching bags. Professor Goldman and Mr. Reyes, for example, called them “anachronistic and regressive.”⁹¹ To them, competitive keyword advertising “improves competition and benefits consumers.”⁹² They felt that “[a]dvertising practices that enhance competition cannot be ‘unfair’ or ‘not straightforward.’”⁹³ Furthermore, they argued the opinion and censure created “a new intellectual property right in lawyers’ names.”⁹⁴ They concluded such action ought to be done by “elected legislators . . . subject to careful public scrutiny.”⁹⁵

86. N.C. State Bar, *supra* note 21.

87. Goldman & Reyes III, *supra* note 3, at 113–14.

88. N.C. State Bar, *supra* note 21.

89. Grievance Comm. of N.C. State Bar, *supra* note 21.

90. *See id.*

91. Goldman & Reyes III, *supra* note 3, at 103.

92. *Id.* at 113.

93. *Id.*

94. *Id.*

95. *Id.*

D. Florida: Round One

In 2013, the Florida Bar's Board of Governors ordered its Standing Committee on Advertising "to draft an opinion regarding the use of search engine optimization techniques such as metatags and hidden text."⁹⁶ "The committee approved Proposal Advisory Opinion A-12-1 on March 5, 2013, which, in part, concluded" competitive keyword advertising is "misleading and therefore impermissible."⁹⁷ Similarly to the North Carolina opinion, A-12-1 was somewhat conclusory. The opinion was a mere two pages and dealt with *both* the use of metatags and hidden text as well as competitive keyword advertising.⁹⁸ In relevant part, the opinion stated:

Lawyers are prohibited from engaging in "deceptive or inherently misleading advertising." . . . 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 Examples include "hidden text" or "meta tags" that use another lawyer's or law firm's name without a proper purpose,

. . . .

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. . . .

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 word⁹⁹

A-12-1 caused quite the controversy. Regulation of metatags and hidden text was viewed as outdated. Tom Copeland, a Director of Marketing at a financial group, explained,

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

96. BD. REVIEW COMM. ON PROF'L ETHICS, *supra* note 12.

97. *Id.*

98. Fla. Bar Standing Comm. on Advert., Proposed Advisory Op. A-12-1 (Mar. 5, 2013).

99. *Id.* at 1–2.

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.¹⁰⁰

Indeed, Mr. Copeland noted that the same day A-12-1 was issued, "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.'" ¹⁰¹ The Florida Bar's Board of Governors ultimately agreed, stating that "meta tags and hidden text are outdated forms of web optimization . . . and can be dealt with via existing rules prohibiting misleading forms of advertising."¹⁰² The linking of these two problems is, perhaps, partly responsible for the failure of Florida to pass specific regulation of either.

Still, several arguments were made specifically regarding regulation of competitive keyword advertising. On April 29, 2013, Elizabeth Clark Tarbert, the Ethics Counselor for the Florida Bar, received the first of many letters she would receive on A-12-1.¹⁰³ Three professors, including Professor Goldman, and one law student wrote her a letter outlining three arguments against prohibiting competitive keyword advertising.¹⁰⁴ Indeed, the letter included a heading that stated, "Competitive Keyword Advertising Should be Encouraged, Not Banned."¹⁰⁵

Their first argument was that names are in short supply.¹⁰⁶ They argued, "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."¹⁰⁷ This argument is so bad; it is almost not worth responding to. No one has argued that a lawyer could not purchase his or her own name. To the extent lawyers share names, oh well. The purchase of one's own name is clearly not misleading. Furthermore, it seems quite safe to assume consumers have a specific person in mind when they search a name.

In fact, their second argument contradicts their first. They argued, "[A] consumer familiar with John Smith, Esq.'s expertise wants to find lawyers who

100. Unpublished Letter to the Editors of the *Fla. Bar News*, by Tom Copeland, Dir. of Mktg. for Blatt Fin. Grp., LLC (Apr. 8, 2013) (on file with the *Marquette Law Review*).

101. *Id.*

102. BD. REVIEW COMM. ON PROF'L ETHICS, *supra* note 12.

103. Letter from Faye E. Jones, Lyrissa B. Lidsky, Eric Goldman, & Jake McGowan to Elizabeth Clark Tarbert, *supra* note 27, at 1.

104. *Id.* at 2.

105. *Id.*

106. *Id.*

107. *Id.*

provide comparable services.”¹⁰⁸ While some consumers undoubtedly do this kind of searching, no reasonable consumer would make such a search and not expect to see results for a *specific* John Smith. Also, it is worth noting that *most* internet users, as acknowledged in a footnote of the letter, do not engage in this kind of searching.¹⁰⁹

Lastly came the intellectual property arguments. They argued, “[C]ourts consistently have held that competitive keyword advertising does not violate intellectual property rights.”¹¹⁰ They proceeded to cite trademark law and *Habush*, which was decided earlier the same year.¹¹¹

The second letter came from Attorney Timothy P. Chinaris, the same attorney who later represented Mr. Hanna, acting on behalf of his client, a lawyer referral service known as 1-800-411-Pain.¹¹² The letter stated, “We agree with the principle underlying the position expressed in the advisory opinion.”¹¹³ It went on to argue for broader language in the proposed prohibition to protect lawyer referral services.¹¹⁴

Google weighed in on December 2, 2013.¹¹⁵ Google’s Director of Trademarks argued the ban was “unconstitutionally overbroad and unnecessary in light of existing rules and advisory opinions governing attorney advertising.”¹¹⁶

“The Board of Governors voted 23-19 to withdraw Proposed Advisory Opinion A-12-1 on December 13, 2013”¹¹⁷ In the Board’s opinion, competitive keyword advertising was permissible so “long as the resulting advertisements or sponsored links clearly are advertising based on their placement and wording”¹¹⁸ In other words, the Board believed consumers would not be confused by such advertisements as long as there were clear markers. Indeed, their logic was very similar to the legal ethicists that weighed

108. *Id.*

109. *Id.* at 2 n.5 (citing Franklyn & Hyman, *supra* note 31, at 483–84).

110. *Id.* at 2.

111. *Id.*

112. Letter from Timothy P. Chinaris, Att’y for Alex Hanna, to Elizabeth Clark Tarbert, Ethics Counsel, Fla. Bar (July 22, 2013), <https://www-media.floridabar.org/uploads/2018/03/CAC-Meeting-Materials-March-20-2018-Teleconference-108-pages.pdf> [<https://perma.cc/Y342-HG4B>].

113. *Id.*

114. *Id.*

115. Letter from Terri Chen to Eugene Keith Pettis, *supra* note 28.

116. *Id.* at 1.

117. BD. REVIEW COMM. ON PROF’L ETHICS, *supra* note 12.

118. *Id.*

in on Mr. Cowgill's controversy.¹¹⁹ Problematically, they presumed search engine providers were using sufficient labeling techniques.¹²⁰

E. *South Carolina and the Attorney's Oath*

In 2015, the Supreme Court of South Carolina weighed in on the debate in *In re Naert*.¹²¹ Two timeshare litigation partners "created a Google AdWords account as part of the[ir] law firm's internet marketing campaign."¹²² The law firm bid on the names of opposing parties' attorneys as well as a company the firm was suing on behalf of clients.¹²³ The resulting advertisement had two lines, with the first stating, "Timeshare Attorney in SC—Ripped Off? Lied to? Scammed?" And a second line read, "Hilton Head Island, SC Free Consult."¹²⁴ The South Carolina Office of Disciplinary Counsel and Attorney Naert "entered into an Agreement for Discipline by Consent . . ."¹²⁵ The court first held the conduct violated Rule 7.2(d): "[A]ny communication made pursuant to Rule 7, RPC, shall include the name and office address of at least one lawyer responsible for its content."¹²⁶ The court then publicly reprimanded the partners for violating the Lawyer's Oath.¹²⁷ "[B]y taking [the] Lawyer's Oath, lawyer[s] pledge[] to opposing parties and their counsel fairness, integrity, and civility in all written communications and to employ only such means consistent with trust, honor, and principles of professionalism."¹²⁸

F. *Texas Weighs in*

In 2016, the Texas Bar issued an opinion, finding that attorneys could engage in competitive keyword advertising if a reasonable person would not associate the advertising attorney with the searched-for attorney.¹²⁹ The opinion suggested that typical competitive keyword advertisements, which include the name of the advertising attorney and a link, do not create a false impression of association.¹³⁰ In keeping with other opinions on this topic, it

119. See O'Keefe, *supra* note 73.

120. See BD. REVIEW COMM. ON PROF'L ETHICS, *supra* note 12.

121. 777 S.E.2d 823 (S.C. 2015) (per curiam).

122. *Id.* at 823.

123. *Id.* at 824.

124. *Id.*

125. *Id.* at 823.

126. *Id.* at 824.

127. *Id.*

128. *Id.*

129. Prof'l Ethics Comm. for the State Bar of Tex., *supra* note 18, at 2–3.

130. *Id.*

was short. Important to the purposes of this Article, it cited *Habush*.¹³¹ However, the opinion seems to misunderstand *Habush*. The manner in which *Habush* is cited suggests the opinion’s author thought *Habush* stood for the proposition that consumers were not confused by competitive keyword advertising. However, *Habush* had almost nothing to do with consumer confusion.¹³² The Texas opinion also looked at the precedent out of North Carolina, which it found unpersuasive.¹³³ The opinion states, “[G]iven 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.”¹³⁴ However, a shield to ethical responsibility should not be “but everyone else does it.” The entire point of bar associations is to regulate the legal profession in ways other professions are not. Surely, no legal ethicist would ever argue “other professionals constantly talk about their clients so lawyers should not have to follow special confidentiality rules.”

Legal ethicists quickly weighed in, and they framed the issue similar to the Texas opinion: Is it a violation even if it is common business practice? Professor Meredith J. Duncan, who teaches professional responsibilities at the University of Houston Law Center, stated, “I am conflicted regarding whether the lawyer conduct described in this opinion is sneaky conduct or whether it is just savvy advertising.”¹³⁵ This Article argues it is both. Indeed, its sneakiness is what makes it “savvy advertising.” Professor Duncan also predicted more states would address the issue given the split of authorities.¹³⁶

131. *Id.* at 3 (citing *Habush v. Cannon*, 2013 WI App 34, 346 Wis. 2d 709, 828 N.W.2d 876).

132. *Id.* 2–3 (“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).”). See the discussion of *Habush infra*, explaining the reasoning in the opinion.

133. Prof’l Ethics Comm. for the State Bar of Tex., *supra* note 18, at 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) . . .”).

134. *Id.*

135. David L. Hudson, Jr., *Texas Lawyers May Use Competitors’ Name in Keyword Marketing*, A.B.A. J. (Nov. 1, 2016), http://www.abajournal.com/magazine/article/search_engine_marketing_legal_ethics [<https://perma.cc/MB2Z-KUNC>].

136. *Id.*

G. Florida: Round Two

Coming almost full circle in this story, Florida again considered a ban in 2018. The controversy started with Mr. Hanna's letter discussed above. Mr. Hanna argued for a rule stating:

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 a 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.¹³⁷

A proposed comment for the rule stated:

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.¹³⁸

The Board of Governors focused on whether the practice was "inherently misleading."¹³⁹ Importantly, the Board considered *Habush*.¹⁴⁰ In May of 2018, the Board Review Committee on Professional Ethics "narrowly voted [the proposal] down."¹⁴¹ "[T]he proposal failed 4-5, so close that some prevailing members said they were willing to reconsider."¹⁴² The Committee Chair described the debate as "spirited."¹⁴³

137. Letter from Timothy P. Chinaris to Elizabeth Clark Tarbert, *supra* note 2, at app. A.

138. *Id.*

139. BD. REVIEW COMM. ON PROF'L ETHICS, *supra* note 12.

140. *Id.* at 3.

141. Ash, *supra* note 13.

142. *Id.*

143. *Id.*

Out of fear that the issue was not dead, Google once again authored a letter to the Florida Bar in the summer of 2018.¹⁴⁴ Google made similar arguments to those found in its 2013 letter. Primarily, Google argued the proposal was unconstitutional.¹⁴⁵ Google also argued that competitive keyword advertising is good policy because it promotes competition.¹⁴⁶

H. Florida: Round Three

The issue has not died in Florida. In May of 2019, the Florida Board of Governors voted once more on a limit to competitive keyword advertising.¹⁴⁷ It awaits approval from the Supreme Court of Florida. The new rule will read:

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

. . . .

(12) a statement or implication that another lawyer or law firm is part of, is associated with, or affiliated with the advertising law firm when that is not the case, including contact or other information presented in a way that misleads a person searching for a particular lawyer or law firm, or for information regarding a particular lawyer or law firm, to unknowingly contact a different lawyer or law firm.¹⁴⁸

A comment will explain,

. . . Another example of impermissible conduct is use of another lawyer or law firm name as an Internet search term that triggers the display of an advertisement that does not clearly indicate that the advertisement is for a lawyer or law firm that is not the lawyer or law firm used as the search term. . . . The triggered advertisement would not be misleading if the first text displayed is the name of the advertising lawyer or law firm and, if the displayed law firm name is a trade name that does not contain the name of a current or deceased partner, the name

144. Letter from Annabelle DanielVarda to Elizabeth Clark Tarbert, *supra* note 54.

145. *Id.*

146. *Id.* at 2–3.

147. BD. REVIEW COMM. ON PROF’L ETHICS, FLA. BAR, DRAFT 20B. PROPOSED AMENDMENTS TO RULE 4-7.13 (GOOGLE ADWORDS) – FIRST READING (Nov. 14, 2018) (on file with the *Marquette Law Review*); Email from Elizabeth Clark Tarbert, Ethics Counsel, Fla. Bar, to Skylar Reese Croy, author (May 28, 2019) (on file with the *Marquette Law Review*).

148. *Id.*

of the lawyer responsible for the advertisement is also displayed as the first text.¹⁴⁹

Professor Goldman and Lyrissa B. Lidsky, the Dean of the University of Missouri School of Law, wrote to the Florida Bar on this issue.¹⁵⁰ (A preliminary draft of this Article was also forwarded for consideration.) Their letter argued, “[T]rademark jurisprudence does not support any effort to regulate competitive keyword advertising based on perceived sponsorship, endorsement or affiliation.”¹⁵¹ Furthermore, the letter argued against the mandatory disclosure aspect of the rule with three points. “First, including a competitor’s name in ad copy may advance a number of legitimate and pro-consumer objectives, such as comparative advertising, critical advertising, or advertising to aggregate consumers who have legal claims against the competitor.”¹⁵² “Second, mandatory disclosure of the advertising attorney’s name makes sense only if that information helps consumers.”¹⁵³ “Third, the mandatory disclosure of the advertising/responsible attorney’s name could meaningfully reduce the amount of information displayed in search engine advertisements, which are severely space-constrained.”¹⁵⁴ The letter concludes, “[C]ompetitive keyword advertising restrictions cannot be justified by intellectual property or consumer protection law”¹⁵⁵

Notably, the letter admits competitive keyword advertising “could be deceptive or misleading for other reasons, but the absence of the advertising attorney’s name in the ad copy doesn’t contribute to those defects.”¹⁵⁶ In a blog post, Professor Goldman argued, “[T]his rule is pointless at best and possibly pernicious at worst. The Florida Bar has no evidence that consumers are currently suffering any detriment from the status quo”¹⁵⁷

149. *Id.*

150. Letter from Eric Goldman, Professor of Law and Co-Dir., High Tech Law Inst., Santa Clara Univ. Sch. of Law, and Lyrissa B. Lidsky, Dean and Judge C.A. Leedy Professor of Law, Univ. of Mo. Sch. of Law, to Elizabeth Clark Tarbert, Ethics Counsel, Fla. Bar (Nov. 25, 2018) (on file with the *Marquette Law Review*).

151. *Id.* at 1.

152. *Id.* at 2.

153. *Id.*

154. *Id.* at 3.

155. *Id.*

156. *Id.*

157. Eric Goldman, *The Ongoing Saga of the Florida Bar’s Angst About Competitive Keyword Advertising*, TECH. & MARKETING L. BLOG (Dec. 27, 2018), <https://blog.ericgoldman.org/archives/2018/12/the-ongoing-saga-of-the-florida-bars-angst-about-competitive-keyword-advertising.html> [<https://perma.cc/96SE-EVH3>].

I. New Jersey Takes a Stance Similar to Florida

In August of 2019, a New Jersey ethics panel published an advisory opinion dated from June.¹⁵⁸ The panel noted that the purchase of another’s name is not itself a “communication.”¹⁵⁹ Therefore, it found Rule 7.1 was not implicated. For similar reasons, the panel also rejected an argument that the practice violated Rule 1.4, which requires a lawyer to “inform a prospective client of how, when and where the client may communicate with the lawyer.”¹⁶⁰

The panel then got to Rule 8.4(c). It stated, “The Committee concurs with the approach of Texas and Wisconsin and finds that purchasing keywords of a competitor lawyer’s name is not conduct that involves dishonestly, fraud, deceit, or misrepresentation.”¹⁶¹ Once again, *Habush* was inappropriately cited for the proposition that competitive keyword advertising is ethical. It also rejected an argument that competitive keyword advertising is “prejudicial to the administration of justice.”¹⁶² The opinion did, however, conclude that “[a] lawyer may not . . . pay the internet search engine company to insert, a hyperlink on the name or website URL of a competitor lawyer that will divert the user from the searched-for website to the lawyer’s own law firm website.”¹⁶³ This understanding of Rule 8.4(c) is analogous to Florida’s new regulation.¹⁶⁴

Like other opinions, the panel presumed users know what results are advertisements: “The user can choose which website to select and the search engine ordinarily will mark the keyword-purchased website as paid or ‘sponsored.’”¹⁶⁵ Simply put, this assumption is incorrect. The incorrect nature of this assumption calls into question whether New Jersey correctly decided that Rule 7.1 is not violated.

III. AN UNPOPULAR ARGUMENT: RECONSIDERING REGULATION OF COMPETITIVE KEYWORD ADVERTISING

The messy and conflicted history of attorney participation in competitive keyword advertising demonstrates the policy considerations. On one hand, some believe that competitive keyword advertising helps consumers and

158. Advisory Comm. on Prof’l Ethics Appointed by the Supreme Court of N.J., *supra* note 17, at 1.

159. *Id.* at 2.

160. *Id.*

161. *Id.* at 3.

162. *Id.* at 3–4.

163. *Id.* at 4.

164. BD. REVIEW COMM. ON PROF’L ETHICS, *supra* note 147.

165. Advisory Comm. on Prof’l Ethics Appointed by the Supreme Court of N.J., *supra* note 17, at 3.

promotes competition. These advocates believe competitive keyword advertising is not misleading and that regulation is unconstitutional and would create a new form of intellectual property. On the other hand, those opposed argue consumers are, in fact, confused. Furthermore, they argue that the reputation of an attorney—and thus the attorney’s name—has special significance. They see attorney participation in keyword advertising as misleading and a violation of the attorney’s oath, which imposes duties owed to other attorneys.

Importantly, the debate over whether competitive keyword advertising is misleading has no framework. And, as this Part argues, both sides are partly right. Advocates of competitive keyword advertising appear to base their understanding of what is misleading on trademark law, which is concerned with confusion around source, sponsorship, and affiliation. While there is confusion surrounding competitive keyword advertising, it does not appear to be, for the most part, this kind of confusion.

This Part summarizes a substantial number of surveys in order to show the amount and kind of confusion. Notably, this data suggests most consumers are not confused about the source, sponsorship, or affiliation of a product when it comes to competitive keyword advertising. This explains why trademark literature, mostly, though not always, favors competitive keyword advertising. However, the surveys show a lot of confusion about other aspects of competitive keyword advertising. Furthermore, this Part challenges the reliance on *Habush* found in the literature and by state bars. Lastly, this Part articulates some other intellectual property rationales—personality justifications, dilution, and commercial morality—that have appeared in the debate but have not been properly labeled. Broadly, this Part articulates the over-reliance of trademark and publicity law surrounding the debate.

A. *Confusion About Confusion*

The bars’ competitive keyword advertising debates often invoke the terms “inherently misleading” and “deceptive.” The debate, however, has not taken the time to properly define these terms.

Surveys going back to 2002 demonstrate various confusion. A Princeton study from 2002 “concluded that more than 60% of respondents were unaware that search engines accept payment to list certain sites more prominently than others in search results.”¹⁶⁶ Over time, consumers improved but not as substantially as, perhaps, expected. A 2003 study concluded “[e]ven well

166. Goodstein, Bamossy, Englis, & Hogan, *supra* note 34, at 743.

informed or Web-savvy users may not know whether a listing is a paid ad.”¹⁶⁷ A Pew study in 2005 “concluded that 62% of consumers cannot differentiate between sponsored and non-sponsored links.”¹⁶⁸ As one article explained:

[A] 2012 SEO Book study in which 1,000 Internet searchers were shown search results pages with between three and four sponsored links and asked, “Does this search result have ads on it?” showed that between 37% and 55% of respondents answered “no” based on the particular search engine results page shown.¹⁶⁹

In 2013, Professors David J. Franklyn and David A. Hyman published survey results in an article appropriately titled, *Trademarks as Search Engine Keywords: Much Ado About Something?*¹⁷⁰ This article, published in the *Harvard Journal of Law & Technology*, made yet another convincing case that competitive keyword advertising causes confusion—just not the kind of confusion trademark law cares about.¹⁷¹ They conducted three surveys from 2010 to 2012 with about 1000 participants each.¹⁷² The participants represented a “broad cross-section of the population.”¹⁷³ They published a table with some telling results.

167. *Id.* (quoting LESLIE MARABLE, CONSUMER WEBWATCH, FALSE ORACLES: CONSUMER REACTION TO LEARNING THE TRUTH ABOUT HOW SEARCH ENGINES WORK, RESULTS OF AN ETHNOGRAPHIC STUDY (June 30, 2003), <https://advocacy.consumerreports.org/wp-content/uploads/2013/05/false-oracles.pdf> [<https://perma.cc/Q52Q-2ZCC>]).

168. *Id.* (citing DEBORAH FALLOWS, PEW RESEARCH CTR., SEARCH ENGINE USERS: INTERNET SEARCHERS ARE CONFIDENT, SATISFIED AND TRUSTING – BUT THEY ARE ALSO UNAWARE AND NAÏVE (2005), <http://www.pewinternet.org/2005/01/23/search-engine-users/> [<https://perma.cc/L6C9-CRJ7>]). Notably, a few studies have observed lower levels of confusion, around twenty percent. PRUSSAKOV, *supra* note 35, at 16 (suggesting eighteen percent of users cannot tell the difference between sponsored and organic results); GORD HOTCHKISS, ENQUIRO SEARCH SOLUTIONS, INTO THE MIND OF THE SEARCHER, 10 (2003–2004), <https://www.richswebdesign.com/InsidetheMindoftheSearcher.pdf> [<https://perma.cc/YY58-UMWJ>] (“In general we found the majority of users in the group were pretty clear about what was a sponsored link and what was an organic link on the page. Only 20% of participants had some confusion, and this tended to be among the less experienced search engine users.”). Even if this kind of confusion is around twenty percent, that is still a significant problem.

169. Goodstein, Bamossy, Englis, & Hogan, *supra* note 34, at 744 (citing Wall, *supra* note 34).

170. Franklyn & Hyman, *supra* note 31.

171. *Id.* at 484.

172. *Id.* at 511–12.

173. *Id.* at 512.

Table 1: A Reproduction of the Results of Professors Franklyn & Hyman's Study Regarding Consumer Knowledge of Search Page Architecture¹⁷⁴

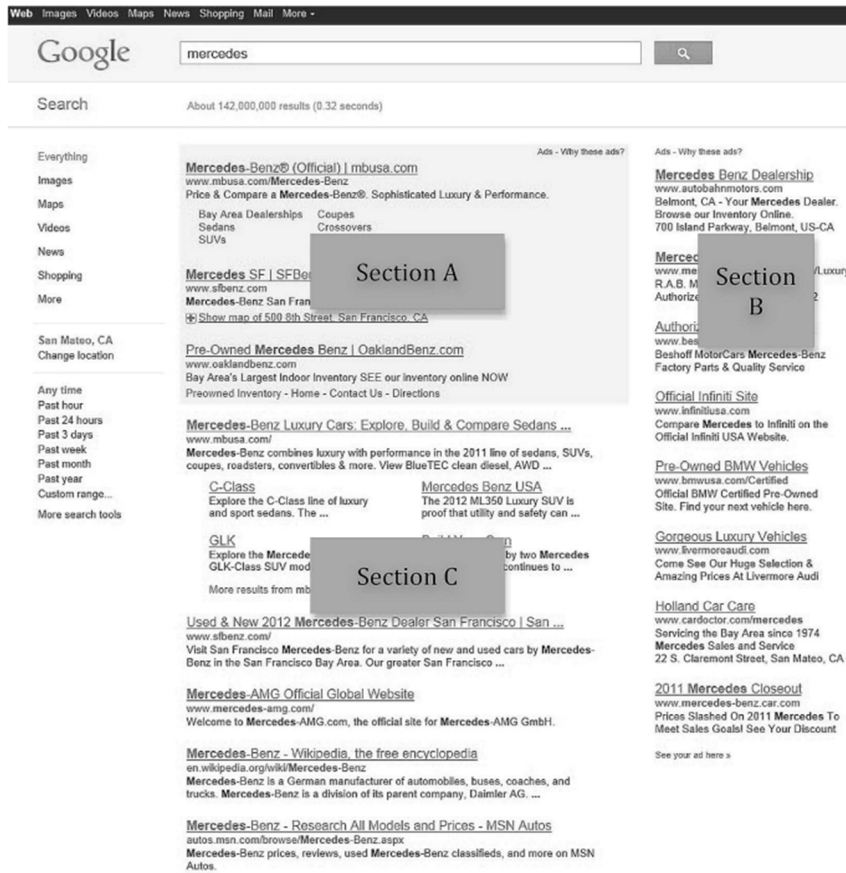
	Yes	No	Not Sure
Aware that search companies are paid to feature certain sites more prominently?	61%	27%	12%
Know the difference between sponsored and unsponsored search results? ¹⁷⁵	42%	31%	27%
	36%	42%	22%
Easy to distinguish between paid and unpaid search results?	35%	38%	27%
Know where the paid results usually appear?	43%	40%	17%

Professors Franklyn and Hyman then presented consumers with the graphic shown in Figure 3 and asked questions related to which parts of the Figure contained advertisements.

174. *Id.* at 513.

175. This question was asked in two of the three surveys and the results are thus shown for both. *Id.* at 513 n.158.

Figure 3: Graphic Shown to Study Participants by Professors Franklyn & Hyman¹⁷⁶



“[F]or sections A and B, the correct answer is ‘paid links,’ while for section C, the correct answer is ‘unpaid links.’”¹⁷⁷ The results of the survey were scary and shocking. They are summarized in the table below, taken from the article.

176. *Id.* at 514.

177. *Id.*

Table 2: Consumer Ability to Identify Paid Advertisements¹⁷⁸

	Section of Figure 3		
	A	B	C
Unpaid Links	15%	24%	51%
Paid Links	46%	38%	16%
Google's Special Marketing Team	17%	15%	11%
Not Sure/Do Not Know	21%	22%	20%
Other	1%	1%	2%
Cumulative Performance			
All 3 Correct	16%		
2 of 3 Correct	30%		
2 of 3 Correct (paid only)¹⁷⁹	21%		
1 of 3 Correct	21%		
0 of 3 Correct	27%		

“[O]nly 16% of survey respondents correctly answered whether all three sections in Figure [3] included paid or unpaid links.”¹⁸⁰ The study further showed “just under half of survey respondents thought the distinction between paid and unpaid links was clear”¹⁸¹

The confusion may come, in part, from the fact that search engine providers occasionally change the search results page architecture and different search engines use different architecture.¹⁸² Indeed, Google results today look quite different than the screenshot used in the study discussed above. Figure 4 is a screenshot taken on March 16, 2019.

178. *Id.* at 515.

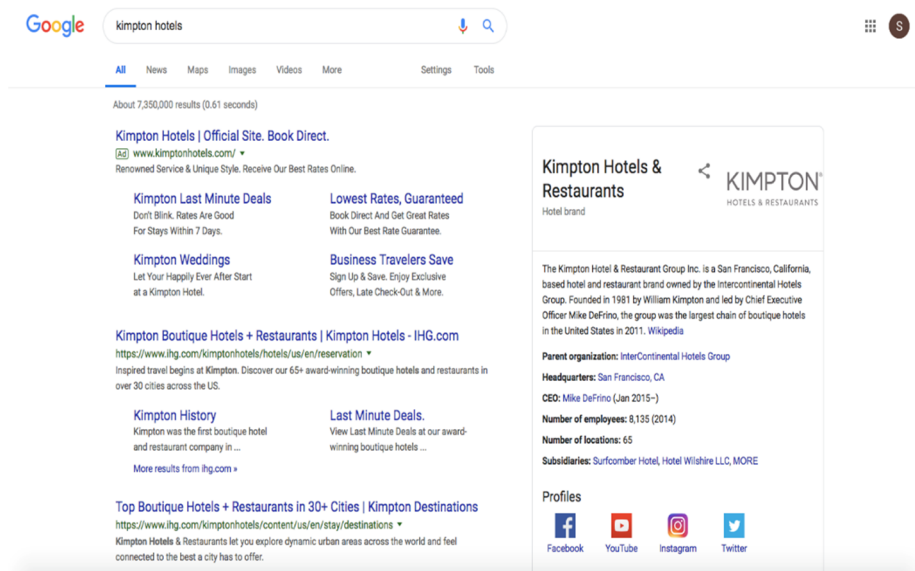
179. The study noted, “If we focus only on paid Ads (sections A and B), . . . only 21% of survey respondents answered correctly.” *Id.*

180. *Id.*

181. *Id.* at 516.

182. See Goodstein, Bamossy, Englis, & Hogan, *supra* note 34, at 732, 745–46.

Figure 4: Screenshot of Search Results on March 16, 2019



Note that the box on the right of the screen is *not* an advertisement.¹⁸³ Historically, however, results on the right have been advertisements, like in the screenshot shown in Figure 3. Also note how tiny the “Ad” label to the left of the URL of the first result is. Additionally, there is no shading or color to set off the advertisement.

The article concluded, “[W]e find little evidence of confusion in the traditional [trademark] sense, but there is plenty of uncertainty about other matters.”¹⁸⁴ The professors noted that “[j]udges have assumed that consumers pay attention to search page architecture and labels in deciding which links to click upon.”¹⁸⁵ Bars regulating keyword advertising have made similar assumptions. Indeed, the Florida Bar’s 2013 decision relied heavily on this

183. The author of this Article admittedly had to look this up because he was not sure. *Your Business Information in the Knowledge Panel*, GOOGLE MY BUS. HELP (last visited Dec. 19, 2018), <https://support.google.com/business/answer/6331288?hl=en> [<https://perma.cc/5HQL-DLJV>] (“Like search results, whether or not a business’s information will appear in the knowledge panel is determined by a variety of factors. Relevance, distance, and the prominence of the business all contribute to its standing in local search results. Verifying a business does not guarantee that it will appear in the Knowledge Panel. There’s no way to request or pay for a better ranking on Google Search, Google Maps, or Google My Business.”).

184. Franklyn & Hyman, *supra* note 31, at 536.

185. *Id.* at 518.

assumption. “The Board of Governors voted . . . to withdraw Proposed Advisory Opinion A-12-1 . . . because the purchase of ad words . . . is permissible *as long as the resulting advertisements or sponsored links clearly are advertising based on their placement and wording . . .*”¹⁸⁶ Even prominent scholars have made this assumption. Professor David S. Levine stated, “[P]eople looking for Attorney Smith would be unlikely to say, ‘Oh, I can’t tell the difference between Attorneys Smith and Jones.’”¹⁸⁷ Perhaps few consumers would go through with hiring Attorney Jones thinking it was Attorney Smith, but evidently a significant number might click on Attorney Jones link without understanding it is an advertisement.

B. Confusion as to Source?

Notably, clients have gone through with hiring an attorney they did not intend to hire—in other words, some confusion in the traditional trademark sense exists. Nothing in the Florida Bar’s record suggests Mr. Hanna was lying when he alleged people who were not even his clients threatened to file complaints against him.¹⁸⁸ Furthermore, trademark law is concerned even with mere initial interest confusion, meaning a client need not go through with actually hiring the wrong attorney.¹⁸⁹ The fact that the client was initially confused is sufficient because “diversion often results in consumer frustration, which paradoxically may be directed not at the source of the diversion, but at the company that the consumer originally sought.”¹⁹⁰ The concern of Mr. Hanna’s attorney—that competitive keyword advertising may cause distrust of the legal system—is legitimate.

Confusion as to source, sponsorship, and affiliation—the type of confusion trademark law is concerned with—is likely between 1.5 and 7.4 percent. In a recent competitive keyword advertising case, one expert testified to confusion at a rate of 7.4 percent.¹⁹¹ The trial court struck the survey as unreliable.¹⁹² On appeal, the Tenth Circuit, while expressing concerns about the survey, found

186. BD. REVIEW COMM. ON PROF’L ETHICS, *supra* note 12 (emphasis added).

187. David S. Levine, *Ten Challenges in Technology and Intellectual Property Law for 2015: Remarks at the Wake Forest Journal of Business and Intellectual Property Law Symposium*, 15 WAKE FOREST J. BUS. & INTELL. PROP. L. 563, 567 (2015).

188. See *supra* Part I for a discussion of Mr. Hanna’s story.

189. See Goodstein, Bamossy, Englis, & Hogan, *supra* note 34, at 743.

190. *Id.* at 744–45.

191. John Benton Russell, Note, *New Tenth Circuit’s Standards: Competitive Keyword Advertising and Initial Interest Confusion in 1-800 Contacts v. Lens.com*, 30 BERKELEY TECH. L.J. 993, 1009 (2015).

192. *Id.* at 1010.

the district court should not have excluded it.¹⁹³ The Tenth Circuit affirmed, somewhat puzzlingly, based on other data, concluding the confusion rate was at most 1.5 percent.¹⁹⁴ Essentially, the court concluded confusion had to be low “because the search engine’s own data showed that only twenty five Internet users (1.5% of the total number who viewed the advertisement) clicked on its competitor’s sponsored link”¹⁹⁵

“J. Thomas McCarthy, a prominent trademark scholar, indicates that a rate of confusion less than 10 percent is poor evidence for actual confusion, and lower rates can be evidence against confusion.”¹⁹⁶ It follows that the amount of confusion caused by competitive keyword advertising is unlikely to be sufficient for trademark infringement.

However, it does not necessarily follow that bar organizations cannot be concerned about this kind of confusion. Even if it is only between 1.5 and 7.4 percent, that is still a problem. Furthermore, those confused in the trademark sense may be the most vulnerable and in need of protection: they may not have a strong grasp of the English language¹⁹⁷ or may be elderly and unfamiliar with search engines. And, at a minimum, keyword advertisements that explicitly use the other attorney’s name should be banned because they have substantial potential for abuse.

C. Please Stop Citing Habush

In addition to trademark analogies, there are also arguments based in publicity rights. As seen above, *Habush* is a seminal case, cited by scholar and bar organizations in order to justify regulation. This Article makes a simple plea: Please stop citing it. Alternatively, acknowledge when citing it just how close the case was and that its reasoning is only tangentially relevant.

Habush Habush & Rottier is a “well-known” Wisconsin law firm.¹⁹⁸ Two of its named partners, Robert Habush and Daniel Rottier, are among the best-known attorneys in Wisconsin, “and their names have commercial and

193. *Id.* at 1013.

194. *Id.* at 1014.

195. Goodstein, Bamossy, Englis, & Hogan, *supra* note 34, at 753.

196. Russell, *supra* note 190, at 1004 (citing 6 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:189 (4th ed. 2014)).

197. Memorandum from Precise Protective Research, Inc. to Client, *supra* note 7, at 2.

198. *Habush v. Cannon*, 2013 WI App 34 ¶ 2, 346 Wis. 2d 709, 828 N.W.2d 876.

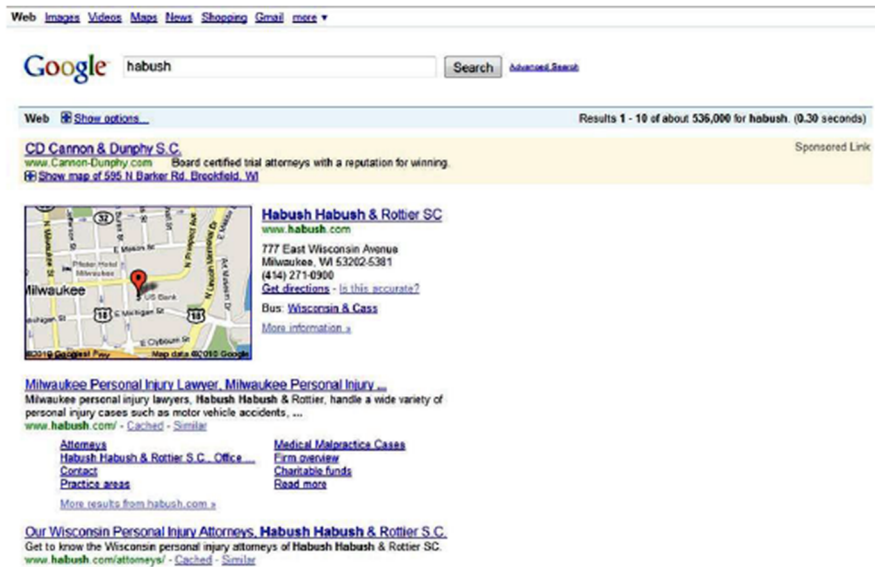
advertising value.”¹⁹⁹ A competitor of Habush Habush & Rottier is Cannon & Dunphy.²⁰⁰

The Wisconsin Court of Appeals stated the facts as follows:

Beginning in 2009, Cannon & Dunphy bid on the keyword search terms “Habush” and “Rottier” through the search engines Google, Yahoo!, and Bing. This bidding assured that, in response to an Internet user’s search of the terms “Habush” or “Rottier,” links to the website of Cannon & Dunphy would appear as the first result above the organic results lists.²⁰¹

The trial court’s slip opinion contained a screenshot, shown in Figure 5.

Figure 5: A Screenshot from the Trial Court’s Opinion²⁰²



Mr. Habush and Mr. Rottier sued, arguing “that, by bidding on the keyword search terms ‘Habush’ and ‘Rottier,’ Cannon & Dunphy used the names for advertising purposes without [Mr.] Habush’s and [Mr.] Rottier’s written consent in violation of WIS. STAT. § 995.50(2)(b).”²⁰³ The statute stated,

199. *Id.*

200. *Id.*

201. *Id.* ¶ 4.

202. Habush v. Cannon, No. 09-CV-18149, slip op. at 3 (Milwaukee Cty. Cir. Ct. June 8, 2011).

203. Habush, 2013 WI App 34 ¶ 5.

995.50 Right of Privacy.

- (1) The right of privacy is recognized in this state. One whose privacy is *unreasonably* invaded is entitled to . . . relief
- (2) In this section, “invasion of privacy” means any of the following: . . .
 - (b) The *use*, for advertising purposes or for purposes of trade, of the name, portrait, or picture of any living person, without having first obtained the written consent of the person²⁰⁴

The parties’ arguments primarily centered on the words “unreasonably” and “use.” Cannon & Dunphy argued “that their purchase of the words ‘Habush’ and ‘Rottier’ . . . [wa]s not a ‘use’ of [the] plaintiffs’ names.”²⁰⁵ The trial court summarized the defendant’s argument:

[I]t is a violation of the right of publicity only if the plaintiffs’ name was used “in or on” the defendant’s product or ad. Their logic is that although a person has a protectable property interest in the use of his or her name, it is only the explicit open display of the name that constitutes “use.”²⁰⁶

The trial court disposed of this argument quickly:

First, the simple, plain English meaning of the word “use” certainly includes the purchase of a name to trigger results from a computer algorithm. Second, even if the law required the open display of a plaintiff’s name, the search terms “Habush” or “Rottier” appear openly in close proximity to the Cannon & Dunphy, S.C. link.

. . . .

. . . The utilization, employment, application, or exploitation of anything for any purpose constitutes “use.”²⁰⁷

The trial judge then analyzed the reasonability of the use.²⁰⁸ The court considered a number of factors:

- (1) “standard and historic methods of competition;”
- (2) “person/firm integration;”
- (3) “user confusion;”
- (4) “internet advertising developments;” and

204. WIS. STAT. § 995.50 (2011–12) (emphasis added).

205. *Habush*, slip op. at 10.

206. *Id.* at 11.

207. *Id.*

208. *Id.* at 16.

(5) “business practices and attorney ethics.”²⁰⁹

On the first factor, standard and historic methods of competition, the trial court was influenced heavily by the business practice of advertising next to, or even moving next to, a competitor.²¹⁰ For example, “A Chevrolet dealership in the post-World War II era would open shop on a large lot at the edge of town. Within a year or two, a Ford dealership was across the street.”²¹¹ Similarly, common experience teaches that McDonalds are often across the street from Burger Kings.²¹² The trial court found competitive keyword advertising was the modern equivalent of these historical practices.²¹³

Problematically, the trial court focused on the resulting advertisement as opposed to the use of the name itself.²¹⁴ Purchasing a name is different than moving next door to competition. While difficult, an attorney can change offices if a strip club moves next door. However, it seems fundamentally unfair and unreasonable to ask the attorney to change his or her name. Furthermore, if an attorney wished to purchase his or her own name as a keyword, it would become more expensive because of the other attorney’s bidding. The trial court missed these distinctions by focusing on the advertisement, as opposed to the use of the name. Indeed, Mr. Freedman’s analogy is more on point because it focuses on the use of the name. Recall that he “likened it to putting one’s name on another lawyer’s door and labeled it as ‘wrong.’”²¹⁵

Next, the trial court considered the “secondary meaning” of the names Habush and Rottier.²¹⁶ It found the names were “inseparable from” a well-known law firm.²¹⁷ Therefore, the court concluded searchers did not necessarily

209. *Id.* at 18–25.

210. *Id.* at 18. In Florida’s most recent debate regarding competitive keyword advertising, one attorney made a similar argument. Email from Mark Gold, Att’y, to Elizabeth Tarbert, Ethics Counsel, Fla. Bar (Oct. 16, 2018) (on file with the *Marquette Law Review*). He stated,

I just have to comment on Mr. Hanna’s alleged “professional injury”. Mr. Hanna has consistently opened offices next door or down the street from my offices, and has even copied my slogan “don’t pay that ticket”. perhaps [sic] we should consider a rule that says a lawyer cannot trade on the reputation of another by opening an office near another attorney practicing in the same field?

Id.

211. *Habush*, slip op. at 18.

212. *Id.*

213. *Id.* at 18–19.

214. *Id.*

215. Combined Reply Brief and Supplemental Appendix of Plaintiffs-Appellants, *supra* note 25 at 10, app. at 52.

216. *Habush*, slip op. at 20.

217. *Id.* at 21–22.

expect to personally find Habush and Rottier.²¹⁸ For example, a well-known Wisconsin car dealership is named “Russ Darrow” after its owner.²¹⁹ The court rhetorically asked, “If one Googles the term ‘Russ Darrow,’ does that mean she expects to have Russ Darrow personally show the new and used cars on the dealership lot?”²²⁰

Here again, the court erred, or at least did not consider the complexities of this factor. A customer who Googles “Russ Darrow” might not expect Russ Darrow to personally serve him or her when he or she goes to make a purchase. However, the customer likely expects someone affiliated with Russ Darrow; someone that Russ Darrow has put his name behind. In law firms, this expectation is arguably amplified. There is a reason law firms are typically named after their key partners.

Next, the court considered “user confusion.” It placed substantial trust and confidence in users “to be skeptical about the first impression they may receive from a web page or commercial advertisement.”²²¹ Given the above analysis of various surveys, the court erred: users are not as familiar with search result page architecture as the court assumed.

The court then considered “internet advertising developments.” The court worried that finding in favor of Mr. Habush and Mr. Rottier might create a slippery slope: Internet search providers are constantly changing their methods and courts should stay out of that.²²² Somewhat ironically, the fact that search providers often make changes is one of the potential reasons for user confusion, yet the court did not consider this in its analysis of user confusion. The court acknowledged internet advertising developments was a weak factor.²²³

Perhaps most interestingly, the trial court considered “business practices and attorney ethics.” In so considering, the court suggested that what is unreasonable for an attorney might be reasonable for a non-attorney.²²⁴ Ultimately, however, the court steered away from weighing in directly on the ethics of attorney participation in competitive keyword advertising, but it did note:

The time may come when a legislature, regulatory board, or supreme court determines that the conduct at issue in this case

218. *Id.* at 22.

219. *Id.*

220. *Id.* at 22.

221. *Id.* at 23.

222. *Id.* at 24.

223. *See id.*

224. *Id.* at 25.

is deceptive and misleading and therefore improper. But no such body has yet drawn this conclusion. Considering the analysis in the preceding sections of this decision, the trend may be toward increased freedom and reduced regulation or restriction.²²⁵

Notably, the first bar to issue a formal ethics opinion, North Carolina, did so shortly after the *Habush* decision and found the use of another attorney's name *was* unethical.²²⁶ The trial court proceeded to balance the factors and found for the defendant.²²⁷

Mr. Habush and Mr. Rottier appealed to the Wisconsin Court of Appeals. Initially, the appellate court tried to dodge the question. It certified the case to the Wisconsin Supreme Court, noting in the certification:

[T]he issues presented here are novel and likely to have wide-ranging impact, because the supreme court has not interpreted § 995.50 in any context even generally resembling this one, and because the legislature has expressly directed in § 995.50(3) that the statute be “interpreted in accordance with the developing common law of privacy,” presumably something the legislature anticipated would ultimately be done by the supreme court.²²⁸

The court explained that it would have to “develop” common law by deciding the case, which it did not feel comfortable doing.²²⁹ The Wisconsin Supreme Court denied the certification, leaving the court in the unfortunate position of having no other choice.²³⁰

The appellate court, which ultimately upheld the trial court's judgment, explained in its opinion that the question of whether competitive keyword advertising constituted a “use” was “a close one.”²³¹ Unlike the trial court, which concluded that competitive keyword advertising was a use but that it was not an unreasonable use, the appellate court held it was not a use.²³² The appellate court found the analogies to physical location persuasive, stating, “[W]e think the strategy used by Cannon & Dunphy here is akin to locating a

225. *Id.*

226. N.C. State Bar, *supra* note 21.

227. *Habush*, slip op. at 25–26.

228. *Habush v. Cannon*, No. 2011AP1769, 2012 WL 2345137, at *1, *petition denied*, 2012 WI 115, 344 Wis. 2d 306, 822 N.W.2d 883.

229. *See id.* at *6.

230. *Habush*, 2012 WI 115.

231. *Habush v. Cannon*, 2013 WI App 34 ¶ 29, 346 Wis. 2d 709, 828 N.W.2d 876.

232. *Id.* ¶ 27.

new Cannon & Dunphy branch office next to an established Habush Habush & Rottier office²³³ It referenced the car dealership analogy from the trial court’s opinion.²³⁴ The appellate court noted the contrary interpretation, that competitive keyword advertising is a “use,” was also reasonable.²³⁵

From this lengthy explanation of the case, it is clear that reliance on *this single* decision for the proposition that attorney participation in competitive keyword advertising does not violate publicity rights—let alone ethics rules—is, at a minimum, overstated. Both the case itself *and* its procedural history show it was a close call. Furthermore, the reasoning is at best questionable for the reasons explained above.

Additionally, common law as summarized in the *Restatement (Second) of Torts* is much broader than the Wisconsin statute at issue. The *Restatement* recognizes “Appropriation of Name or Likeness” as a cause of action: “One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”²³⁶ Comment b further provides that the cause of action is not limited to “commercial appropriation.”²³⁷ The rationale for protection is similar to the “personality justification” sometimes used to justify intellectual property—that the creator of the intellectual property identifies so much with the property that he or she is harmed on a personal, human level, by its misappropriation.²³⁸ The *Restatement* explains:

The interest protected . . . is the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others. Although the protection of his personal feelings against mental distress is an important factor leading to a recognition of the rule, the right created by it is in the nature of a property right, for the exercise of which an exclusive license may be given to a third person, which will entitle the licensee to maintain an action to protect it.²³⁹

Instead of citing the *Restatement*, however, scholars and bars have looked exclusively to *Habush*.

233. *Id.* ¶ 29.

234. *Id.*

235. *Id.* ¶ 20.

236. RESTATEMENT (SECOND) OF TORTS § 652C (AM. LAW INST. 1977).

237. *Id.* cmt. b. *But see id.* (“Statutes in some states have, however, limited the liability to commercial uses of the name or likeness.”).

238. Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330 (1988).

239. RESTATEMENT (SECOND) OF TORTS § 652C cmt. a (1977).

D. *A Fundamental Misunderstanding of Professional Responsibilities*

There is another—more fundamental—problem with advocates of competitive keyword advertising citing *Habush*: A violation of civil law is not an ipso facto violation of an ethics rule and vice versa. Mr. Pierce noted,

Habush was not a disciplinary case, and the court of appeals in Wisconsin CANNOT find violations of disciplinary rules, so the fact that there was no violation of the right to privacy statute does not mean ipso facto that the same behavior does [not] violate a disciplinary rule. . . . *I certainly have had the experience of lawyers citing Habush for the proposition that the practice was just fine, which is not what the case said.*²⁴⁰

For example, Mr. Pierce cites *Office of Lawyer Regulation v. Marks (In re Marks)*,²⁴¹ where the Wisconsin Supreme Court held that the Office of Lawyer Regulation did not need to prove the tort of misrepresentation in order to prove a violation of the disciplinary rules.²⁴² In 1996, Donald Koivisto hired Attorney Marvin E. Marks to represent him and his daughter after his wife died in a car accident.²⁴³ Attorney Marks used two contingency fee agreements that both stated:

If for any reason, the Attorney-Client relationship was to be terminated prior to settlement, compromise, or judgment, etc., without good cause on client's behalf, the client hereby agrees to pay attorney for the value of legal services received by the client for attorney on an hourly rate schedule of \$100.00 per hour plus expenses. Said fee will be immediately due and payable.²⁴⁴

Mr. Koivisto decided to hire a different attorney.²⁴⁵ Eventually, his daughter also terminated Attorney Marks and she hired the same attorney representing her father.²⁴⁶ Attorney Marks claimed to insurance adjusters that he had a lien on the settlement of claims.²⁴⁷ The Office of Lawyer Regulation prosecuted Attorney Marks under Rule 8.4(c) for claiming a lien that did not exist.²⁴⁸ Attorney Marks argued, “[H]e may have been wrong about having

240. Email from Timothy Pierce to Skylar Reese Croy, *supra* note 62 (emphasis added).

241. *Id.* (citing *In re Marks*, 2003 WI 114, 265 Wis. 2d 1, 665 N.W.2d 836 (per curiam)).

242. 2003 WI 114, ¶ 50.

243. *Id.* ¶ 5.

244. *Id.* ¶ 6.

245. *Id.* ¶ 8.

246. *Id.* ¶ 14.

247. *Id.* ¶ 22.

248. *Id.* ¶ 48.

such a lien, but that he did not intentionally deceive anyone because he believed he was legally justified in asserting the lien claims.”²⁴⁹ The court disagreed.²⁵⁰ “While [Attorney] Marks may have legitimately maintained a claim for the legal services he rendered before the date of his termination, he nonetheless represented to the insurers that he was entitled 25 percent of any recovery ultimately obtained by the Koivistos.”²⁵¹ Importantly for this Article, the court reasoned: “[I]t is unnecessary to either plead or prove the tort of misrepresentation in order to establish by clear and convincing evidence that an attorney has violated a rule of professional conduct, proscribing attorney conduct involving dishonesty, fraud, deceit, or misrepresentation.”²⁵²

Nor does a violation of an ethics rule give rise to a cause of action. The ABA Model Rule’s Scope states, “Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached.”²⁵³

Habush is only relevant to professional responsibilities insofar as its reasoning in interpreting the privacy law at-hand is similar to reasoning that ought to apply to a disciplinary rule. However, *Habush* did not consider, in any significant manner, consumer confusion nor did it seriously consider attorney advertising regulation more generally. Indeed, the trial court merely noted these concerns in passing. In summary, even if *Habush* was decided correctly, it cannot serve as a shield in the context of disciplinary proceedings. Some bars have a fundamental misunderstanding of this case.

E. Other Intellectual Property Rationales

Whether intellectual property is even the right framework for thinking about attorney regulation is questionable. However, given that scholars and bars seem to have intellectual property-related concerns, it is worth acknowledging *all* of the various rationales for intellectual property. The debate has focused, to some extent appropriately, on consumer confusion—a trademark rationale. Some of these other rationales hint at preserving the dignity of the legal profession, which is a legitimate secondary interest of bar associations.²⁵⁴ These other rationales are:

249. *Id.* ¶ 47.

250. *Id.* ¶ 48.

251. *Id.* ¶ 52.

252. *Id.* ¶ 50 (citing *In re Disciplinary Proceedings Against Schalow*, 131 Wis. 2d 1, 13, 388 N.W.2d 176 (1986)).

253. MODEL RULES OF PROF’L CONDUCT scope (AM. BAR ASS’N 2018).

254. See the discussion of constitutionality of bar regulation of advertising, *infra* Section IV.A.

- (1) personality justification;
- (2) dilution; and
- (3) commercial morality.

1. “Leave Me My Name!”

Personality “justification posits that property provides a unique or especially suitable mechanism for self-actualization, for personal expression, and for dignity and recognition as an individual person.”²⁵⁵ “[I]ts central tenet [is] the proposition that, ‘to achieve proper self-development—to be a *person*—an individual needs some control over resources in the external environment.”²⁵⁶

In the United States, personality justifications for intellectual property are minimal, but it is the primary rationale in Europe.²⁵⁷ The most common example of a law based on personality justifications is artists’ “moral rights.”²⁵⁸ Artists have the “right to prevent others from, among other things, modifying, distorting, or otherwise interfering with the integrity of that work—even after the creator alienates both the physical object in which the work is embodied and its copyright.”²⁵⁹ In the United States, a weak version of moral rights exists in the Visual Artists Rights Act of 1990.²⁶⁰

It is hard to think of something more personal than a name.²⁶¹ It seems reasonable to say that names hold a special place in *all* societies. Indeed, the comments in the *Restatement (Second) of Torts* discussed above are essentially personality justifications for the tort.²⁶² As Professor Jonathan Kahn argued,

255. Hughes, *supra* note 238, at 330.

256. *Id.* (quoting Margaret Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982)).

257. *Id.* at 330–31.

258. See Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1, 1 (1997).

259. *Id.*

260. *Id.*

261. See Jonathan Kahn, *What’s in a Name? Law’s Identity Under the Tort of Appropriation*, 74 TEMP. L. REV. 263, 267–68 (2001) (quoting ANTHONY COHEN, SELF CONSCIOUSNESS: AN ALTERNATIVE ANTHOLOGY OF IDENTITY 72 (1994)) (“Claude Levi-Struss has pointed out that ‘naming is a mode of classification, and that classification is a necessary precondition to possession.’ Commenting on Levi Strauss, anthropologist Anthony Cohn further notes that ‘his logic would lead us to the conclusion that naming is required for our society to possess a person, that is, to make the person a member.’”).

262. The word “personality” is even a part of the language used to discuss publicity rights. *E.g.*, Manav K. Bhatnagar, Comment, *Fantasy Liability: Publicity Law, the First Amendment, and Fantasy Sports*, 119 YALE L.J. 131, 133 (2009) (citations omitted) (“Courts have consistently held that publicity law protects the *identity* or *persona* of a player—as expressed through images, likeness, personality,

“[A]n appropriation and commodification of identity is considered a blow to a person’s dignity, undermining the integrity of his or her self.”²⁶³

For attorneys, names hold a particularly important place—above that even of most other citizens. It is common practice for female attorneys, for example, to keep their last names when they marry because their last names have value.²⁶⁴ For example, the Dean of the University of Wisconsin Law School is Margaret Raymond and she is married to Professor Mark Sidel.²⁶⁵

2. Diluting a Name

Trademark law protects against more than just consumer confusion. It also protects the investment made in a brand. A famous brand can sue for dilution.²⁶⁶ “Trademark dilution occurs when a person or company uses a mark identical or substantially similar to a pre-existing trademark, triggering a mental association on the part of the consumer between the two marks, thereby eroding

or other symbolic means—and not against ‘mere use of a name.’”); Tyler Hartney, Note, *Likeness Used as Bait in Catfishing: How Can Hidden Victims of Catfishing Reel in Relief?*, 19 MINN. J.L. SCI. & TECH. 277, 292 (2018) (2018) (quoting IND. CODE ANN § 32-36-1-6) (“[T]he language is very broad in terms of opening the door to claims for any ‘aspect of a personality’s right of publicity,’ and personality is defined as any name, voice, signature, photograph, image, likeness, *distinctive appearance, gestures, or mannerisms.*”).

263. Kahn, *supra* note 261, at 265.

264. Leigh Ann Humphries, *Dr. Maiden Name Will See You Now – Medical Students Give Their Last Names A Lot of Thought*, MEDPAGE TODAY (Feb. 2, 2015), <https://www.medpagetoday.com/publichealthpolicy/generalprofessionalissues/49826> [<https://perma.cc/5VGD-NFTE>] (“Women who do decide to keep their maiden names are anything but maidens. Many are high-power executives, news anchors, lawyers, artists, or as this article suggests, future leading doctors. Highly educated, high-earning women are disproportionately likely to keep their names after marriage. This may not be surprising. Long education and competitive work environments lead some to marry at older ages, at times when they have established professional and personal lives with their maiden names.”). For a scholarly analysis of brides deciding to keep their name, see Richard E. Kopelman, Rita J. Shea Van-Fossen, Eletherios Paraskevas, Leanna Lawter, & David J. Prottas, *The Bride Is Keeping Her Name: A 35-Year Retrospective Analysis of Trends and Correlates*, 37 SOC. BEHAV. & PERSONALITY 687 (2009).

265. See Margot Slade, *Dean Limelight: Margaret Raymond, University of Wisconsin Law*, LAWDRAAGONCAMPUS (Nov. 9, 2014), <http://campus.lawdragon.com/dean-limelight-margaret-raymond-university-of-wisconsin-law-school/> [<https://perma.cc/HE59-G4B9>] (“There are some great restaurants here; my husband, Mark Sidel, and I love the Madison Farmers’ Market . . .”).

266. Dilution only protects famous marks because dilution is concerned with the “whittling away” of the mark and not confusion. Julie C. Frymark, Note, *Trademark Dilution: A Proposal to Stop the Infection from Spreading*, 38 VAL. U. L. REV. 165, 175 n.71 (2003). Perhaps the fame requirement creates a problem for the analogy this Article draws: Should only famous attorneys be protected? This Article, however, does not suggest that a dilution analogy is a primary argument for regulation. It is merely a secondary concern that could edge a bar on the fence toward regulation.

the strength of the original mark.”²⁶⁷ The point of dilution causes of action is to protect “the goodwill and investment made by business owners”²⁶⁸ Generally, courts and legislatures agree that dilution “is necessary to maintain a competitive economy”²⁶⁹

By analogy, attorneys invest in their names and reputations. The misuse of attorneys’ names arguably discourages attorneys from investing in their “brand.” It does not promote healthy and natural competition, but instead allows one attorney to usurp the brand of another. Indeed, a similar concern has partially justified publicity rights: “Recognition of the right also avoids the unjust enrichment and depreciation in value of the likeness, which would occur if advertisers and others were allowed to trade on the goodwill another has created in his name or likeness.”²⁷⁰

3. Commercial Morality

Similarly, part of the justification for trade secret law is commercial morality.²⁷¹ Essentially, businesses have to play nicely with each other out of a sense of moral obligation. Indeed, going back to the *Restatement (First) of Torts*, commercial morality has been an aspect of trade secret law.²⁷² “[O]ne of the primary tasks of law in a liberal, capitalist democracy is to maintain and further the values and characteristics which are crucial to the functioning of capitalism.”²⁷³ Duties imposed by commercial morality distinguish capitalism from economic anarchy.

In addition to trade secrets, the hot news tort is another kind of commercial morality imposed by law.²⁷⁴ No one “owns” a property right in news per se,

267. Kathleen B. McCabe, Note, *Dilution-by-Blurring: A Theory Caught in the Shadow of Trademark Infringement*, 68 FORDHAM L. REV. 1827, 1828 (2000).

268. *Id.* at 1829.

269. *Id.* (citing H.R. Rep. No. 104-374, at 3 (1995), as reprinted in 1995 U.S.C.C.A.N. 1029, 1030; S. Rep. No. 79-1333 (1946), as reprinted in 1946 U.S.C.C.A.N. 1274, 1275)).

270. Ashley D. Hayes, *The Right of Publicity and Protection of Personae: Preemption Not Required*, 51 SYRACUSE L. REV. 1049, 1058 (2001).

271. See Kurt M. Saunders, *The Law and Ethics of Trade Secrets: A Case Study*, 42 CAL. WESTERN L. REV. 209, 210 (2006).

272. RESTATEMENT (FIRST) OF TORTS § 757 cmt. f (AM. LAW INST. 1939) (“A complete catalogue of improper means is not possible. In general they are means which fall below the generally accepted standards of commercial morality and reasonable conduct.”).

273. Harry J. Glasbeek, *Commercial Morality Through Capitalist Law: Limited Possibilities*, 27 REVUE JURIDIQUE THEMIS 265, 265 (1993).

274. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 237–38 (1918).

yet news organizations owe quasi-property duties to other news organizations. As two scholars wrote:

In the only hot news misappropriation case to reach the U.S. Supreme Court, the Associated Press (AP) had been granted an injunction to keep rival International News Service (INS) from taking AP dispatches from the frontlines of World War I, rewriting them, and transmitting them as INS articles. The Court upheld the injunction, and in doing so, famously declared that AP had a “quasi-property” right in its news reports. This limited right allowed AP to prevent competitors from reaping where they had not sown²⁷⁵

These arguments stand in contrast with Professor Goldman and Mr. Reye’s claim that competitive keyword advertising promotes competition.²⁷⁶ The question ought to be what promotes healthy competition: not what promotes competition generally. Lawyers have, or at least should have, duties imposed by commercial morality. They do not own property rights in their names, however, they own quasi-property rights they can enforce against other attorneys. Recall South Carolina’s opinion from above.²⁷⁷ Furthermore, the Preamble to the Model Rules of Professional Conduct states, “A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.”²⁷⁸ In order for the legal profession to exist in a healthy and competitive capitalistic society, lawyers need to play nicely with each other. Getting into catty fights is a sign of a bad lawyer and bars are justified in reacting. Furthermore, it hurts the public’s perception of the profession.

IV. CRY ME A RIVER, GOOGLE

Advocates of attorney participation in competitive keyword advertising love to cry foul and bring up regulations’ constitutionality. Google, for example, argued against the 2013 Florida Bar’s proposal on constitutional grounds:

[T]he Proposed Advisory Opinion ban[s] all advertising using another attorney or law firm’s name as a triggering “keyword,” regardless [of] whether that advertisement is inherently false or misleading. . . . [M]any keyword advertisements triggered from the name of another attorney or law firm are not

275. Jeffrey L. Harrison & Robyn Shelton, *Deconstructing and Reconstructing Hot News: Toward a Functional Approach*, 34 *CARDOZO L. REV.* 1649, 1655 (2013).

276. Goldman & Reyes, *supra* note 3, at 113.

277. *See In re Naert*, 777 S.E.2d 823 (S.C. 2015) (per curiam).

278. MODEL RULES OF PROF’L CONDUCT pmbl. (AM. BAR ASS’N 2018).

inherently false and misleading, and serve an important function in providing consumers 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.²⁷⁹

Consumers’ inability to identify advertisements ought to be of considerable concern to state bars because it means consumers are being manipulated. Confusion as to source and commercial morality are also persuasive.

This Part first explains the constitutionality of attorney advertising regulations. Next, this Part questions whether the purchase of another’s name is even speech within the scope of First Amendment protection. Lastly, this Part notes that the U.S. Supreme Court has not exempted the media from publicity rights lawsuits. States’ interests in regulating attorney participation in competitive keyword advertising is at least as great as states’ interest in protecting publicity rights.

A. *The Slippery Slope of Attorney Advertising*

At the Founding of the United States, attorney advertising was abnormal.²⁸⁰ Attorneys were seen as members of a profession, and advertising was not only viewed as a threat to the profession’s dignity but also a threat to the public.²⁸¹ Advertising was thought to lead to “barratry, champerty, and maintenance.”²⁸² Advertising, however, rose in the nineteenth century.²⁸³ Its rise was more than a minor problem. For example, Figure 6 below is an advertisement from 1833.²⁸⁴

279. Letter from Terri Chen to Eugene Keith Pettis, *supra* note 28.

280. Callender, *supra* note 44, at 92.

281. *Id.*

282. *Id.*

283. *Id.*

284. This advertisement is discussed in PEARCE, KNAKE, GREEN, JOY, KIM, MURPHY, & TERRY, *supra* note 43, at 211.

Figure 6: Attorney Advertisement from 1833

AMERICAN LAW AGENCY.

THE American and British Public are informed that the undersigned have established Law Agencies in each of the United States, and that claims of every description will be carefully attended to through the medium of eminent and responsible counsel in each State, and personally by the undersigned in the State of Maryland, and at Washington, in the District of Columbia.

Please address them under the firm of Hoffman & Dobbin, Counsellors at Law, Baltimore, Maryland.

**DAVID HOFFMAN,
GEORGE W. DOBBIN.**

Baltimore, Jan. 1, 1833.

REFERENCES:

We are of opinion that entire confidence may be placed in David Hoffman, Esq. LL. D. Counsellor-at-law in the Supreme Court of the United States, and in his associate George W. Dobbin, Esq. and that claims entrusted to them will be attended to with ability, integrity, and promptitude.

John Marshall, Chief Justice U. S. Richmond.
Edward Livingston, Secretary of State, U. S. Washington.

N. Biddle, President Bank U. S. Philadelphia.
Prime, Ward, King & Co. New York.
Thomas H. Perkins & Sons, Boston.

Robert Gilmor & Sons,	}	Baltimore.
Hoffman, Bend & Co.		
Baring, Brothers & Co.	}	London.
Thos. Wilson & Co.		
Bolton, Ogden & Co.	}	Liverpool.
W. & G. Brown & Co.		

Baltimore, Jan. 10—eolm2am5m

Notably, the attorneys advertising in Figure 6 had an endorsement from none other than Chief Justice John Marshall.

This is the slippery slope that can become attorney advertising. “[T]hroughout the nineteenth century an alarming amount of corruption entered the legal profession. Part of the corruption was believed to originate from the

decline of professional regulation that had occurred”²⁸⁵ The increase in corruption led to the ABA’s promulgation of the Professional Canon of Ethics in 1908.²⁸⁶ While today many presume that the dignity of the profession is a separate policy goal from the protection of the public, the two were seen as linked at the turn of the nineteenth century.²⁸⁷ Bars, perhaps, went too far over the next several decades with regulating attorney advertising.²⁸⁸ In 1977, the U.S. Supreme Court responded in *Bates v. State Bar of Arizona*,²⁸⁹ which held that attorney advertising was protected commercial speech,²⁹⁰ perhaps as a result of state bars’ over-regulation on attorney advertising.²⁹¹ While supporters of attorney advertising like citing *Bates*, the opinion itself noted several limits, summarized well by a student comment:

First, although advertising could not be subject to blanket suppression, the state had broad power to regulate how an attorney may advertise. Second, false or misleading ads remained subject to restraint. However, the court failed to define either false or misleading in the context of attorney advertising. Third, although the Court opened the door to various forms of attorney advertisements, the holding was limited to advertising routine legal services in the print media. Finally, the Court failed to extend the holding to television advertising. Specially, the Court stated, “[T]he special problems of advertising on the electronic media will warrant special consideration.”²⁹²

285. Callender, *supra* note 44, at 93.

286. *Id.*

287. *Id.*

288. *See id.* at 94–95.

289. 433 U.S. 350 (1977).

290. *Id.* at 383.

291. In the decade after *Bates*, many discussed the decision as a reaction to the severely limited nature of attorney advertising at that point in history. *See, e.g.*, Robert F. Boden, *Five Years After Bates: Lawyer Advertising in Legal and Ethical Perspective*, 65 MARQ. L. REV. 547, 550 (1982) (“The prevailing theory, from 1908 to *Bates* in 1977, was that advertising by lawyers was a form of solicitation of legal business, equally to be condemned with ‘ambulance chasing’ and other forms of direct or personal solicitation.”); *First Amendment – Professional Discipline and the Right to Advertise*, 68 J. CRIM. L. & CRIMINOLOGY 624, 624 (1977) (“The absolute ban on lawyer advertisements enforced by the bar since the beginning of this century was held unconstitutional in *Bates v. State Bar of Arizona*.”).

292. Callender, *supra* note 44, at 97 (quoting *Bates*, 433 U.S. at 384); *see also Bates*, 433 U.S. at 383 (“In holding that advertising by attorneys may not be subjected to blanket suppression, and that the advertisement at issue is protected, we, of course, do not hold that advertising by attorneys may not be regulated in any way.”).

Under *Bates*, regulation of competitive keyword advertising is permissible for at least three reasons. First, a ban on competitive keyword advertising is not a blanket ban on advertising: It is narrowly tailored. Specific limits on competitive keyword advertising—as opposed to a ban—are even more narrowly tailored. Second, competitive keyword advertising not only harms the dignity of the profession, but it also misleads consumers: Indeed, it harms the dignity of the profession, in part, *because* it misleads consumers. Lastly, the internet is analogous to “the special problems of advertising on the electronic media” that the Court noted warrant “special consideration.”

Some supporters of competitive keyword advertising might argue that even if the advertisements are misleading, most members of the public are not harmed. They would stress that few searchers would hire the wrong attorney. However, this argument relies on an overly narrow definition of harm. As shown above, consumers trust organic results more than advertisements.²⁹³ They also have trouble distinguishing the two. A keyword advertisement that is insufficiently labeled is harmful because it takes advantage of this increased trust. Being misled and manipulated is inherently harmful. It causes a consumer to waste time, and it causes frustration.²⁹⁴ This wasted time and frustration is quite similar to initial interest confusion, a well-established ground for regulation in trademark law.

Furthermore, the U.S. Supreme Court has held state bars are justified in regulating attorneys if an act has “proved to be misleading in practice.”²⁹⁵ This Article has laid out substantial empirical proof. In *Florida Bar v. Went for It, Inc.*,²⁹⁶ the Court also stated that bars have “substantial interest . . . in . . . preventing the erosion of the confidence in the profession”²⁹⁷ This is a legitimate secondary concern with respect to competitive keyword advertising.

B. *Defining Speech*

Cannon & Dunphy tried to defend itself in *Habush* by arguing “their use of search engine sponsored links [wa]s protected by the First Amendment”²⁹⁸ The trial judge quickly dismissed this argument:

293. PRUSSAKOV, *supra* note 35, at 17.

294. See Goodstein, Bamossy, Englis, & Hogan, *supra* note 34, at 743–44.

295. *In re R.M.J.*, 455 U.S. 191, 207 (1982).

296. 515 U.S. 618 (1995).

297. *Id.* at 635.

298. *Habush v. Cannon*, No. 09-CV-18149, slip op. at 5–6 (Milwaukee Cty. Cir. Ct. June 8, 2011).

This argument fails because the use of a computerized system to sequence search results is not speech. Plaintiffs take no issue with the message or content of the text of defendants' sponsored link. Nor do plaintiffs object to anything on the defendants' website. This lawsuit involves the hidden process which causes the link to appear at all. That process is content neutral. It is not information; nor is it a message of any sort. *It is not speech, commercial or otherwise.* Therefore, it is not subject of the protection of the First Amendment.²⁹⁹

The appellate court did not consider this issue on appeal, but the argument is straightforward and convincing.

C. *The Media and Publicity Rights*

Google has also assumed that the bars *only* interest in regulation is the protection of the public from false or misleading information. Yet, the bar may have an interest in protecting the integrity of attorneys' names. And the Supreme Court has held even the news media cannot escape publicity laws.³⁰⁰ In *Zacchini v. Scripps-Howard Broadcasting Co.*,³⁰¹ the Court explained

Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent. . . .

. . . "The rationale for [protecting the right of publicity] is the straight-forward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."³⁰²

V. CONCLUSION

As these debates continue to rage, bar associations need to think more broadly than they have been. How does the public use the internet? What truly

299. *Id.* at 6 (emphasis added).

300. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578–79 (1977).

301. 433 U.S. 562.

302. *Id.* at 574–76 (quoting Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326, 331 (1966)); see also Judith Endejan, Comment, *The Tort of Misappropriation of Name or Likeness Under Wisconsin's New Privacy Law*, 1978 WIS. L. REV. 1029, 1031 ("Two commentators have concluded, 'If there is certainty in any area of privacy law, it is the area of appropriation.' Despite this conclusion and despite the removal of substantial first amendment considerations from this area, the appropriation tort may be more complicated than is initially perceived.").

will protect the public? Do justifications other than protecting the public have any barring on the decision?

This Article applauds those states that have banned or at least regulated attorney participation in competitive keyword advertising. Those that have not have failed to realize consumers' limited and fragile understanding of search engine optimization. Regulation is necessary not only to protect the public but also to preserve the dignity of the profession.

If a middle ground is necessary, states should require the first line of the text of a competitive keyword advertisement state, "ADVERTISEMENT." A labeling requirement goes to the heart of the underlying problem: Consumers have trouble identifying keyword advertisements as advertisements. The problem is amplified in the context of competitive keyword advertising for the reasons argued in this Article.

Search engine providers should *not* be responsible for ensuring an advertisement is sufficiently labeled. That responsibility should lie with the responsible attorney. Search engine providers do not have an interest in sufficiently labeling advertisements, and, furthermore, they are not responsible for following ethical rules. This requirement also curtails the problems caused by the changing nature of search result page architecture. Lastly, even if Google and other supporters of competitive keyword advertising are correct in arguing a ban creates First Amendment concerns, a mere labeling requirement almost certainly does not.

Admittedly, this Article's favored solution would be an outright ban. In the future, hopefully bars will at least consider more seriously *leaving attorneys their names*. For now, however, a labeling requirement will suffice.