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## What's in a Name? The Ethics of Competitive Keyword Advertising

Essentially, New Jersey allows the practice of competitive keyword advertising, provided that the advertisement does not redirect the searcher to the advertiser's site. Nevertheless, the practice is unethical in the greater sense of the word "ethics."

By **Marc Garfinkle** | September 02, 2020



**Credit: Jay Mallin**

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In the early days of the internet, a law firm's website was informative, created to be discovered by internet researchers who were interested in information about, or contact with, an attorney for a legal need. Promoting a practice was passive. You staked out a piece of bandwidth with a website, and you were instantly visible when your name was called. Contrast that with television advertising which invades our home with annoying jingles from New York, or radio ads barking a lawyer's name at millions to find the dozen who might care. Advertising by website was straightforward and transparent. And civil.

Most of us don't need the whole world to know of our existence; we market in a geographical area, or we point to our specialties, or cultural or linguistic or socio-economic communities. We can focus the ad budget with great precision. For efficiency, we imbed keywords into our websites, allowing the right internet searchers to find us more easily. We even get professional help to choose the keywords that should optimize the number of "hits" our site receives. There may be many hundreds of keywords and keyword phrases in a professional website, generally relating to the firm's geographical coverage, areas of practice, attorneys' names and so on.

When a user enters a search term, the list or scroll of "unpaid" links that appear on the screen represents the "organic" search results. Links are displayed in descending order, the most relevant websites appearing first. But pop-ups and unpaid ads are a scourge when trying to conduct even the most mundane internet search.

The internet remembers who searches, and how and whom we search. It knows each user's interests, employment, demographic data, personal connections and much more. It was no surprise, then, that the search engines (i.e., Google) offer advertisers the ability to send their link directly to users who entered certain terms or combinations of terms in the search box. The searcher enters a product name, for example, and a link to a competitor's website will then appear on the searcher's screen—perhaps as a pop-up, perhaps as a deceptively designed paid advertisement—along with the so-called organic results.

Called "competitive keyword advertising," the technique is an advertising home run.

Naturally, attorneys are now purchasing as keywords not just their specialties, jurisdictions and words of art, but *the names of other attorneys in their field*—attorneys whose names or firms were frequently searched. Thus, injured passengers seeking an attorney in the wake of an airplane crash may enter a term such as, "airplane crash," "aviation lawyer" or "aeronautics attorney. Some, knowing that F. Lee Bailey handles aviation accidents, might put Bailey's name in the search box to contact him or to learn more about him. Normally, Mr. Bailey's website or other information about him would appear at the top of the organic list returned to the searcher. Less relevant search results would appear below.

With competitive keyword advertising, an attorney who has paid for search term "F. Lee Bailey" can have a link to her website appear above or before Bailey's information, or as a pop-up which the searcher may not easily ignore before moving on, if ever, to Bailey's link.

There is a division among the states concerning the ethical propriety of the practice. North and South Carolina, for example, have disciplined attorneys who have done so. Texas, on the other hand, has deemed the practice ethical, provided that a reasonable person is not likely to conclude that the advertising attorney is associated with the searched-for attorney. Of the jurisdictions that have allowed the practice, the rationales have generally been that the practice does not violate civil law, and that prohibiting the practice would effectively create a new intellectual property right in attorneys' names.

New Jersey took a more direct route. Ethics Advisory Opinion 735 held that the practice does not violate the present RPCs. This observer agrees. Essentially, New Jersey allows the practice, provided that the advertisement does not redirect the searcher to the advertiser's site.

Nevertheless, competitive keyword advertising is unethical in the greater sense of the word "ethics." At the least, "buying" a colleague's name and using it as bait in front of her potential clients violates the Golden Rule. Who among us would not resent his or her name being a keyword on another lawyer's site? Who would okay another to siphon off the fruits of her goodwill? If our colleagues would agree to our piggybacking on their success, why not just ask for their permission. But we know they would object, so we do it with neither their knowledge nor consent. While that may be fair play in the marketplace, the practice is not only morally repugnant, it neither embodies who we are nor engenders the types of inter-attorney relationships we must have.

Legal or not, there is no good reason to permit the practice, unregulated. We are not engaged in simple commerce, where “caveat everyone” is the rule. Being a lawyer sometime entails additional burdens or constraints, including the imposition of an elevated level of civility and consideration among colleagues. We are a fraternity of men and women, and our commonality of interests far outweighs our differences.

This name-jacking is cancerous. It will inevitably degrade relations between colleagues. When a trapper returns to her string of traps—painstakingly baited and strategically placed—to find them sprung and the prey taken, we call it poaching, punishable by death in some societies. The metaphor is obvious. Buying names as keywords doesn’t pass the smell test. It offends decency. It is sneaky and unfair. It should be regulated by the Committee on Attorney Advertising.

Regulation would simply require the would-be poaching attorneys to list all keywords they use. If any is the name of a lawyer or law firm, the attorneys should be required to obtain the written informed consent of the lawyers or law firms whose goodwill they wish to carjack. Is that too much to ask?

Tell me what you think, dear readers. Send your opinions to my website. To find me, just Google “Kevin Michels” or “Bennet Wasserman” or “Ray Londa” or “Bob Ramsey” or “Michael Ambrosio” or “Jerry Hanlon,” and my link will pop up. Thanks for searching.

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