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Recent Developments in Risk Management **December 2019** | Volume 24 | Issue 6

Advertising – Internet – Keyword Purchase

***N.J. Advisory Comm. on Prof'l Ethics, Formal Op. 735* (2019)**

Risk Management Issue: May a lawyer ethically advertise using online keyword technology, including the purchase of a competitor law firm's name?

The Opinion: The New Jersey Advisory Committee on Professional Ethics (the "ACPE") recently considered the ethical implications of advertising online through the purchase of "keywords" from internet search engines. The inquiring lawyer wanted to purchase keywords of a competing law firm's name, so that his firm would appear in the paid search results whenever an internet user searched for the name of the competing law firm. In addition, the lawyer inquired whether it was ethical to pay the search engine to insert a hyperlink ahead of the listing for the competing law firm's website that would direct the search engine user to his firm's website.

The ACPE concluded that a lawyer may ethically purchase keywords, including its competitors' firm names. However, a lawyer may not ethically divert an internet user to his own website by paying a search engine to insert a hyperlink preceding the listing of his competitor's website. The ACPE concluded that the purchase of a keyword does not constitute a "communication" as defined by New Jersey's Rules of Professional Conduct. Accordingly, purchase of the keyword as described by the inquiring lawyer would not violate Rules 7.1 or 1.4.

In addition, the ACPE considered whether keyword purchase would violate Rule 8.4(c), which prohibits conduct involving dishonesty, fraud, deceit, or misrepresentation. Jurisdictions are not uniform on this issue, although most conclude that such a purchase would not rise to the level of a Rule 8.4(c) violation. As the ACPE noted, the website of the keyword purchaser will generally appear as a paid or "sponsored" advertisement, preceding the organic results of the user's search. This conveys to the internet user that the firm paid for the advertising and still allows the user to select the website of his or her choice. The ACPE concluded this is not deceptive or dishonest conduct. However, the ACPE also determined that paying an

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internet search engine to purposefully divert a user to a lawyer's website by inserting an unidentified hyperlink over the competing firm's website *would* be dishonest conduct and in violation of Rule 8.4(c). Such practices are surreptitious and intended to deceive the user.

Other jurisdictions that have reached conclusions similar to New Jersey include Florida, Texas, and Wisconsin; recent litigation suggests that neither privacy rights nor intellectual property rights of the competing law firm would be violated. For example, in *Habush and Rottier v. Cannon et al.*, 2013 WI App 34, a Wisconsin appellate court considered whether the keyword purchase of a competing law firm's name would violate the competitor firm's right of privacy. The Wisconsin court found that purchasing a keyword of a competing law firm's name was akin to physically locating a law firm next to a competing law firm and benefiting from the flow of people attracted to the competing firm. Since the court found this was not "using" the name of the competing firm in a way the Wisconsin legislature intended to prohibit by the right to privacy statute, the competitor firm's right to privacy was not violated. In contrast, the North Carolina State Bar issued a formal ethics opinion finding that the keyword purchase of a competing firm's name would violate Rule 8.4(c), because it is "neither fair nor straightforward" to "purchase the recognition associated with one lawyer's name" in order to direct consumers to a competing firm's website.

Risk Management Solution: The majority of jurisdictions considering the topic have determined that the keyword purchase of a competing law firm's name does not violate privacy rights, intellectual property rights, or the Rules of Professional Conduct. Many of these jurisdictions reason—like New Jersey—that such a purchase is not a "communication," nor does it deceive the internet user if the purchaser's website appears as a paid or sponsored advertisement, and the user may still select the competing firm's website from organic search results. However, with jurisdictions differing significantly, lawyers should consult the authority of their jurisdiction. To lessen possible risk, lawyers should avoid secretly diverting traffic from a competing law firm's website. Because this is a developing area of common law, statutes, and discipline, frequent consultation of the Rules and decisions is recommended.

Judges – Social Relationships – Disclosure – Disqualification

ABA Formal Opinion 488

Risk Management Issue: ABA Formal Opinion 488 considers when judges must disclose or disqualify themselves in judicial proceedings as a result of a social or close personal relationships with lawyers or parties that fall short of the category of relationships (i.e., spousal, domestic partner, or other close family relationships) that must be disclosed under Rule 2.11 of the Model Code of Judicial Conduct.

ABA Formal Opinion 488: Model Code of Judicial Ethics Rule 2.11 enumerates situations in which judges must disqualify themselves in proceedings because their impartiality might reasonably be questioned—including matters implicating some specific family and personal relationships. However, the rule is silent with respect to (1) acquaintanceships; (2) friendships; and (3) close personal relationships. ABA Formal Opinion 488 now provides guidance on each of these types of relationships.

A judge and lawyer are considered acquaintances when their interactions outside of court are coincidental or relatively superficial. Examples of this type of relationship include simultaneous attendance of bar association or other professional meetings, or attending the same religious services. Although a judge may voluntarily disclose an acquaintanceship to the parties or their lawyers in a proceeding, they are not obligated to do so, because acquaintanceships do not call into question the judge's impartiality.

By contrast, a judge and a party or lawyer may be friends, which means they share some higher degree of mutual affection. A judge should analyze the nature of the friendship and disclose any friendships the parties or their lawyers might consider relevant to a possible motion for disqualification— even if the judge believes

there is no basis for disqualification. If, after disclosure, a party objects to the judge's participation in the proceeding, the judge has the discretion to either continue to preside over the proceeding or disqualify him- or herself.

Finally, a judge may have a personal relationship with a lawyer or party that goes beyond friendship, but does not rise to the level of automatic disqualification under Rule 2.11. For example, the judge may be romantically involved with a lawyer or party, desire a romantic relationship, or be actively pursuing a romantic relationship. Alternatively, the judge and a lawyer or party may be divorced but communicate frequently because they share custody of children; or, a judge might be the godparent of a lawyer's or party's child or vice versa. A judge must disqualify himself or herself when the judge has, desires or is pursuing a romantic relationship with a lawyer or party. A judge should disclose other intimate or close personal relationships even if the judge believes that he or she can be impartial. If, after disclosure, a party objects to the judge's participation in the proceeding, the judge once again has the discretion to continue to preside over the proceeding or disqualify himself or herself.

A judge subject to disqualification based on a friendship or close personal relationship with a lawyer or party may ask the parties and their lawyers to consider whether to waive disqualification. If the parties and lawyers agree that the judge should not be disqualified, the judge may participate in the proceeding.

Judges need not disqualify themselves if a lawyer or party is an acquaintance, nor must they disclose acquaintanceships to the other lawyers or parties. Whether judges must disqualify themselves when a party or lawyer is a friend or shares a close personal relationship with the judge or should instead take the lesser step of disclosing the friendship or close personal relationship to the other lawyers and parties, depends on the facts and circumstances. Judges' disqualification in any of these situations may be waived in accordance and compliance with Rule 2.11(c) of the Model Code.

Risk Management Solution: In circumstances where a judge discloses a friendship or other intimate or close personal relationship, the parties or their lawyers should assess whether the facts warrant a formal objection. They should also ensure that the judge puts into the record the reasons for the decision to remain on the case or disqualify.

Engagement Agreements – Arbitration Clauses – Client Disclosure and Consent

***Brian Delaney v. Trent S. Dickey and Sills Cummis & Gross, P.C.,* New Jersey Superior Court, Appellate Division, Docket No. A-1726-1714**

Risk Management Issue: What are a lawyer's obligations of disclosure to the client when the engagement agreement includes a mandatory arbitration clause for fee disputes and malpractice claims?

The Case: Plaintiff retained defendant attorneys to represent him in a business dispute with his partners. The retainer agreement provided for mandatory binding and confidential arbitration of all disputes "arising out of or relating to" the engagement, pursuant to the JAMS Employment Arbitration Rules and Procedures (the "JAMS Rules").

Among other provisions, the arbitration agreement in the retainer called for: a mutually-selected arbitrator or one selected in accordance with JAMS Rules if the parties could not agree; a waiver of any claim for punitive damages; and recovery of fees and costs by the prevailing party at the arbitrator's discretion. The retainer agreement also purported to incorporate the entire JAMS Rules by reference and provided a link to http://www.jamsadr.com. Importantly, the 33-page JAMS Rules provided for discovery restrictions and other material terms likely to affect a party's ability to develop proof and trial strategy.

No actual copy of the JAMS Rules was provided to the plaintiff. In addition, defendants failed to explain the arbitration provision and the JAMS Rules to the plaintiff. Unaware of this gap in his knowledge, plaintiff signed the engagement agreement.

Later, after a dispute, plaintiff terminated the defendants, refused to pay $400,000 in fees and initiated a malpractice action against them. Defendants sought to compel arbitration of both the fee dispute as well as the malpractice claim. The Chancery Division judge granted the request and dismissed the case.

On appeal, the plaintiff complained that no one explained the arbitration provision to him or apprised him that he was constitutionally entitled to a jury trial for his malpractice claim. He complained further that he was not warned that the arbitration fees and costs could "easily exceed $20,000," or that these fees and costs "greatly exceeded" the filing fees for a Superior Court action and there was a chance those fees and costs could be awarded against him.

On these facts, the appellate court concluded that the arbitration clause violated the Rules of Professional Conduct and was unenforceable.

The defendants, the court ruled, failed to comply with RPC 1.4(c). Pursuant to the rule, they should have explained the consequences of agreeing to submit to arbitration and to the JAMS Rules to the "extent reasonably necessary to permit [Plaintiff] to make" an informed decision. In particular, defendants were remiss in failing to advise their client that he was waiving his right to a jury trial, his ability to recover punitive damages, and that he was exposing himself to the possibility of paying defense costs and charges.

Further, the court found that the arbitration agreement, in requiring a waiver of punitive damages, violated RPC 1.8(h)(1) prohibiting an attorney from prospectively limiting the attorney's liability to the client for malpractice.

In what it stressed was a narrow holding, the appellate court concluded that where a mandatory arbitration clause in a retainer agreement incorporates a document containing material terms regarding the arbitration, the attorney must at least provide the incorporated document to the client, explain its material terms, and ensure that the client either read, or have a chance to read, the incorporated document before signing the engagement agreement. Since this was not done in this case, the appellate court held that the arbitration clause was void.

Risk Management Solution: This case underscores the need to provide full disclosure to prospective clients of all information necessary to permit informed and intelligent consideration of an arbitration agreement and ensure that arbitration agreements comply with all jurisdictionally relevant ethics requirements. Rules language, comments, and ethics opinions vary from state to state, so consult your states' authorities before including a mandatory arbitration provision in your engagement agreement. For instance, a related DC Ethics Opinion, discussed in the May 2019 issue of the Lawyers' Lawyer, determined that agreements to arbitrate fee disputes do not fall within RPC 1.8(a), while agreements to arbitrate malpractice claims require at least informed consent.

Best practices dictate full disclosure, confirmed in writing, to the client of all the substantive, procedural, and financial ramifications of arbitration, and also that the lawyer explicitly call the client's attention to the arbitration provision(s) at the time the agreement is presented and advise the client of the right to secure independent counsel on the malpractice arbitration issue.

Hinshaw & Culbertson LLP
151 North Franklin Street
Suite 2500, Chicago, IL 60601
312-704-3000
www.hinshawlaw.com
www.lawyeringlaw.com

Editor:
Noah D. Fiedler

Contributors: Shelley M. Bethune, Robert Buchholz, Filomena Meyer

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