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: IN RE SUPREME COURT ADVISORY :
: COMMITTEE ON PROFESSIONAL :
: ETHICS OPINION NO. 735 :
: :
: :

NEW JERSEY STATE BAR ASSOCIATION
BRIEF IN SUPPORT OF PETITION FOR REVIEW OF ACPE OPINION 735

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PRELIMINARY STATEMENT

The Advisory Committee on Professional Ethics (ACPE or Committee) issued Opinion 735 to answer the question of whether it violates the Rules of Professional Conduct to purchase a competitor lawyer's name as a keyword in an internet search as part of a search engine's ad campaign in order to display the lawyer's own law firm website in the search results when a consumer searches for the competitor. The Committee determined it did not violate the Rules of Professional Conduct, specifically RPC 8.4(c).

The New Jersey State Bar Association (NJSBA) asks the Supreme Court to review the conclusion the Committee reached as this issue is ripe given the pace of technological changes facing the profession and the unsettled nature of the question around the country. Opinion 735 is one of three ethics opinions nationally which addresses this issue. Texas and Wisconsin determined purchasing another lawyer's name as a keyword for internet search advertising was not unethical; North Carolina determined that it was.

The NJSBA is concerned that this conclusion condones gamesmanship over professionalism where, if an attorney has enough money to spend on advertising, an attorney can use a competitor's name to redirect a consumer to that attorney's website instead of the site the consumer originally intended. Competitive keyword advertising can take advantage of a consumer's interest in a

competing person's name, and does so without actually displaying the targeted competitor's name in the advertisement copy. Online consumers may not know that the first few ads provided in their search results are not the sites of the attorney searched. (This is distinguishable from descriptive keyword advertising where attorneys can pay to have their information appear in response to a search that includes certain descriptive words and not a specific person's or firm's name.)

The NJSBA believes a critical question exists about whether it is ethical for one lawyer to buy another lawyer's name for purposes of a keyword search, thereby capitalizing on someone else's good will and reputation. While Opinion 735 attempts to answer that question, the NJSBA believes it is based on several presumptions which may not always be accurate and could yield questionable conclusions. For example, Opinion 735 relies on the presumption that the website of a keyword purchaser's law firm and the competitor's law firm will "presumably both appear in the resulting search." This may not always be the case.

Opinion 735 also relies on the belief that consumers will understand the difference between a paid ad on the internet and an organic website of a competing lawyer. This presumption, however, is belied by the many consumers who are regularly taken advantage of by fraud on the web because they cannot distinguish the difference between an email which is fraudulent versus one which

is legitimate. Research suggests that even sophisticated tech users do not understand the difference between results that appear because they were paid to show up when certain words are searched and the organic results of using those words. The Federal Trade Commission has even issued warnings and guidelines distinguishing the two because consumers don't understand the distinction. See "FTC staff to search engines: Differentiate ads from natural results," ftc.gov/news-events/blogs/business-blog/2013/06/ftc-staff-search-engines-differentiate-ads-natural-results.

STATEMENT OF THE MATTER INVOLVED

Increasingly, lawyers have found that participating in search-based advertising programs offered by search engines such as Google can be an important source of obtaining prospective new clients.¹ There is no dispute that more and more, consumers rely on search engine results to find lawyers and that there is a great deal of competition on the web for legal services.¹

There are two kinds of search results on the internet: organic and ad based. The organic search consists of a listing of websites which most closely matches a user's search query based on relevance. Paid search results are advertising where a website owner pays to have its pages displayed in response to a certain keyword query. Those who advertise pay a provider like Google to

¹For purposes of this brief, Google AdWords campaign will be referred to as the applicable search engine as it is the dominant player in internet search.

ensure that their website will appear above any organic search results.

The purpose of paying for keywords is so that advertisers can draw in consumers who may not be aware of that specific advertiser's services. Consumers rely on search engines to search the web and find vendors to meet their need. For example, if you want a house painter and do not know the name of one to hire, you might search for "house painter in Mercer County." Once the results appear on your computer screen, you will then decide which vendor to research by clicking on the entry. This reflects the descriptive word advertising mentioned above.

Opinion 735 assumes that internet users are sophisticated enough to understand the difference between paid ads and organic searches. The NJSBA, however, has concerns about that assumption. Understanding human nature, consumers will believe that the search results which appear first, on the top of the page will be the "best" or closest response to the search question posed, i.e. house painter in Mercer County. Therefore, a potential litigant may respond to the first result they see which, in fact, may not reflect the consumer's actual intent in conducting a search at all. The results, therefore, could be misleading, even if that is not the actual intent.

QUESTIONS PRESENTED

1. Is it ethical to purchase a competitor lawyer's name as a search keyword for purposes of appearing on the top of the first page of an internet search?
2. Is the Committee's presumption that the keyword purchaser's law firm website and the competitor's law firm website will both appear in the resulting search applicable to all searches?
3. Is the Committee's assumption correct that consumers can readily distinguish between ad search results and organic search results?
4. Do the questions this inquiry raises require further examination by appropriate Supreme Court committees, as well as a larger audience, to ensure the Rules of Professional Conduct are appropriately responsive to evolving technological developments?

ERRORS COMPLAINED OF

The purchase of a competitor lawyer's name in order to appear in the ad search results above the organic search results of the law firm's website could potentially be a misleading communication pursuant to RPC 7.2(a) and could further mislead the public in violation of RPC 8.4(c). Because the conclusion in Opinion 735 relies on various assumptions that may or may not be accurate, the NJSBA contends that the inquiry requires additional study and broader input.

BASIS FOR GRANTING REVIEW

The Committee recognized that the question posed was a matter of great importance to New Jersey lawyers. When researching, it found only three jurisdictions in the country to address this question - Texas, North Carolina and Wisconsin. It noted that the Florida Bar's Standing Committee on Advertising had proposed an opinion, which would have determined such conduct deceptive and misleading. This opinion was rejected by Florida's Board Review Committee on Professional Ethics. Therefore, the three jurisdictions which addressed this issue are divided.

The Committee adopted the conclusion of the Texas and Wisconsin bars. The NJSBA contends that the underlying facts and questions posed to those bar groups and their legal analyses are not applicable to the question posed to the ACPE here.

TEXAS: The Texas State Bar did not address the exact question raised in New Jersey. Instead, it addressed whether Lawyer A's purchase of Lawyer B's name as a keyword search term is an advertisement that holds out Lawyer A to be a shareholder, partner, or associate of Lawyer B to the public. Texas focused on whether the keyword purchaser's ad misrepresented a lawyer's association with the other lawyer. Utilizing the "reasonable person standard" as to whether or not a reasonable person would believe that Lawyer A and Lawyer B were associated in some way, it concluded that the use of a competitor's name would not be

conduct involving dishonesty because 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 a webpage showing search results." It concluded that it would be "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 a lawyer whose name was used in the search." State Bar of Texas Professional Ethics Committee Opinion No. 661 (July 2016).

WISCONSIN: The second case which the Committee relied upon was Habush v. Cannon, 828 N.W. 2d 876,881-82 (Wisc. App. Ct. 2013). This Wisconsin case arose from a lawsuit based on an invasion of privacy. The legal analysis in that case was not pertinent to an analysis of whether or not the purchase of a competitor's name was unethical but whether or not the buying of another lawyer's name for use as a keyword search term invaded a lawyer's privacy. It was not an ethics Opinion by the Wisconsin Bar.

NORTH CAROLINA: The North Carolina opinion addresses the exact scenario presented to the Advisory Committee on Professional Ethics. The North Carolina State Bar 2010 Formal Ethics Opinion 14 (April 27, 2012) concluded that it is a violation of Rule of Professional Conduct 8.4(c) for Attorney A to purchase Attorney B's name as a keyword search term when

Attorney B never authorized Attorney A to use his name in connection with Attorney A's keyword search/advertisement. North Carolina decided this "conduct" shows a "lack of fairness or forthrightness." It stated, "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."

Looking at the paucity of opinions throughout the country on the ethical issues raised by internet advertising, and the division among the opinions that do exist, the NJSBA requests Supreme Court review of Opinion 735 and that it be referred for further study and broader input.

ARGUMENTS IN SUPPORT OF PETITION

Lawyers operate in a position of trust. One of the safeguards lawyers rely upon to preserve this position is the goodwill earned and the reputations developed over many years. In fact, many attorneys profit or fail based on their reputation. Therefore, to say that a competitor who appropriates an attorney's name, an embodiment of an attorney's goodwill and reputation, is not unethical cuts to the core of the professionalism standards to which an attorney is held. The NJSBA posits that the question of whether such action is ethical should not be decided in a vacuum and based on questionable presumptions. It should be thoroughly vetted with input from a broader audience.

For an attorney to appropriate another's name for their benefit certainly has the appearance of being underhanded. Not only could it be construed as the attorney aiming to gain a competitive advantage, but it also undermines the other lawyer's web presence. This does not comport with fairness, as North Carolina has concluded.

By purchasing a competitor's name as a keyword search term in a Google AdWord search, the Committee states that this "keyword" is not a "communication" governed by RPC 7.1 and therefore, the keyword purchase of a competitor lawyer's name is not "communication." The Committee does not address the results which ensue from buying that keyword, pushing the purchasing attorney's name to the top search engine result instead of the attorney searched for.

It flies in the face of a lawyer's obligation to be truthful if it is acceptable to appropriate another attorney's name to trigger search results so one's name is placed higher in the results, raising the likelihood of a consumer being directed to a different website than the one that was the subject of the search. A lawyer is held to a higher standard of conduct even in one's personal life, not just when representing clients. Our Supreme court has stated, "in the legal profession, there is a reverence for the truth." In re Hyra, 15 N.J. 252, 254 (1954). Lawyers must

demonstrate "honesty, truthfulness and reliability." Application of Matthews, 94 N.J. 59, 77 (1983).

Retention of legal counsel is fundamentally different from the purchase of ordinary consumer products. See Petition of Felmeister & Isaacs, 104 N.J. 515, 536 -37 (1987), which discussed at length the underpinning of the decision to permit attorneys to advertise. That case held that misleading advertising creates a danger that consumers will make "uninformed or ill-advised choices of counsel as legal representation that can affect a consumer's basics rights and have serious long-term consequences." Id. More often than not when people need to engage the services of a lawyer, they are in a vulnerable position - they have a problem and need urgent help. When litigants are contacting a lawyer, they want to hire someone they consider to be the best. The purchase of a competitor lawyer's name to elevate one lawyer's name over another in search results has an inherent bias and subverts this desire of a potential client to contact and hire the individual they believe is the best.

Opinion 735 states: "the websites of the keyword purchaser's law firm and the competitor's law firm will, presumably, both appear in the resulting search." (emphasis supplied). This sentence conveys the impression that there is a sense of equality in the positioning of the websites in the search results list. That is not correct. Google's algorithm varies from day to day and

decides which keyword purchaser gets the ads and in what order the ads appear in the search results. That listing and the ranking of an ad purchaser in the search results depends on how much money a lawyer is willing to pay. The entire system of advertising used by Google is the focus of a multistate investigation by a group of bipartisan attorneys general because of the amount of power and influence that advertising can exert on the public's day to day behaviors. nj.gov/oag/newsreleases19/pr20190909b.html.

Google is the world's largest search engine. Its algorithm for how it ranks results is perhaps its most valuable intellectual property in the world. Google uses over 200 ranking factors in its algorithm some of which are keywords. Therefore, the purchase of keywords could rank a competitor above the actual firm being searched. See backlinko.com/google-ranking-factors.

Using one law firm as an example, einhornharris, a search of that name on Aug. 30, 2019, returned 1,090,000 results. Suffice it to say, nobody is looking at all those results. As the Committee has stated, both the law firm and the competitor law firm will "presumably" both appear in the search results but here, there are 1,090,000 results. Einhorn Harris has an interest in making sure it appears on the first page as close as possible to the top of the page of the results which are displayed. EConsultancy, one of the foremost internet marketing and technology resources, referred to this practice as an "extortion scheme" where "you're forced to

pay up if you want to be found." econsultancy.com/state-antitrust-investigation-google-affect-marketing/.

The question then becomes: What happens if your website appears first in the search results? Here are some statistics from moz.com, a company focusing on search engine optimization whose metrics, according to PCMag, have become an industry standard: 75% of respondents either click on the first one or two results; then, they scan page one looking for the most relevant answer to their search query, or they visit multiple results on page one. Only 7% of respondents indicated that they browse beyond the first page of results to see as many results as possible. moz.com/blog/new-google-survey-results.

These facts about the consumer's behavior are even more relevant when a search is conducted on a mobile device where perhaps only three results appear without scrolling as opposed to viewing search results on a 22-inch screen where more searches are visible on the "first" page.

A second incorrect assumption the Committee made is that "the keyword purchaser's website ordinarily will appear as a paid or 'sponsored' website, while the competitor lawyer's website will appear in the organic results (unless a competitor has purchased the same keyword, in which case it will also appear as a paid or 'sponsored' website). The Committee assumes that because the user can choose which website to select in the search results that the

user will recognize if the keyword purchased website is paid or "sponsored."

It is true, a user can choose which site to click on. The question which remains is, will they? The same Moz study found "searchers age 60 and over are 200% more likely than 18- to 21-year-olds not to discriminate between a paid and organic listing." Id. Also, the Committee indicates that "the search engine ordinarily will mark the keyword purchased website as paid or sponsored. What if the search engine does not do that? How then does the public know which website they are being directed to if they click on the paid advertisement?"

A quick look at a search for United (SBa1) shows that on the first line, all the letters are in large font. The second line contains a URL site containing the search word (United) in smaller font but it is not the United Airlines website but cheapflightfares and, the third line, in even smaller font, has a tiny square to the left where the word "ad" appears. (SBa1). The ad presents information which looks almost identical to that which would be the result of an organic search to an unsophisticated user. It is questionable to believe that the use of the tiny word "ad" protects consumers from being misdirected to a site they do not want.

Of equal importance is the fact that internet users of all ages generally do not know how to interpret the validity of the information they are presented with online. A recent FBI Internet

Crime Report demonstrates that users of all kinds believe what they see online and do not necessarily know how to process basic data, including even simple perceptions such as the differences between email and websites that are obviously fraud and those which are legitimate. [fbi.gov/news/stories/ic3-releases-2018-internet-crime-report-042219](https://www.fbi.gov/news/stories/ic3-releases-2018-internet-crime-report-042219).

Importantly, as of September 2018, 91% of all cyber-attacks began with an email which a user clicked on believing it was a legitimate email without carefully scrutinizing the sender's address. See fifthdomain.com/industry/2018/09/14/91-percent-of-hacks-begin-with-an-email/. One only has to work in an office or regularly log on to Facebook to have been warned not to click on certain emails or sites as they are vehicles for wrongdoers to insert viruses on one's computer or for hackers to obtain personal data, hoping to capitalize on users not knowing the difference between what is fraudulent and what is legitimate.

Given the success of obviously fraudulent websites and emails, it is reasonable to assume that many consumers lack the basic understanding of how to interpret what they see on the internet. Accordingly, it also seems reasonable to assume that search engine keyword advertising can and will be used by competitors to divert potential clients to unintended websites. If advertising is meant to inform the public, Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691 (1977), this conduct

arguably does the opposite and is ripe for further scrutiny and review before being declared ethical.

CONCLUSION

Purchasing another person's name for use as a keyword search term which results in an ad and leads a consumer to another website (not the one intended when the keyword was typed in) does not comport with a lawyer's obligation to be honest and truthful. The NJSBA contends that the critical and important question of whether such action is ethical should not be decided in a vacuum based on questionable presumptions nor in the context of a single inquiry. Rather, the NJSBA urges the Supreme Court to direct its appropriate committees to examine the advertising and soliciting possibilities now available as a result of evolving technology. That will allow a wide and learned audience to make recommendations about the issues raised, with the goal of ensuring that lawyers be held to the highest standards of ethics and professionalism, and that consumers remain protected from potentially misleading and deceiving practices in situations where they are most vulnerable.


Respectfully,
New Jersey State Bar Association

By Evelyn Padin/Sab
Evelyn Padin, Esq., President
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Dated: 9/13/19

CERTIFICATION OF COUNSEL

The undersigned, general counsel for the New Jersey State Bar Association, certifies that this Petition presents a substantial question and if filed in good faith and not for purposes of delay.



Sharon A. Balsamo, Esq.
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Dated: 9/13/19

APPENDIX

United Airlines Fares | Save Big on Airline Tickets

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