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SUPREME COURT OF NEW JERSEY  
DOCKET NO. 083396

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IN RE SUPREME COURT ADVISORY : ON PETITION FOR REVIEW  
COMMITTEE ON PROFESSIONAL : UNDER RULE 1:19-8  
ETHICS OPINION NO. 735 :  
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: :  
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**NEW JERSEY STATE BAR ASSOCIATION  
BRIEF IN RESPONSE TO BRIEF AND APPENDIX ON BEHALF OF  
THE ADVISORY COMMITTEE ON PROFESSIONAL ETHICS**

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## Introduction

The New Jersey State Bar Association (NJSBA) submits this brief in reply to the opposition submitted by the Attorney General of New Jersey to the NJSBA petition seeking review of the Advisory Committee on Professional Ethics Opinion No. 735 (ACPE Opinion 735).

## LEGAL ARGUMENT

### I. ACPE Opinion 735 Does Not Promote Access to Legal Services; Rather, it Allows Consumers to be Misled When Seeking Specific Information

It is well-settled that a state is free to impose an outright prohibition on false, deceptive or misleading commercial speech by lawyers. *Ibanez v. Florida Board of Accountancy*, 512 U.S. 136 (1994). Allowing an attorney to purchase another attorney's name as a Google adword to obtain a competitive advantage over another attorney in an internet search result listing does not advance the goal of the advertising rules to increase access to legal services for consumers, as is claimed in the opposition brief. Rather, it allows misleading advertising, whose prohibition is permitted by the *Ibanez* decision, to persist on the internet, and makes it more difficult for consumers to access the particular lawyer they are seeking.

If left to stand, ACPE Opinion 735 would allow a situation where an attorney (or perhaps even more significantly, a law firm) has the option of essentially subsuming another attorney's name simply by paying for an adword that pushes their name and contact information higher in a list of search results, as well as more often, when a consumer is actually looking for the attorney whose name has been purchased as an adword. This is presumably motivated by an underlying intent to misdirect the consumer and encourage prospective clients to contact the attorney who has purchased the adword, rather than the attorney whose name the client used as a search term. This is very different than allowing an interested lawyer or firm to buy descriptive words as adwords, such as "Lawyer in Morris County." ACPE Opinion 735 allows that attorney to actually buy another lawyer's name as an adword.

The opposition brief argues that one's ability to buy another lawyer's name for advertising purposes is the "electronic version of product placement." (AGb10). One example noted in support of this argument analogizes the practice to a consumer being able to "ignore the generic product located next to and packaged similarly to the branded medicine in a drug store." (AGb14). This example, however, is qualitatively different than an ad which purposefully uses another lawyer's name on the internet to obtain business.

There is no question that a user can skip over an ad on the web. (AGb14). But that presents a dilemma. When products are presented in a display in a store, they are typically all within view of the consumer at the same time, without presumption of rank or hierarchy. If one wants to buy Tylenol, one can buy it, or choose a generic acetaminophen product, because both can be easily seen when scanning the full array of products without any interaction with the products themselves and without much effort. But a listing on the internet in response to a search is vastly different. From a consumer standpoint, our culture has been conditioned to typically assume that the top results are the most germane. So, when consumers enter an attorney's name, they expect to be directed to that attorney's information at the top of the list of search results. But, if they are instead directed to a list where another attorney has paid to be at the top and the sought-after attorney can only be found by purposefully scrolling down the page, the result is not merely a consumer "encountering an unwanted ad," (AGb14) but the purchasing attorney's conscious interference in and manipulation of the consumer's choice. Further, if consumers search for the original attorney and are provided instead with a list that presents a different law firm at the top, they may just assume that the original attorney is affiliated with the firm, and proceed to the firm's website, never to return to affirmatively



seek out the attorney they originally sought. In those scenarios, not only has the purchasing attorney or law firm bought the original attorney's name to obtain an economic benefit but the purchasers have engaged in misrepresentation by using the sought-out attorney's name to encourage consumers to view their site instead. Such action arguably amounts to a violation of RPC 7.1 which prohibits attorneys from making false and misleading statements when advertising their services.

Another example posited in the opposition brief supporting the conclusion reached by the Advisory Committee compares buying another attorney's name for adword search purposes with an attorney advertising in the Yellow Pages. (AGb10). If a consumer were to look in the Yellow Pages to find an attorney, they would find a static, alphabetical listing of attorneys. If consumers want to find a specific lawyer, they can look for and find them in the listing without interference by a third party. The Yellow Pages does not direct readers to another attorney when they are looking for a specific person. This example, too, as with the drug store product example, is a passive event and involves no intercession from a third-party that redirects consumers to another attorney who is not the one they are trying to contact.

The NJSBA submits that, by allowing one attorney to buy another attorney's name as a Google adword for search purposes, ACPE Opinion 735 does not promote more consumer access to

lawyers (AGb10). On the contrary, it poses a barrier to the consumer's access to the justice system because it permits one lawyer to pay Google to get in between consumers and the actual lawyers they want to reach.

II. Purchasing Another's Name for Advertising  
Purposes Can Yield Misleading and Unfair Results  
That May Discriminate Against Competing Lawyers

The NJSBA contends that rather than "level the playing field allowing small firms and solos to compete for business" (AGb11), the exact opposite could occur depending on how much money the competing lawyers are willing to spend. The ability of an attorney to purchase another's name as an adword can discriminate against solo and small-firm lawyers in that the competing lawyer or bigger firm, which may have more money, can outbid the solo or small-firm lawyer for the lawyer's own name with no recourse. In that scenario, another lawyer would be permitted to advertise with the sought-after attorney's name simply because the sought-after attorney could not afford to pay more to ensure their name appears at the top of a search list generated from the consumer's request to search for that attorney's name. Perhaps more significantly, the end result could be a scenario where a law firm purchases the names of both the originally sought attorney and the attorney who bought that person's name as an adword, as well as all of the lawyers' names



who practice in a particular practice or geographic area, with the aim of redirecting any consumer conducting a search for any lawyer not associated with the firm.

For these reasons, the NJSBA submits that the practice of buying another's name for Google adword purchases could lead to misleading and unfair results that threaten to harm the public and therefore warrants further discussion and debate by the wider legal community.

### III. Consumers May Not Be Able to Readily Distinguish Between True Search Results and Search Results that are Advertisements

In the NJSBA's brief on the merits, it noted the inability of many internet users to distinguish between ads and organic search results. In response, the opposition brief posits that because the ad is denoted as such in the search result and "both entities" (which it assumes the organic search will be presented near the ad) are "simply presented" in the search (AGb8), a searcher can make an informed choice. Therefore, it is argued, the purchase of another attorney's name as an adword is not unethical. The opposition brief also minimizes the chance of a consumer not understanding the difference between an ad and an organic search because there is a "growing sophistication of the audience." (AGb13).

In the appendix of the NJSBA's brief on the merits, a copy of a search for United Airlines is included, which shows the URL for United Airlines appearing as fourth in the search list. (SB1). A more recent similar search shows United Airlines as the sixth, seventh and eighth listing, followed by three more ads. In the more recent search, the search of the URL for United Airlines is in the middle of the list preceded by and followed by ads making finding its real site even more confusing and difficult. This factual example demonstrates that "searching through" and "discarding ads" is not as inconsequential as the opposition brief would like one to believe.

Indeed, in January 2020 Google instituted a "new look for its search result on the desktop which blurs the line between organic search results and the ads that sit above them. . . Now, there appears to be next to no visual distinction between ads and search results." *Google's Ads Just Look Like Search Results Now*, [theverge.com/tldr/2020/1/23/21078343/google-ad-desktop-design-change-favicon-icon-ftc-guidelines](https://theverge.com/tldr/2020/1/23/21078343/google-ad-desktop-design-change-favicon-icon-ftc-guidelines) (a paper copy is attached as Exhibit A). The author theorizes this new change will encourage the user to click on more ads, which will add to Google's own revenue. This will make it even more difficult for unsophisticated searchers to differentiate between a paid ad or an organic listing.

Under these circumstances, it becomes more imperative that the Supreme Court consider the issues the NJSBA and the Bergen County Bar Association raise in their petitions for review of ACPE Opinion 735, and allow for greater discussion and debate by the entire bar.

Conclusion

The NJSBA does not disparage the diligence of the committee and understands the difficulty this question presents as technology is changing daily. The potential adverse real-life scenarios which can result from the conclusion of Opinion 735 should compel this change to be considered in an open process where all members of the bar may participate. As illustrated herein, the type of advertising contemplated by ACPE Opinion 735 is vastly different than any other type of traditional advertising considered by the Court before, and it deserves widespread discussion and debate.

There are over 98,000 attorneys admitted to the New Jersey bar, approximately 37,000 of whom are in active practice in New Jersey. This decision will impact the use - or misuse - of their very names.

For these reasons, the NJSBA urges the Court to allow for a wider spectrum of the bar to have input, especially when, as is noted in the opposition brief, "advertisements are ubiquitous" (AGb13) and "an internet presence has become an integral part of all business advertising, including the law." (AGb12).

Respectfully,  
New Jersey State Bar Association

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Dated: 1/24/2020

## APPENDIX

## Google's ads just look like search results now

[107 comments](#)

*The latest desktop update blurs the lines*

By [Jon Porter@JonPorty](#) Jan 23, 2020, 8:45am EST

*The blurring of ads and search results. Screenshot by Thomas Ricker / The Verge*

Last week, Google began rolling out a [new look for its search results on desktop](#), which blurs the line between organic search results and the ads that sit above them. In what appears to be something of a purposeful [dark pattern](#), the only thing differentiating ads and search results is a small black-and-white "Ad" icon next to the former. It's been formatted to resemble the new favicons that now appear next to the search results you care about. Early data [collected by Digiday](#) suggests that the changes may already be causing people to click on more ads.

*The Guardian's [Alex Hern](#)* is one of [many commenters](#) to point out the problem, noting that there's now next to no visual distinction between ads and search results. "There is still, technically, \*labelling\*, but it's hard to escape the conclusion that it is supposed to be difficult to spot at a glance where the adverts end," he tweeted.

It's especially striking considering how distinct [Google designed its ads in the past](#). Up until 2013, the search engine gave its ads an entirely different background color to distinguish them from its organic search results. But even after that, it continued to use unique colors that effectively let users quickly see where its ads ended and organic results began.

In a blog post announcing the new design [when it came to mobile last year](#), Google partially explained the change by saying that adding favicons to organic search results means that "a website's branding can be front and center," which means "you can more easily scan the page of results." But it spent far less time talking about the changes to its ad designs, which now feel much more significant, especially when viewing results on a laptop or monitor.

In the past, Google's Sundeep Jain justified simplifying the company's ad designs by saying that a simpler design "makes it easier for users to digest information," according to [Search Engine Land](#). He added that the company was trying to reduce the number of different colors used on a page in order to bring a little more "harmony" to the layout.

Google says a simpler design "makes it easier for users to digest information"

It's hard not to get the feeling that this "harmony" is less about offering a better user experience, and more about helping Google's ad revenue. As [Digiday reports](#), there's data to suggest that's actually the case. According to one digital marketing agency, click-through rates have already increased for some search ads on desktop, and mobile click-through rates for some of its clients increased last year from 17 to 18 percent after similar changes to Google's mobile search layout.

Google is fundamentally an ad business. In the third quarter of 2019, Google's parent company Alphabet made nearly \$34 billion from Google advertising, out of a total revenue of \$40 billion for Alphabet as a whole. At that sort of scale, small changes in ad click-through rates could end up having a huge effect on Alphabet's bottom line, even if it means tricking users for cheap clicks.

