



## NEW JERSEY STATE BAR ASSOCIATION

June 22, 2020

Honorable Stuart Rabner, Chief Justice  
and Associate Justices of the Supreme Court  
New Jersey Supreme Court  
Hughes Justice Complex/ P.O. Box 037  
Trenton, NJ 08625-0037

Re: In re ACPE Opinion 735  
Docket No. 083396 (A-61/62-19)

Dear Chief Justice Rabner and Associate Justices of the Supreme Court:

Please accept this Letter Brief in lieu of a more formal brief in the above referenced matter. The New Jersey State Bar Association (NJSBA) reiterates the arguments contained in its previous submissions that, contrary to the conclusion of the Advisory Committee on Professional Ethics in its Opinion 735 (ACPE 735), the purchase of a competitor lawyer's name to appear higher in the list of search results could be misleading communication pursuant to 7.1(a) and misleading in violation of RPC 8.4 (c)<sup>1</sup>.

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<sup>1</sup>This brief addresses the ethical implications of an attorney purchasing another attorney's name without their knowledge for advertising purposes. It does not address a situation where an attorney pays a fee for the "good will" associated with a lawyer's name or a firm's name directly from the lawyer or firm as part of a business transaction that involves the lawyer or firm whose name is being purchased as a knowing party to the transaction.

The NJSBA posits that (1) ACPE 735 is based on inaccurate presumptions that led to questionable conclusions, (2) appropriating another's name and capitalizing on their goodwill and reputation does not comport with fairness, indeed it borders on deceit, and (3) retention of legal counsel is fundamentally different from the purchase of ordinary consumer products and must be viewed through a different lens.

For these reasons, the NJSBA urges this Court to decline to adopt the conclusions in ACPE 735 and instead engage in a wide-ranging review of the advertising possibilities now available as a result of evolving technology involving internet browsers. This will ensure that lawyers continue to be held to the highest standards of ethics and professionalism when engaging in new technology, and consumers remain protected from misleading and deceiving practices in situations where they are most vulnerable.

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Rulings Being Appealed

Advisory Committee on Professional Ethics Opinion 735,  
<https://www.njcourts.gov/notices/2019/n190806c.pdf?c=tOj>.

Procedural History/Statement of Facts

On August 6, 2019, the Supreme Court published Advisory Committee on Professional Ethics Opinion 735 relating to a lawyer’s use of internet search engine keyword advertising. On September 4, 2019, the Bergen County Bar Association (BCBA) filed a Petition seeking review of the Opinion. On September 13, the NJSBA also filed a petition seeking review of the Opinion. The state filed its response on December 13, 2019, and the BCBA and NJSBA filed reply briefs on December 24, 2019 and January 24, 2020, respectively.

The Supreme Court issued Orders dated May 5, 2020 granting the Petitions for Review and allowing the BCBA and NJSBA until June 22 to file supplemental briefs. This brief is submitted is response to those Orders.

## Legal Argument

### I. Using Another Attorney's Name to Attract Clients is a Misleading and Deceitful Communication in Violation of RPC 7.1 and 8.4.

RPC 7.1 states, "A lawyer shall not make false or misleading communications about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement." It clarifies that 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."

RPC 8.4 states, "It is professional misconduct for a lawyer to. . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation. . ."

The inquiry addressed by the Advisory Committee on Professional Ethics in ACPE 735 focused on a practice that allows an attorney to pay for an indirect communication that misleads a consumer into believing that the purchasing attorney's firm most closely matches what the consumer is searching for, rather than the actual website containing the searched name. While a purchasing attorney is not directly communicating misleading information to a consumer, they are indirectly doing so by using their purchasing power to engage the internet browser to lead the consumer to their own website

over the website of the actual attorney being searched. The consumer has no way of knowing that this is occurring and the NJSBA argues that this is tantamount to the type of materially misleading communication prohibited by RPCs 7.1 and 8.4.

While search results may be labeled as "ads" when they first appear, that may not be apparent to an average consumer who is searching quickly or on a mobile device with a small screen. The reason businesses pay to be on the top of a search list is that consumers are most likely to click through to those websites that appear at the top of their search results. Attorneys who engage in this practice are doing so with the actual intent of misleading consumers to click through their website instead of the website of the attorney the consumer intended to find.

The potential for deception is further heightened when the purchasing attorney's website uses descriptive names and not the names of the attorneys involved, such [dwilawyers.com](http://dwilawyers.com). When [dwilawyers.com](http://dwilawyers.com) is returned as a result of the consumer's search for Jane Doe, Esq., it is reasonable to expect that the consumer is going to click on [dwilawyers.com](http://dwilawyers.com), expecting to find information about Jane Doe, Esq.

To prevent consumers from being misled in these scenarios, the NJSBA urges the Court to decline to adopt the conclusion of

ACPE 735 and instead engage in a wider, more comprehensive review of the issues presented.

II. An Attorney's Good Name and Reputation are Unique to the Attorney, and it is Unfair for Others to be Permitted to Capitalize on That Good Name in a Potentially Deceitful Manner by Redirecting Potential Clients.

Attorneys are held to higher ethical standards because of the unique position of trust in which they are placed when representing clients. An attorney's good name and reputation are their lifeblood. Many attorneys spend their entire career building a reputation for outstanding counsel and advocacy on behalf of their clients, and they rely on repeat business based on the value of their good name and reputation. Clients seek out specific attorneys because of that reputation. Yet, ACPE 735 permits others to profit from the good name and reputation that an attorney has worked diligently to achieve by allowing them to entice consumers to their own website, in a manner that is unknown to the consumer, contemporaneous with the fact that the consumer is clearly searching for another attorney in a manner that is hidden and unknown to the consumer. At worst, this practice is unethical and deceitful; at best, it deserves wider discussion, debate, review and regulation.

III. There are Alternative Ways to Direct Consumers to a Purchasing Attorney's Website than by Using a Competitor Attorney's Name.

If the Court declines to accept ACPE 735 and instead prohibits the type of advertising at issue, attorneys seeking to capitalize on internet browser searches have many other ways to do so. There are numerous other word combinations attorneys can use to direct consume searches to their website that do not involve using another's exact name. They can choose key words that reflect their geographical location, their area of practice or any one of numerous other descriptive words that would lead potential clients to them. None of those word combinations purchases would yield the kind of misleading results at issue in this matter. The only words complained of here, that give the NJSBA pause, are those that encompass an attorney's actual name, which they have spent a lifetime building a reputation around.

When a potential client searches for a specific attorney, that client should have the right to expect that attorney will be at the top of the search results that are returned, and they should not have to cull through false results to get to the individual they are actually seeking.

Conclusion

For all of the reasons contained in the NJSBA's prior submissions in this matter, and the reasons contained herein, the NJSBA urges the Court decline to adopt the conclusions contained in ACPE 735. Instead, the Association urges the Court to engage in a wide-ranging review of the advertising possibilities now available as a result of evolving technology. This approach will ensure that lawyers continue to be held to the highest standards of ethics and professionalism when engaging in new technology, and consumers remain protected from misleading and deceiving practices in situations where they are most vulnerable.

Very truly yours,

/S/

Kimberly A. Yonta, Esq.  
President  
Attorney ID No.: 007002000

cc: Donna Arons, Esq., Assistant Attorney General  
Andrew J. Cevalco, Esq.  
Thomas Loikith, Esq.