

IN RE OPINION NO. 735 OF THE
ADVISORY COMMITTEE ON
PROFESSIONAL ETHICS

SUPREME COURT OF NEW JERSEY

DOCKET NO. 083396 (A-61/62-19)

On Appeal to the Supreme Court
of New Jersey from the Advisory
Committee on Professional Ethics

SUPPLEMENTAL BRIEF ON BEHALF OF
BERGEN COUNTY BAR ASSOCIATION

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Table of Contents

	Page
Table of Authorities	ii
SUMMARY PROCEDURAL HISTORY AND STATEMENT OF FACTS	1
LEGAL ARGUMENT	5
I. THE SPECIAL ADJUDICATOR'S FACTUAL FINDINGS DEMONSTRATE THAT IT IS INHERENTLY MISLEADING FOR AN ATTORNEY TO PURCHASE A COMPETING ATTORNEY'S NAME AS A KEYWORD	5
1. Purchasing a competing attorney's name as a keyword is misleading because "most users have a difficult time telling the difference" between paid and organic results.....	6
2. Search engines' evolving advertising guidelines and restrictions do not serve a protective function.....	9
II. ETHICS COMMISSIONS' RECENT ADVISORY OPINIONS AGREE ATTORNEYS VIOLATE THE RULES OF PROFESSIONAL CONDUCT WHEN PURCHASING A COMPETING ATTORNEY'S NAME AS A KEYWORD	11
CONCLUSION	14

TABLE OF AUTHORITIES

Page(s)

Rules

RPC 8.4(a) 7

RPC 8.4(c) *passim*

Regulations

ACPE Opinion No. 735 *passim*

Md. Bar Ass'n Comm'n on Ethics Op. 2022-02, at 8 13, 14

Mich. Bar Comm'n on Prof. and Jud. Ethics Op. RI-385 13

Miss. Bar Ethics Comm'n Op. 264 12

N.J. Sup. Ct. Advisory Comm. on Prof. Ethics Op. No.
735..... 8

Other Authorities

Prof. Conduct Op. 2021-04, at 2 11, 12

Report of the Special Adjudicator *passim*

SUMMARY PROCEDURAL HISTORY

AND STATEMENT OF FACTS

The New Jersey Supreme Court's Advisory Committee on Professional Ethics issued Opinion #735 on June 25, 2019.

On or about September 15, 2019, the Bergen County Bar Association petitioned this Court for review of that decision. That application was granted on May 5, 2020. Various interested parties were also granted the right to file amicus briefs, and the Court heard oral argument on those soon after.

On October 1, 2021, this Court issued an Order appointing the Honorable Jeffrey R. Jablonski, A.J.S.C. as Special Master to conduct a detailed factual analysis of issues delineated by the Court.

After a period of discovery and various conferences with the Court, Judge Jablonski held a hearing on this matter on October 23 and October 24, 2023. At that hearing, he took testimony from various experts as well as from attorneys who had been affected by the advertising conduct described in ACPE 735. On June 7, 2024, Judge Jablonski submitted to this Court his "Report of the Special Adjudicator". In that report, Judge Jablonski made eighteen factual findings (along with subparts) in response to this Court's Order remanding this matter for further proceedings.

The findings of Judge Jablonski that are of particular relevance to the issue at hand are as follows:

1. All major search engines use complex algorithms to retrieve the relevant pages in response to a user's search. See Report of the Special Adjudicator, Finding #2, at 17. One of the ranking factors in producing search results is the presence of keywords. Advertisers can pay for specific keywords to have their ads appear when those keywords are searched. See id. at 18-19, Finding #2 C.

2. The search results generated by paid advertising often appear ahead of organic searches. See id. at 26, Finding #11 D. Priority placement is a key feature of paid advertising and is designed to ensure the paid ads have prominence. See id. at 26, Finding #11 E.

3. Although such paid ads are usually designated as such, most users have a difficult time distinguishing between paid and organic advertisers. In fact, recent scholarship reveals that 68.2% of respondents were unable to recognize a Google Ad on a SERP. See id. at 29, Finding #16.

4. The algorithms and protocols that search engines utilize to generate search results are proprietary and are not disclosed to the public. See id. at 29, Finding #17. If an attorney does not participate in paid search advertising, their information is not included in the paid search areas of a SERP. See id. at 24, Finding #9.

5. The charges for paid keyword advertisers are generated when users click on the displayed advertisement. See id. at 23, Finding #4 G.

6. The algorithms and protocols that search engines utilize to generate search results are proprietary and are not disclosed to the public See id. at 29, Finding #17. Search engines rely on AI to refine these algorithms. See id. at 30, Finding #18.

7. Although the algorithms and protocols for determining the display of an advertisement in response to a keyword search are proprietary to each search engine, one of the factors that influences the display is the amount paid by the advertiser and keyword relevance. See id. at 22, Finding #4 D.

8. Search engines create their own guidelines regarding what keywords are available for purchase and in fact restrict or prohibit certain keywords. See Id. at 23-24, Findings #5, #6, and #7.

9. Search engines have restrictions to ensure that paid "advertisements are compliant with both legal and ethical standards". See Id. at 24, Finding #8.

10. Paid search ads are prioritized over organic search results. Priority placement is a key feature of paid advertising and is designed to ensure that paid ads have prominence. See Id. at 26, Finding #11E.

11. Organic listings are often considered more authentic and trustworthy than paid keywords. See Id. at 28, Finding #14.

LEGAL ARGUMENT

I. THE SPECIAL ADJUDICATOR'S FACTUAL FINDINGS DEMONSTRATE THAT IT IS INHERENTLY MISLEADING FOR AN ATTORNEY TO PURCHASE A COMPETING ATTORNEY'S NAME AS A KEYWORD

Because the Special Adjudicator's Report finds keyword advertising links may be misleading to consumers, this Court should modify Opinion 735 to provide that the practice of an attorney purchasing another attorney's name as a keyword to be used in competitive internet advertising violates RPC 8.4(c), which provides that "[it] is professional misconduct for a lawyer to . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation." As has been previously argued before this Court, the only motivation for using another attorney's name as a keyword is so that the advertising attorney can gain an economic benefit from the other attorney's reputation. The Report's findings prove that such misleading conduct is effective because (1) the majority of consumers cannot distinguish between the organic search results they intend to find and those to which an advertising attorney seeks to misdirect them; and (2) the evolving limits and restrictions search engines impose on their advertiser customers do not supplant the limits and restrictions this Court imposes on attorney conduct. Thus, using a competitor attorney's name for keyword advertising violates RPC 8.4(c).

1. Purchasing a competing attorney's name as a keyword is misleading because "most users have a difficult time telling the difference" between paid and organic results.

The Special Adjudicator found based on the expert testimony before him that 68.2% of consumers were unable to recognize an advertisement in search engine results. Report of the Special Adjudicator, at 29 [hereinafter Report]. "Consequently, existing or potential [consumers] are left on their own to ascertain the validity of any search result." Id. Thus, placing the burden to distinguish between organic and paid results onto consumers enables advertising attorneys to successfully misdirect the majority of consumers unfamiliar with the "nuances" distinguishing ads and organic results. See id. In fact, it seems clear that both the advertising attorney and the companies that own the search engines are financially motivated to encourage that misdirection. The companies are paid "per click" and the advertising attorneys presumable generate business based on same. But for the strong likelihood for consumer misdirection, there would be no incentive for attorneys to invest in these marketing campaigns.

The Report found that with the proper keywords purchased, keyword marketing can be a highly cost-effective method of very quickly directing users to one's website. Report at 19. Deploying a competing attorney or firm's name to do so is dishonest because the purchasing attorneys are intending to misdirect consumers into

clicking their page - which is unrelated to and unassociated with the competing attorney - by relying on the fact that more than two-thirds of consumers, presumably mostly unsophisticated consumer, may fail to know the difference.

This misdirection is facilitated through search engines' physical placement of the advertised results on top of the results the user actually seeks. See Report at 28. The Report found that "[t]op positions achieve higher click through rates and that position often drives traffic to the site." Id. Advertisers seek the top spot because it "fosters the perception of authority and relevance among users." Id. Accordingly, when an advertising attorney purchases a competitor's name as a keyword, the attorney seeks to drive traffic by anticipating that consumers believe the advertiser is somehow related to the competing attorney who the consumer actually intends to find. This conduct is, at best, intentionally deceptive - the very definition of fraudulent. And even if no consumers were actually tricked into believing the advertising attorney is related to or associated with the competing attorney, the advertising attorney's *attempt* to do so alone violates the RPC. See RPC 8.4(a).

Ultimately, Opinion 735's reasoning relied on the assumption a consumer would differentiate between an advertising attorney's site and the site for the attorney a consumer actually intended to find:

The Committee . . . finds that purchasing keywords of a competitor lawyer's name is not conduct that involves dishonesty, fraud, deceit, or misrepresentation. The websites of the keyword purchaser's law firm and the competitor's law firm will, presumably, both appear in the resulting search. 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 . . . The user can choose which website to select and the search engine ordinarily will mark the keyword-purchased website as paid or "sponsored." This is not deceptive, fraudulent, or dishonest conduct within the meaning of RPC 8.4(c).

N.J. Sup. Ct. Advisory Comm. on Prof. Ethics Op. No. 735, at 3 (June 25, 2019). But as the Report makes clear, 68.2% of consumers do not recognize the distinction between their intended search result and the sponsored results. Report at 29. Therefore, this Court should modify Opinion 735 to reflect that attorneys who purchase competitors' names as keywords is inherently misleading conduct in violation of RPC 8.4(c) in order to protect consumers/clients, which is the purpose of these rules.

It must also be noted that inherent in the rationale of ACPE 735 is the common sense recognition that consumers value organic search results more highly than paid advertisements. Otherwise, the ability to distinguish between paid advertisements and organic searches would be irrelevant.

2. Search engines' evolving advertising guidelines and restrictions do not serve a protective function.

This Court should not defer to Google, Microsoft, or any other search engine providers in determining the appropriate guidelines for attorney conduct. The Report found that "[e]ach search engine maintains its own policies . . . to prevent the misuse of sensitive terms, the dissemination of misleading information, and any content that violates the search engines' advertising policies," with violating advertisers subject to suspension or other adverse consequences. Report at 23-24. It further found that, per the companies' restrictions, advertisements "cannot be misleading and must also comply with all other content-based guidelines set forth by the platforms," and that "these restrictions ensure that advertisements are compliant with both legal and *ethical* standards and also provide a positive and safe user experience." Id. at 24 (emphasis added).

The ethical standards Google and other search engine providers impose on their advertising customers cannot replace this Court's Rules of Professional Conduct. While search engine companies have deemed "white hat" search engine optimizations to be ethically legitimate attempts to improve website clicks that "comply with a search engine's guidelines," in the context of attorney ethics, these companies' standards are irrelevant. Report at 16. It is axiomatic that this Court determines what constitutes

ethical and proper attorney advertising conduct - not the policies of companies with an economic incentive to direct consumers to and advertiser's website.

The "complex" and "sophisticated" algorithms these companies deploy "are proprietary and they are not fully disclosed to the public." Report at 17, 28-29. They are continually tweaked and modified over time to increase clicks and revenue. Neither this Court nor the public will ever know how they actually work and what weight they give to private names as search terms. See id. at 29. The Court cannot rely on the market to regulate ethical attorney conduct when the market is motivated to direct consumers to its advertisers. Consumers' existing difficulty differentiating ads from organic results is clear and may grow even greater as search engine companies continually adjust their algorithms and the formatting of ads in results to drive revenue. And with the search engine companies' "increasing[] use" of AI to "enhance digital marketing and search engine strategies," the sophistication and complexity of keyword advertising methods will only increase. Id. at 30.

Further, attorneys whose names are subjected to keyword purchase should not bear the burden of protecting themselves and their prospective clients from another attorney's online advertising campaign. The Report noted the recourse to which attorneys might pursue to prevent advertising attorneys from

benefitting from their name and reputation: “[C]ease and desist letters, threatened or actual legal action, complaints to the platform (if trademark infringement occurs), and employing keyword exclusion lists.” Report at 25. It also noted that for “\$10-\$15 per day plus a management fee,” an attorney can determine whether name is not being used adverse to them. Id. at 10. Innocent attorneys should not be forced – to their own financial detriment – to defend against another attorneys’ deceptive conduct. More importantly, the availability of possible mitigation methods does not justify deceptive conduct by the advertising attorney.

Accordingly, this Court should modify Opinion 735 to clarify that an advertising attorneys’ purchase of a competing attorney’s name as a keyword is inherently misleading conduct that violates the Rules of Professional Conduct.

II. ETHICS COMMISSIONS’ RECENT ADVISORY OPINIONS AGREE ATTORNEYS VIOLATE THE RULES OF PROFESSIONAL CONDUCT WHEN PURCHASING A COMPETING ATTORNEY’S NAME AS A KEYWORD

Post-Opinion 735, several states’ ethics boards have rejected attorney use of competitor attorneys’ names in keyword advertising. In 2021, for example, Ohio’s Board of Professional Conduct found a lawyer or law firm violates RPC 8.4(c) when purchasing a competitor lawyer’s name for use in online keyword advertising. Ohio Bd. of Prof. Conduct Op. 2021-04, at 2 (June 11, 2021). As the Board explained, because “the purchase and use of a competitor lawyer’s or law firm’s name as a keyword for advertising

is an act that is designed to deceive an Internet user," the conduct constitutes misrepresentation in violation of RPC 8.4(c). Id. (emphasis added). Internet users may be deceived because unsophisticated consumers do not realize the top search result is not the intended lawyer or law firm. Id. at 3. And even when consumers do not fall for the advertising attorney's top search result, the Board recognized that the advertising lawyer "at the very least violated [RPC] 8.4(a)" because their keyword purchase constitutes an attempt to misrepresent in violation of RPC 8.4(c). Id. (emphasis added).

One year later, the Ethics Committee of the Mississippi Bar found that attorneys violate the Rules of Professional Conduct when employing a lead generator service that utilizes another attorney or law firm's trademark, name, or likeness. Miss. Bar Ethics Comm'n Op. 264, at 1 (Apr. 7, 2022). The Committee determined that use of another attorney's name or likeness to advertise an unaffiliated practice manipulates potential clients. Id. Employing a lead generator to engage in this manipulation on the attorney's behalf is just as impermissible. Id. at 2. The Committee explained that this advertising practice—whether or not done through a lead generator—constitutes false and deceptive communication because the advertising attorney does not have permission from the attorney or law firm to use their name, likeness, or trademarked materials. Id. at 1.

Michigan's Bar concluded the same: "Contrary to the reasoning of the Texas opinion," the Michigan Bar explained that "[t]he use of a competitor's name or tradename without consent in competitive keyword advertising is inherently deceptive." Mich. Bar Comm'n on Prof. and Jud. Ethics Op. RI-385, at 2-3 (Nov. 18, 2022) (emphasis added). The Michigan Bar rejected the proposition relied on in the Texas and New Jersey advisory opinions—that it is highly unlikely a reasonable person using a search engine would be misled into thinking the top results were associated with the lawyer initially searched for—because advertisements for other attorneys prominently displayed at the top of search results can be particularly confusing when a consumer is attempting to find a specific lawyer or law firm's information. Id. Even if the search engine labels the listing as an "ad," consumers may still be deceived when the advertisement is displayed as a top result. Id.

The Maryland Bar's Committee on Ethics similarly "agrees with the New Jersey Bar Association" and acknowledged "[t]he core reason for purchasing as a keyword the name of another lawyer or law firm is to appropriate for oneself the earned reputation of another lawyer or firm in order to further one's own financial interests." Md. Bar Ass'n Comm'n on Ethics Op. 2022-02, at 8 (Jan. 11, 2023). It found that "only about [one] in [six] searchers say they can consistently distinguish between paid and unpaid results." Id. at 2-3. Accordingly, the Committee recognized the conduct "is

inherently deceptive, especially to the unsophisticated consumer, evidences a lack of professional integrity, and calls into question the trustworthiness of the lawyer who does so." Id. at 8.

This Court should follow the conclusions of ethics commissions in Ohio, Mississippi, Michigan, and Maryland and modify Opinion 735 to recognize that the practice of an attorney purchasing as a keyword a competing attorney's name to be used in order to display the advertising attorney's own website in the search results violates RPC 8.4(c).

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that ACPE Opinion No. 735 be overruled and that this court determine that the purchase of another attorney's name as a keyword by an advertising attorney be determined to violate R.P.C 8.4.

Respectfully submitted,

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