

Andrew J. Cevalasco, Esq. (ID No. 018911980)  
ARCHER & GREINER, P.C.  
Counselors at Law  
Court Plaza South, West Wing  
21 Main Street, Suite 353  
Hackensack, New Jersey 07601  
(201) 342-6000

Attorneys for Petitioner,  
The Bergen County Bar Association

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IN RE SUPREME COURT

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PROFESSIONAL ETHICS  
OPINION NO. 735

SUPREME COURT OF NEW JERSEY

A-61-62 September Term 2019

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Agency: Advisory Committee  
on Professional Ethics

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**REPLY SUPPLEMENTAL BRIEF**

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On the Brief

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## LEGAL ARGUMENT

### **I. THE RECORD BELOW REQUIRES REVERSAL OF ADVISORY COMMITTEE ON PROFESSIONAL ETHIC OPINION 735.**

The Argument advanced by the Advisory Committee on Professional Ethics in support of Opinion 735 fails to focus on the attorney conduct in the question and instead attempts to justify intentionally deceptive conduct by minimizing the potential impact of that conduct upon the public. The Committee properly notes that "long standing precedent teaches that the rule (Rule 8.4(c)) is aimed at deliberately deceptive or illegal misconduct . . ." See ACPE Supplemental Brief at p.10. Its argument against enforcement here conflates the advertising attorney's misleading conduct with the content of advertising attorney's ad governed by RPC 7.1. The Committee's argument also downplays the explicit finding by Judge Jablonski that some consumers do in fact have difficulty distinguishing between paid advertisements and organic search results and are misled. See Report of the Special Adjudicator, at 29. It minimizes that key fact, arguing that because consumers "have the ability

to filter through the search results" the attorney conduct in purchasing a competitor's name as a keyword for the express purpose of diverting them is not misleading. This argument ignores the fact that some consumers are in fact misled and they deserve protection. It further ignores the intent of an advertising attorney to redirect consumers from the website of the attorney whose name is being searched to their own websites.

There is nothing inherently altruistic on the part of the advertising attorney or beneficial to the consumer in redirecting a specific attorney name search to the website of a different attorney. The fact that some consumers may be able to recognize the deceptive conduct and not be fooled by it does not make the conduct any less intentionally deceptive or more ethical. RPC 8.4 is no less implicated because the deceptive conduct of an attorney is discovered or ineffectual.

Moreover, advertising attorneys have a robust universe of generic search terms from which to choose in order to attract potential clients to their websites.

Precluding an advertising attorney from using the name of a competitor as a search term is a narrow and ethically necessary restriction. It is unlikely to have any effect on a consumer's ability to locate legal services that are "more competitive or more convenient".

In short, RPC 8.4 is directed at precisely the attorney conduct at issue in this case. The argument that the consumer can avoid being misled misses the point. It is the attorney's conduct, not the consumer's savvy that must be the focus of this Court. In fact, such an argument essentially concedes that the conduct complained of is deceptive and misleading and a violation of RPC 8.4.

**II. RPC 8.4 IS THE APPROPRIATE VEHICLE FOR ADDRESSING DECEPTIVE OR MISLEADING ATTORNEY CONDUCT**

The argument that RPC 7.1 should control the issue presently before this court misses an important distinction. RPC 8.4(c) prohibits attorney conduct involving "dishonesty, fraud, deceit or misrepresentation." It bars attorneys from purchasing competing lawyers' names as keywords not because the

purchase constitutes a misleading *communication*, but because the chosen *method* of delivering the communication may trick or deceive internet users. Because RPC 8.4 focuses on attorney conduct and not advertising content, it and not RPC 7.1 or 7.2 is the appropriate vehicle for barring attorneys from the misleading *method* of communicating/advertising i.e. purchasing competing lawyers' or law firms' names as keywords.

Prohibiting this misleading conduct under RPC 8.4 does not implicate the *content* of an attorney's advertising communications under RPC 7.1, 7.2, or any other attorney advertising guidelines. R.P.C. 8.4 applies because the means by which the advertiser seeks prospective clients to engage with the content of their advertisement is deceptive and misleading *conduct*.

The Maryland State Bar Association's Committee on Ethics addressed this precise issue and found that Rule 8.4, rather than the attorney advertising rules is the appropriate vehicle for restricting deceptive means of communication. See Md. Bar Ass'n Comm'n on Ethics Op.

2022-02, at 5 (Jan. 11, 2023). The Committee found the conduct violates Rule 8.4 regardless of whether the advertising content is substantively misleading. It explained that purchasing competing attorneys' names as keywords is an advertising method that is "inherently deceptive, especially to the unsophisticated consumer, evidences a lack of professional integrity and calls into question the trustworthiness of a lawyer who does so," all of which fall squarely under RPC 8.4's conduct restrictions. Id. at 8.

Ohio's Board of Professional Conduct reached the same conclusion: "The purchase and use of a keyword in advertising does not result in the dissemination of any information about the lawyer or by the lawyer that is not publicly available," thus, "so long as the information on the purchasing lawyer's own website is not false, misleading, or nonverifiable," RPC 7.1 is not violated. Ohio Bd. of Prof. Conduct Op. 2021-04, at 2 (June 11, 2021). But it separately recognized that the purchase of a competing lawyer or law firm's name for use in keyword



advertising is nonetheless "an act that is designed to deceive an Internet user and thus contrary to Prof.Cond.R. 8.4(c)." Id. (emphasis added).

This Court should also rely on that reasoning to rule that RPC 8.4(c) applies to his matter.

**III. THE PURCHASE OF COMPETING LAWYERS' NAMES IS MATERIALLY INDISTINGUISHABLE FROM USE OF COMPETING LAW FIRMS' NAMES**

There is no material distinction between use of a lawyer's name as a keyword and use of a competing law firm's name. Using competitive keywords in this manner is misleading to consumers in violation of RPC 8.4(c) in either circumstance. Arguing that it may be somewhat easier to detect the deception if a competing law firm name is used rather than that of an individual attorney ignores the fact that some people are misled and fails to focus on the advertising attorney's conduct, which is what R.P.C. 8.4 is intended to regulate.

Jurisdictions that have considered attorney use of competing attorney or law firm names in keyword advertising have not distinguished between the two. See, e.g., Mich. Bar Comm'n on Prof. and Jud. Ethics Op. RI-

385, at 2 (Nov. 18, 2022) ("As a result of competitive keyword advertising or "leeching," consumers searching for a specific lawyer or law firm may unwittingly follow advertising links to the sites of entirely different attorneys or law firms that are not associated with the specific lawyer or law firm for which consumers have searched."); accord Md. Bar Ass'n Comm'n on Ethics Op. 2022-02, at 8 (Jan. 11, 2023); Ohio Bd. of Prof. Conduct Op. 2021-04, at 2 (June 11, 2021) (emphasis added).

Further, North Carolina recently extended its ban on the purchase of a competing attorneys' name to unique law firm trade names. The committee determined:

[A lawyer] intentionally purchasing the recognition associated with [another lawyer's] unique law firm trade name to direct—if not divert—consumers to [the lawyer's] website . . . creates confusion for consumers who are specifically looking for [the other lawyer's] website based upon a search of [their] specific and unique law firm trade name to the detriment of the consumer. As such, the conduct is "neither fair nor straightforward" and is, therefore, dishonest in violation of Rule 8.4(c).

N.C. Bar. Ethics Comm. 2023 Formal Ethics Op. 4, at 1  
(Jan. 19, 2024).

This Court should follow the well-reasoned opinions of the jurisdictions that have considered the issue and draw no distinction between an attorney's use of a competing lawyer's name from a law firm's names in keyword advertising. Engaging in the use of either search term violates RPC 8.4(c).

**IV. DECEPTIVE AND MISLEADING CONDUCT VIOLATES RPC  
8.4 IRRESPECTIVE OF WHETHER IT VIOLATES TRADEMARK LAW**

Jurisdictions that have considered the issue recognize that regulating conduct under the rules of attorney ethics is distinct from federal trademark law. See Mich. Bar Comm'n on Prof. and Jud. Ethics Op. RI-385, at 3 n.2 (Nov. 18, 2022) ("Although outside the scope of this opinion, it is worth noting that in some instances, competitive keyword advertising may violate copyright law." (Citation omitted)). These jurisdictions did not rely on trademark law in their analyses. Looking instead to research on the percentage of consumers that cannot distinguish paid search results from organic results is

most instructive on this issue. See Md. Bar Ass'n Comm'n on Ethics Op. 2022-02, at 3 (Jan. 11, 2023).

Further, importing conclusions from commercial law is inappropriate in the context of attorney ethics. It has long been recognized by this Court that the practice of law is a profession, not merely a business. As such, this Court has held attorneys to a higher standard than those engaged in ordinary commerce. As this Court has noted: "The [legal] profession in New Jersey and its qualities represent, in our judgment, an important public interest worth preserving." Petition of Felmeister & Isaacs, 104 N.J. 515, 544, 518 A.2d 188, 203 (1986). These principles have been addressed extensively in the area of attorney advertising, where this Court has balanced the value of preserving the integrity of the legal profession with the value of providing more expansive information to the public. See Id. Although giving due deference to the latter, the Court has exercised its powers to regulate advertising precisely to protect the public and the profession. Thus,

regardless of whether the practice of purchasing a competitor's name as a keyword would impose civil liability on a party in the commercial marketplace, within our profession that conduct can and should be regulated by this Court to protect the public and uphold the integrity of the profession.

**CONCLUSION**

For the reasons set for above, it is respectfully submitted that this Court should find use of a competing attorney or law firm's name in online keyword advertising is deceptive and misleading conduct in violation of RPC 8.4(c).

Respectfully submitted,

ARCHER & GREINER, P.C.  
*Attorney for Petitioner*  
*Bergen County Bar Association*



By: \_\_\_\_\_  
Andrew J. Cevasco, Esq.

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