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## PRELIMINARY STATEMENT

Attorneys spend their entire careers earning and building a reputation for outstanding counsel and advocacy on behalf of their clients, and for integrity and professionalism in their representation. At its core, the practice here - the use of an attorney's name as a keyword search term for purposes of internet advertising by another attorney - is the practice of capitalizing on an attorney's life work without their knowledge or consent for the purpose of gaining an economic advantage. In Opinion 735, the Advisory Committee on Professional Ethics (ACPE), found the practice does not violate under the Rules of Professional Conduct (RPCs). The New Jersey State Bar Association (NJSBA) respectfully submits the practice is misleading, dishonest and perhaps deceitful, and should not be condoned by this Court.

The Special Adjudicator's findings, submitted to the Court for its consideration after a lengthy discovery process and hearing, illustrate how and why attorneys engage in the practice and what they gain from it. Importantly, the Special Adjudicator's findings conclude that potential clients are likely not able to distinguish between internet search results that are paid advertising, including as a result of purchased keywords, and those organic results that appear in direct response to the search terms a user entered.

A number of individuals participated in the Special Adjudicator process by submitting interrogatory answers, providing testimony at the hearing, or both. Their participation illustrates the confusing effects of keyword advertising where another lawyer used their name and reputation in an effort to redirect traffic to the lawyer's website and potentially gain new clients. Their stories also provide insight into the extensive efforts taken to stop the practice and rectify any confusion.

A majority of state bars and state ethics commissions examining the practice of keyword advertising utilizing another attorney's name as a keyword have found the practice under consideration to be "deceitful," "confusing," "unprofessional," and worthy of a reprimand. The NJSBA respectfully urges this Court to come to the same conclusion and reverse ACPE Opinion 735.

### PROCEDURAL HISTORY AND STATEMENT OF FACTS

On June 25, 2019, the ACPE issued Opinion 735 finding that "a lawyer may, consistent with the rules governing attorney ethics, purchase an internet search engine advertising keyword that is a competitor lawyer's name, in order to display the lawyer's own law firm website in the search results when a person searches for the competitor lawyer by name." N.J. Sup. Ct. Adv. Comm. On Prof. Ethics Op. No. 735 (June 25, 2019) at 4.

On Sept. 13, 2019, the NJSBA filed a Petition for Review asking the Supreme Court to review the Opinion and engage in an examination of the advertising and soliciting possibilities now available as a result of evolving technology with the goal of ensuring lawyers are held to the highest standards of professionalism and consumers remain protected from potentially misleading and deceiving practices.

The Bergen County Bar Association (BCBA) also filed a Petition for Review, and other organizations, including Masters Marketing Group, New Jersey Defense Association and the New Jersey Civil Justice Institute, filed *amicus curiae* briefs with the Court.

On May 5, 2020, the Court granted the NJSBA and BCBA petitions. Oral argument was heard on Nov. 10, 2020.

On Oct. 1, 2021, the Court issued an Order appointing Hon. Jeffrey R. Jablonski as a Special Adjudicator and charged Judge Jablonski with conducting a detailed factual analysis of several enumerated issues.

The Special Adjudicator oversaw a period of discovery where the parties engaged experts, exchanged reports, and submitted form interrogatory answers from affected individuals. A hearing was held on Oct. 23 and 24, 2023, during which experts and affected individuals testified.

On June 7, 2024, the Special Adjudicator submitted a “Report of the Special Adjudicator” (Report) to the Court for its consideration. The Report explained the format of the hearing and record, contained a factual framework, referenced information about other states’ approaches to the issue, and enumerated 18 factual findings.

This brief responds to the Report pursuant to the Court’s Oct. 1, 2021 Order.



## ARGUMENT

- I. The Special Adjudicator's Findings Support the NJSBA Arguments that the Purchase of a Competing Attorney's Name as a Keyword Search Term for Advertising Purposes is Misleading, Dishonest and Prohibited by the Rules of Professional Conduct.

The NJSBA has argued, beginning with the filing of the Petition for Review in this matter, that purchasing another person's name for use as a keyword search term designed to intentionally lead a consumer to a different website than the one which they intended does not comport with a lawyer's obligation to be honest and truthful, and is a misleading and deceitful practice in violation of RPCs 7.1 and 8.4. The findings contained in the Report bolster these arguments. Those findings explain how keyword advertising works, the business motivations and economic incentives behind such advertising, and the potential results that can be achieved. Most importantly, the findings conclude that most users cannot differentiate between a paid advertisement and an organic result that appears in response to their search. "The differences between organic and paid advertising searches are nuanced and most users have a difficult time telling the difference between them." Report at 29.

That is because, in purchasing certain keywords, the purchaser is granted priority placement in the search results, as paid search results are prioritized over organic search results to ensure they have prominence and are seen first

by the user. Report at 26. Appearing higher in the search results increases the likelihood of a user clicking through to the site being advertised, Report at 26, thus misdirecting consumers who are searching for something or, in this case, someone else.

The decision to bid on specific keywords to have one's ad appear in response to a search for those words is very intentional. Advertisers often optimize their ads by, among other things, selecting the right keywords. Report at 19. While paid ads are usually designated with a small "Ad" or "Sponsored" moniker to differentiate them from the organic results, there are many benefits obtained by using keyword marketing campaigns. Id. Advertisers can more accurately target specific audiences and can direct users to a specific landing page. Id. Such efforts are very cost effective if they are managed correctly to ensure optimization. Id. Keyword advertising presumably results in increased traffic to an advertiser's website, as charges are generated when users click on the displayed advertisement. Report at 18-19. If no one clicked on the paid ads, there would be no incentive for a search engine to continue to offer them or for advertisers to continue to purchase them.

It is important for an advertiser to find the right keywords to purchase to ensure their website is seen and clicked on. For a lawyer, using as a keyword search term a competitor attorney's name who has earned a good reputation

and enjoys significant prominence in a practice area will increase the likelihood that information about the advertiser's law firm website will be seen, as it will likely appear in response to someone searching for the other prominent attorney - many times even above the searched attorney's information. Having the law firm website appear in response to a search for someone else creates the impression that the attorney being searched for is somehow connected to the responding firm, or at least puts the purchasing law firm in front of their competitor's potential clients. This is at best misleading and at worst, dishonest and deceitful.

Even the search engines themselves recognize that some keywords should not be permitted. Report at 23-24. Search engines create their own guidelines that govern what keywords can be purchased to prevent the dissemination of what they construe as misleading information. Id.

Admittedly, the algorithms and protocols that the search engines use are proprietary and they are not fully disclosed to the public, so it is possible that search engines use private names even if the name is not a purchased keyword. Report at 29. It is important to note, however, that this case is about regulating *attorney* conduct, not *search engine* conduct.

In addressing attorney conduct, the Special Adjudicator acknowledged that, "Confidence is created and perpetuated in the judicial system based on

the candor, credibility and honesty of those who work in it. It is fundamental, therefore, that attorneys act with complete integrity and scrupulous adherence to the Rules of Professional Responsibility.” Report at 32.

The Special Adjudicator also noted that

Under the current RPCs, lawyers commit professional misconduct if they “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” RPC 8.4(c). Lawyers must also not act in a way that is “prejudicial to the administration of justice.” RPC 8.4(d). When advertising their services, lawyers are prohibited from making any “false or misleading communications about the lawyer’s services, or any matter in which the lawyer has or seeks a professional involvement.” RPC 7.1(a).

Report at 31.

When read as a whole, the Special Adjudicator’s findings lay out how and why there is a high likelihood of consumers being misdirected when confronted with paid advertising search results that appear as a result of keyword advertising. Purposefully using another attorney’s name as a keyword to lead consumers to a different attorney’s website aids in that misdirection, in violation of the RPCs. While the ACPE found that such behavior is acceptable, the NJSBA urges this Court to not permit it.

II. Information Provided by Individual Attorneys Whose Names Were Used by Competitors as Keyword Search Terms Illustrate the Misleading Nature of the Practice and Lend Support to a Finding that the Practice is Unethical.

Seven individuals (six attorneys and one marketing consultant) testified during the Special Adjudicator hearing and/or submitted information to the Special Adjudicator about the effects and consequences of having their names used as keywords by another attorney. They received reports of confusion from others; clients and colleagues were unable to locate them; and one individual started receiving messages inquiring about whether they had switched firms. No one was able to quantify a documented loss of business, since it is impossible to know how many potential clients clicked on other sites and ended up retaining a different attorney. What was clear from the testimony, however, was that at least some individuals had difficulty locating the attorneys they were looking for because of keyword advertising by other firms.

Diana Lynn Helmer, a marketing consultant for the firm of Helmer, Conley & Kasselman, testified about her firm's numerous experiences with clients searching for the firm name and receiving results with other firms at the top of the search list. The first experience involved one of the firm's own attorneys, who was directed to a firm office in a location where the firm did not have an office. After a lawsuit was filed, the purchasing firm ended its

practice of using the Helmer firm as keyword purchase. The Helmer firm, though, continued checking its name and soon discovered other firm's names were appearing in response to searches for the Helmer name. Helmer did outreach and many of the firms voluntarily agreed to take action to stop the misdirection of clients, but some refused. The firm's technical advisors suggested that the firm purchase its own name at additional advertising costs to combat the practice. The firm continues to experience issues with other firms using the firm name in its keyword advertising purchases and continues to grapple with how to proactively address the practice. See C-5, Interrogatory answers of Diana Lynn Helmer.

Cary B. Cheifetz, Esq. was advised by an accountant that the accountant had googled Cheifetz's name in an effort to call him, but that another law firm came up. Cheifetz contacted the law firm and, after some initial resistance, the other firm voluntarily agreed to stop using Cheifetz as a keyword for its internet search presence. See C-8, Interrogatory answers of Cary B. Cheifetz, Esq.

Misty V. Avallone, Esq. found her name associated with another law firm in response to her self-searching on the internet. A colleague also noted the search result, inquiring if Avallone had taken a new position with the firm. When Avallone reached out, the firm agreed to remove her name from their

advertising purchases; however, in subsequent self-searches, Avallone discovered the same practice being utilized by the firm again and again. See C-6, Interrogatory answers of Misty V. Avallone, Esq.

Roseanne S. DeTorres, Ph.D., Esq. found another website responding to the search of her name on the internet when she searched for her name. She was advised by her technical professionals that the other firm was appearing in response to search requests because of keyword advertising. DeTorres did not take any specific action, The practice continued for about two years and then stopped. She now checks the search results associated with a search of her name to ensure the practice does not continue. See C-9, Interrogatory answers of Roseanne S. DeTorres, PhD., Esq.

A client of Richard H. Weiner, Esq.'s advised him that a search of his name resulted in another law firm's information being presented onscreen. Weiner did not take immediate action, but when it was brought to his attention a second time, he looked into the issue further. Since Opinion 735 had just recently been issued, Weiner did not pursue the issue with the offending law firm, but urged the BCBA to take action, which it did, seeking review of the ACPE opinion. See C-10, Interrogatory answers of Richard H. Weiner, Esq.

Robert C. Papa, Esq. described the discovery of another firm using his firm's name as a keyword when he searched the web to see what response was

triggered by a search of the firm's name. Another firm's name appeared at the top of the resulting list. Papa reached out to the firm and after initially agreeing to reverse course, the firm resumed using Papa's firm in its keyword purchases. Only after Papa filed an Order to Show Cause to halt the practice did the offending firm agreed to stop. See C-11, Interrogatory answers of Robert C. Papa, Esq.

Laura Ruvolo Lipp, Esq. testified about a slightly different scenario where clients reported having difficulty finding her. She was eventually able to trace the difficulty to her old firm retaining her name in the firm's metadata in its website. When clients called the old firm, the firm attempted to retain the clients directly. In the context of a lawsuit, the firm agreed to remove Lipp's name from the metadata, and she believes the issues are now resolved. See C-7, Interrogatory answers of Laura Ruvolo Lipp, Esq.

While the stories from each of the seven individuals varied slightly, as well as their individual responses to discovering they were the subject of a keyword purchase, the consistent theme is that clients, friends and colleagues were misled by dishonest and perhaps even deceitful search results, in violation of the RPCs. These stories add names and faces to the arguments advanced by the NJSBA, and illustrate the practical effects of keyword



advertising using another's name. These attorneys had to expend time, effort and resources to have the practice stopped.

As noted earlier, the RPCs prohibit this type of conduct, as it is misleading, dishonest and deceitful. None of the attorneys could quantify any damages they may have suffered or how many potential clients were either diverted away from them or had difficulty finding them because of misleading search results, but at least some individuals expressed confusion and difficulty in finding the attorney for whom they were looking. Rather than condoning the practice of using a competitor lawyer's name in keyword marketing, the NJSBA respectfully submits that the Court should reverse ACPE Opinion 735 and make it clear that such conduct is not ethical.

III. A Majority of Opinions from Other States Have Concluded that Keyword Purchases Using A Competitor Attorney's Name are Misleading and Unethical; New Jersey Should do the Same.

Six out of nine states that have examined whether it is ethical to purchase another attorney's name in a keyword marketing campaign agree with the NJSBA's assessment that it is dishonest, deceitful, misleading and violative of the RPCs. The Special Adjudicator's Report references six states where this issue was considered, Report at 11-13, but there are three more to consider as well.

The North Carolina State Bar Association characterized the use of a competitor lawyer's name as a keyword as showing a "lack of fairness or forthrightness." In concluding the practice violates the RPCs, 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." N.C. State Bar 2010 Formal Ethics Op. 14 (April 27, 2012).

The Ohio Board on Professional Conduct concluded: "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 and thus contrary to Prof. Cond. R. 8.4(c). The advertising lawyer is attempting to deceive the consumer into selecting the advertising lawyer or law firm's website, as opposed to the intended lawyer or law firm." Ohio Bd. of Prof. Conduct, Op. 2021-04 (June 11, 2021).

In concluding the use of a competitor's name in keyword advertising is inherently deceptive and a violation of Michigan's RPC 8.4(b), the Michigan State Bar Association Ethics Committee said, "The practice of using a competitor's name or tradename as a keyword can be particularly confusing to consumers attempting to search for a specific lawyer or law firm, but the search results prominently display other attorneys' advertisements." Mich. Bar Comm'n on Prof. and Jud. Ethics Op. RI-385 (Nov. 18, 2022).

The Maryland State Bar Association Ethics Committee acknowledged that, “The 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. In the view of the majority of this Committee, such 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.” MD State Bar Assoc. Comm. on Ethics, Docket No. 2022-02 (Jan. 11, 2023).

In considering the practice of an attorney hiring lead generator services that engage in the unauthorized use of John Doe’s (another attorney’s/ law firm’s) trademark, likeness, or name for advertising, the Ethics Committee of the Mississippi Bar concluded that an attorney’s use of another’s name, trademark, or likeness without permission is not permissible, nor is it permissible for a third party (i.e. lead generator service) to engage in such activities on the attorney’s behalf. Ethics Op. No. 264 of the Miss. Bar (April 7, 2022).

Finally, the South Carolina Supreme Court reprimanded an attorney for engaging in keyword advertising utilizing opposing counsels' names as

keywords in an Internet marketing campaign in violation of the state's Lawyer's Oath. In re Naert, 777 S.E. 2d 823 (2015).

Two of the states that determined the use of another lawyer's name in keyword advertising campaigns does not violate the ethics rules premised their conclusions, similar to the ACPE here, on the ability of users to distinguish sponsored ads from organic ads. The Florida Board of Governors noted, "the purchase of ad words is permissible as long as the resulting sponsored links are clearly advertising on their placement and wording." Report at 12. The Texas State Bar Association stated, "since 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 web pages showing search results, it appears 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 the lawyer whose name was used in the search." State Bar of Texas Prof. Ethics Comm., Op. No. 661 (July 2016). Similarly, the trademark infringement cases noted by the New Jersey Civil Justice Institute are premised on a notion that there is not a likelihood of confusion when paid advertisements appear with organic results. See M. Kilejian & S. Dahlstrom, "Trademark Infringement Claims in Keyword Advertising," Franchise Law Journal, Vol. 36, No. 1 (2016). The

Special Adjudicator's finding that many users cannot differentiate between organic search results and those generated from paying advertisers challenges the conclusions of the Florida Bar Board of Governors, the Texas State Bar and the infringement cases.

The third state that did not take issue with the practice under consideration, Wisconsin, considered the practice in the context of a privacy statute, not the ethics rules. Habush v. Cannon, 828 N.W.2d 876 (Wisc. App. Ct. 2013).

Based on the above, ACPE Opinion 735 is an outlier in its determination that the purchase of another attorney's name for keyword advertising purposes is not unethical. The more the practice has come to light and has been examined by state ethics boards, the more states are lining up behind the notion that the practice is dishonest, deceitful, misleading and unethical. The NJSBA respectfully urges the Court to follow the lead of those six states and reverse Opinion 735.

IV. The Current Rules of Professional Conduct Prohibit Misleading and Deceitful Conduct; While Changes are not Necessary, A Comment to the RPCs Might be considered to Provide Additional Clarity.

The Special Adjudicator concluded that no changes to the current rule are necessary to address the keyword search term issue considered here.

Since the practice of using a competitor lawyer's name as a keyword search term to encourage potential clients to consider the purchasing lawyer's firm over the competitor lawyer's firm has been shown to be misleading and potentially deceitful, the NJSBA agrees that the current RPCs already address the conduct. Specifically, the current RPCs prohibit conduct involving dishonesty, fraud, deceit or misrepresentation (RPC 8.4(c)) and prohibit lawyers from making false or misleading communications about the lawyer's services or any matter in which the lawyer has or seeks a professional involvement. (RPC 7.1(a)).

Furthermore, in an effort to clarify any misinterpretation of the Rules as related to the purchase of internet advertising, the NJSBA previously recommended that the Special Master consider an explicit comment that could be added to RPC 8.4 instead of changes to the language in the Rule itself, to wit:

It is a violation of RPC 8.4(c), representing dishonesty, fraud, deceit, or misrepresentation, for a lawyer to purchase another lawyer's or law firm's name as a keyword search term from internet search engines to use in the lawyer's own keyword advertising. The purchase of the recognition and reputation associated with a lawyer's or law firm's name to direct consumers to another lawyer's website is neither fair nor straightforward and is misleading.

The NJSBA sought review of ACPE Opinion 735 because its members firmly believe that the current RPCs address the practice at issue and prohibit it. Whether the recommended comment is added to the RPCs or not, the purchase of another attorney's name as a keyword to capitalize on the good will and reputation of that attorney and potentially direct clients away from that attorney is misleading and potentially deceitful in violation of the current RPCs. The NJSBA urges the Court to recognize that and provide a written opinion reversing ACPE Opinion 735.

## CONCLUSION

The NJSBA sought review of ACPE Opinion 735 because its members believed that, contrary to the Opinion, the practice of purchasing a competitor's name as a keyword search term for purposes of appearing in search results when a potential client is searching for the competitor, is dishonest, misleading and perhaps deceitful, in violation of the RPCs. The findings contained in the Special Adjudicator's Report, the testimony elicited during the scope of the hearing, and findings by a majority of other states support the NJSBA's contention that the practice under consideration is unethical. The NJSBA respectfully asks this Court to reverse Opinion 735 and prohibit such conduct by New Jersey attorneys pursuant to the existing RPCs.

Respectfully submitted,  
NEW JERSEY STATE BAR ASSOCIATION

By: William H. Mergner Jr. / Sab  
William H. Mergner Jr., Esq., President  
Attorney ID No.: 036401985

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