

REVISED

SUPREME COURT OF NEW JERSEY
Docket No. 083396

IN RE SUPREME COURT
ADVISORY COMMITTEE ON
PROFESSIONAL ETHICS
OPINION NO. 735

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JUL 15 2024
SUPREME COURT
OF NEW JERSEY

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE*
NEW JERSEY CIVIL JUSTICE INSTITUTE

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FILED

JUL 15 2024

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TABLE OF CONTENTS

INTRODUCTION..... 1

POINT ONE 2

**RPC 8.4 IS NOT THE APPROPRIATE VEHICLE FOR ADDRESSING THE ETHICS
OF ATTORNEY KEYWORD ADVERTISING..... 2**

POINT TWO 4

**OPINION 735 DOES NOT DISTINGUISH BETWEEN SEARCHING FOR A
LAWYER’S NAME AND SEARCHING FOR A LAW FIRM’S NAME. 4**

POINT THREE 5

PETITIONER’S ARGUMENT IS CONTRARY TO FEDERAL TRADEMARK LAW... 5

TABLE OF AUTHORITIES

Cases

Bates v. State Bar of Arizona,
433 U.S. 350 (1977)..... 3

In re Opinion 39 of the Committee On Attorney Advertising,
197 N.J. 66 (2008) 3

In re R.M.J.,
455 U.S. 191 (1982)..... 3

Rules

RPC 7.1 1, 2, 3

RPC 7.2 1, 2, 3

RPC 8.4 1, 2, 3

Other Authorities

M. Kilejian & S. Dahlstrom,
“Trademark Infringement Claims in Keyword Advertising,” *Franchise Law Journal*, Vol. 36,
No. 1, at 129 (2016) 5

INTRODUCTION

New Jersey Civil Justice Institute (“NJCJI”) thanks the Court for the opportunity to address this matter as *amicus curiae*. NJCJI takes no position on the ultimate issue before the Court, but offers the following observations.

First, questions concerning attorney keyword search advertising should be answered either by reference to the existing regulations governing attorney advertising – RPC 7.1, RPC 7.2, and the Attorney Advertising Guidelines – or by a new rule or guideline specifically addressing the issue. The broad proscriptions of RPC 8.4 are ill-suited to the complex and nuanced issues presented, especially in light of First Amendment concerns.

Second, there may be meaningful differences between purchasing a *lawyer’s name* as a keyword and purchasing a *law firm’s name* as a keyword, as the latter is arguably less likely to confuse the public. Although both issues were raised by the underlying ethics inquiry (Ra1), Opinion 735 appears to address only the former and not the latter. The Court should address both issues, and distinguish between them as appropriate.

Third, many courts have found that a business’s keyword search advertisement using a competitor’s trademark is not likely to confuse consumers. Although neither Opinion 735 nor the Report of the Special Adjudicator reference that body of law, those trademark cases suggest that a lawyer’s use of another lawyer’s name in a keyword search advertisement is unlikely to confuse or mislead the public.

POINT ONE

RPC 8.4 IS NOT THE APPROPRIATE VEHICLE FOR ADDRESSING THE ETHICS OF ATTORNEY KEYWORD ADVERTISING.

The question before the Court concerns attorney advertising, specifically attorney keyword search advertising. *See* Letter from the Court dated May 20, 2020 (“The appeal arises from an opinion of the Advisory Committee on Professional Ethics, and concerns whether an attorney, consistent with the Rules of Professional Conduct, may purchase from an internet search engine company a keyword that is a competitor lawyer’s name in order to display the purchasing lawyer’s own website in the search results when a person searches for the competitor lawyer by name.”). Indeed, Opinion 735 is titled “Lawyer’s Use of Internet Search Engine Keyword Advertising.” Pa1.

Attorney advertising is regulated in New Jersey by several rules, including RPC 7.2 (incorporating RPC 7.1) and three court-approved Attorney Advertising Guidelines. Those rules prohibit an advertisement that includes a “false or misleading communication” concerning a lawyer or a lawyer’s services. RPC 7.1 and RPC 7.2, therefore, are – or should be – an important consideration in the question before the Court.

But Opinion 735 is expressly limited to RPC 8.4(c) and (d). *See* Opinion 735 at 4 (purchasing keywords of a competitor lawyer’s name “does not involve dishonesty, fraud, deceit, or misrepresentation, and is not conduct prejudicial to the administration of justice. Therefore, it does not violate Rule of Professional Conduct 8.4(c) or (d).”). *Compare* Report of the Special Adjudicator at 31-32 (addressing both RPC 7.1 and RPC 8.4). *See also* Resp. Bf. at 6 (describing the issue before the ACPE as a “very narrow question ... namely, whether the challenged practice ... is permitted under RPC 8.4”).

With respect to RPC 7.1, Opinion 735 merely refers to a finding by the Committee on Attorney Advertising (CAA) that RPC 7.1 does not cover the purchase of a keyword search because that purchase is not a “communication.”¹ The CAA’s finding is difficult to square with Opinion 735. According to Opinion 735, the purpose of purchasing a competitor-lawyer’s name as a keyword is to “display the lawyer’s own law firm website in the search results.” Opinion 735 at 4. But that “display” – the advertisement – is surely a “communication,” and the advertisement cannot be divorced from the keyword purchase that generated the advertisement.

Because the question for the Court concerns attorney advertising, that question should be answered either by reference to the existing regulations governing attorney advertising – RPC 7.1, RPC 7.2, and the Advertising Guidelines – or, if necessary, by a new rule or guideline specifically addressing attorney keyword advertising. But the broad proscriptions of RPC 8.4(c) and (d) are ill-suited to the complex and nuanced issues raised by Opinion 735 and the Report of the Special Adjudicator. The inquiry presented is a square peg, and RPC 8.4 is a round hole.

A narrow approach is also consistent with First Amendment concerns. *See Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (truthful legal advertising is protected by the First and Fourteenth Amendments); *In re R.M.J.*, 455 U.S. 191, 203 (1982) (“Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information ... if the information also may be presented in a way that is not deceptive”); *In re Opinion 39 of the Committee On Attorney Advertising*, 197 N.J. 66, 79 (2008) (“state bans on truthful, fact-based claims in lawful professional advertising could be ruled

¹ *See* Opinion 735 at 2 (“The inquiry was also docketed with the Committee on Attorney advertising. That Committee found that purchasing a competitor lawyer’s name as a keyword does not violate the rules governing attorney advertising. Attorney advertising rules apply to lawyers’ ‘communications.’ RPC 7.1. The keyword purchase of a competitor lawyer’s name is not, in itself, a ‘communication.’”).

unconstitutional when the state fails to establish that the regulated claims are actually or inherently misleading”) (quotation omitted). *Compare* Brief of Petitioner New Jersey State Bar Association at 9 (attorney keyword advertisement “does not comport with fairness”).

POINT TWO

OPINION 735 DOES NOT DISTINGUISH BETWEEN SEARCHING FOR A LAWYER’S NAME AND SEARCHING FOR A LAW FIRM’S NAME.

Opinion 735 responded to an ethics inquiry asking whether it was permissible to purchase “the name of another attorney or law firm” as a keyword. *Ra1*. But Opinion 735 appears to address only the former, *i.e.*, the purchase of a *lawyer’s* name as a keyword, and does not appear to address the latter, *i.e.*, the purchase of a *law firm’s* name as a keyword. *See* Opinion 735 at 1 (“The Advisory Committee on Professional Ethics received an inquiry asking whether a lawyer may, consistent with the rules governing attorney ethics, purchase a ... 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.”). There may be significant differences between purchasing the name of a lawyer and purchasing the name of a law firm.

Imagine that Mary Philbrook² is employed at the Smith Jones law firm. Attorney Jane Doe, employed at the Brown Miller law firm, purchases “Mary Philbrook” as a keyword, so that an internet search for “Mary Philbrook” results in an advertisement – a link to the Brown Miller website – appearing ahead of the link to Ms. Philbrook’s webpage. As a result, a person viewing the results of an internet search for “Mary Philbrook” may assume that Ms. Philbrook works at Brown Miller rather than at Smith Jones.

² https://en.wikipedia.org/wiki/Mary_Philbrook.

Now imagine that attorney Jane Doe (at Brown Miller) purchases “Smith Jones” as a keyword, so that an internet search for “Smith Jones” results in an advertisement – a link to the Brown Miller website – appearing above the link to the Smith Jones website. A person viewing the results of an internet search for “Smith Jones” is arguably unlikely to confuse the Brown Miller website with the Smith Jones website.

In short, the Court’s answer to the question presented should distinguish, as appropriate, between purchasing the name of a lawyer and purchasing the name of a law firm.

POINT THREE

PETITIONER’S ARGUMENT IS CONTRARY TO FEDERAL TRADEMARK LAW.

As noted, the question here is whether an attorney’s keyword search advertisement, using the name of another lawyer (or law firm), is false or misleading.

Nationwide, only a handful of courts have addressed this specific question. *See generally* Opinion 735 at 2-3; Report of the Special Adjudicator at 11-13. But *many* courts have addressed a closely related question, finding that a keyword search advertisement, using a competitor’s trademark, does not result in a likelihood of confusion among consumers. *See* M. Kilejian & S. Dahlstrom, “Trademark Infringement Claims in Keyword Advertising,” *Franchise Law Journal*, Vol. 36, No. 1, at 129 (2016) (“Courts have repeatedly held that merely purchasing, selling, or using the trademark of another as a keyword does not result in a likelihood of confusion among consumers, and thus there is no actionable claim under the Lanham Act.”).³ *See also id.* at 130-131 (“time and time again, courts analyzing likelihood of confusion in Internet keyword

³ www.americanbar.org/content/dam/aba/publications/franchise_lawyer/summer2016/flj-v36-1-kilejian.pdf.

advertising cases find that purchasing a competitor’s trademark as a keyword ad trigger does not lead to a likelihood of confusion”); *id.* at 131 n.29 (collecting cases).

If the use of a competitor’s trademark in a keyword search advertisement does not result in a likelihood of confusion among consumers, then a lawyer’s use of another lawyer’s name in a keyword search advertisement is similarly unlikely to confuse or mislead the public.

Petitioner Bergen County Bar Association argues otherwise, positing that a lawyer’s use of another lawyer’s name in a keyword search advertisement will mislead the public. *See* Petitioner’s letter-brief at 12 (“use of a Competitor Lawyer’s name as a keyword ... misleads the public”); *see also id.* at 8 (“keyword advertising is thus an intentional and deliberate attempt to mislead the searcher into believing that the Purchasing Attorney is connected with or comparable to the Competitor Lawyer”). Petitioner’s argument is seemingly at odds with a large body of federal copyright law.

Respectfully submitted,

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Dated: July 8, 2024