

SUPREME COURT OF NEW JERSEY
Docket No. 083396

IN RE SUPREME COURT ADVISORY COMMITTEE ON PROFESSIONAL ETHICS OPINION NO. 735	: : : : :	ON PETITION FOR REVIEW UNDER RULE 1:19-8
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SUPPLEMENTAL BRIEF ON BEHALF OF THE ADVISORY COMMITTEE
ON PROFESSIONAL ETHICS IN RESPONSE TO THE PETITION

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PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

1. Background

The New Jersey State Bar Association and the Bergen County Bar Association challenge ACPE Opinion No. 735 (Bba1),² that concerns the propriety of the use, by attorneys, of certain internet search engine keyword advertising techniques. The ACPE found that an advertising method by which a link to the advertising firm's webpage appears as a paid ad in the search results for a competing firm's name did not violate the Rules of Professional Conduct, but that the insertion of a hyperlink on the name of a competitor to divert the user to the advertising lawyer was not permissible. (Bba4).

Following full briefing and argument, on October 1, 2021, this Court issued an Order appointing the Honorable Jeffrey R. Jablonski as a Special Master, and remanding the matter to him to conduct a detailed factual analysis of certain enumerated issues. (RSa1). Judge Jablonski conducted a hearing over two days and took testimony and received reports from three expert witnesses: John S. Miko, D.Ed., MBA, PMP (court-appointed); Ross A. Malaga, Ph.D

¹ Because they are closely related, these sections are combined for efficiency and the court's convenience.

² "Bba" and "SBa" refer to the appendices of Petitioners Bergen County Bar Association and State Bar Association, respectively, filed with their original briefs. "RSa" refers to the appendix of Respondent ACPE, filed with this supplemental submission.

(court-appointed); and Steven W. Teppler, Esq. (Petitioners' witness). (RSa14). Petitioners also presented the testimony and interrogatory answers of seven attorneys who conveyed their various experiences with the challenged practice. (RSa9). On June 3, 2024, Judge Jablonski issued a report addressing the issues presented by the Court, and pursuant to this Court's Order, the ACPE now submits this supplemental brief. (RSa7).

2. Facts Elicited at the Hearing

The three top internet search engines in the United States are Google, Bing, and Yahoo. (RSa17; RSa50; RSa92; Ra168-169). An internet user initiates a search on one of these search engines by typing a word or phrase ("keyword") into the engine's search box. (RSa19; RSa41; RSa90; RSa153). A second or two later, a Search Engine Results Page ("SERP") appears, which is a display of relevant content designed to address the user's questions and provide instant answers. (RSa21; RSa46; RSa91; RSa162).

Search engines constantly search the internet for content which they then index for future use. (RSa23; RSa51; RSa93; RSa169-171). When a user enters a keyword into a search box, the search engine, using its own proprietary algorithms, retrieves results from its index that are likely to be relevant to the user. Those results, which appear naturally in response to a user's query, and may take into account the user's personal history, preferences, and geographic

location, are called “organic search results.” (RSa23-24; RSa42; RSa51-52; RSa156). Many companies engage in “search engine optimization” (“SEO”) techniques, to improve the visibility and relevance of their websites so that they will appear as organic responses to a keyword search. (RSa20; RSa41; RSa90; RSa153-154).

Paid keyword advertising can also appear on the SERP as a result of a search. (RSa24-25; RSa42; RSa90; RSa157). Advertisers design internet marketing campaigns to draw attention to their businesses. They create compelling copy and headlines, and then bid on keywords that will determine whether their ad will appear when a keyword search is inputted. Ibid. When a user enters a keyword in the search box, it triggers immediate action by the search engine, which conducts an on-line auction behind the scenes among the advertisers that have bid on the particular keyword(s). (RSa27-29; RSa45-46; RSa107-109; RSa161-162).

Search engine companies have an interest in displaying ads that will appeal to their users. They typically charge advertisers on a “cost per click” basis, meaning that the advertiser pays when a user clicks on their ads. Ibid. The amount paid by the advertiser depends on the auction result. Ibid. Advertisers specify the maximum amount they are willing to bid on a keyword. Ibid. Following the virtual auction, the search engine determines the amount

the advertisers will pay per click, which is usually one cent more than the next lowest ranked bidder. (RSa46; RSa62; RSa108; RSa179-180). The advertiser then pays that amount each time a user clicks on its ad. Ibid. As one expert observed, “Because of this pricing model, there is an inherent incentive for the search engine to not only display ads with high maximum cost-per-click but high quality and relevance, so they are actually clicked on.” (RSa62).

Using a proprietary algorithm, the engine assigns each ad a rank based on factors such as the bid amount, ad relevance, quality of the ad and advertiser’s website, and other criteria. (RSa28; RSa60-61; RSa107-109; RSa182-183). The ranking determines whether and where any given ad appears in response to a keyword inquiry. Ibid. Advertisers can also specify the time and geographic regions in which their ads will appear. (RSa27-28; RSa60; RSa110; RSa184). If numerous advertisers bid on the same keyword(s), ads are displayed based on their ranking; lower ranked ads may not be displayed. (RSa27-28; 61; RSa107-109; RSa184-185). None of the top three search engines permit an advertiser to be the exclusive purchaser of a particular keyword. (RSa29; RSa64; RSa111; RSa192).

After the user enters a keyword, the SERP displays organic and paid search results, as well as knowledge graphs, news results, local listings, videos, and maps, among other things. (RSa24; RSa46-47; RSa95-101; RSa173-174).

The user can then click on a link associated with a particular result to go to a “landing page” of the website and obtain more information. If the user is dissatisfied with that particular website, they can click the engine’s back button and return to the SERP to continue the search.

There is no established rule for where organic and paid search results will appear on a SERP. (RSa32-33; RSa69-70; RSa115; RSa205-207). Paid ads may appear above, below, or to the side of organic results; they do not appear in the same place each time the keyword is entered, and they may appear differently depending on the device on which the search is conducted. Ibid. Search engines designate paid search results with a label such as “ad,” “sponsored,” or “advertisement.” (RSa33-34; RSa71-73; RSa119-124; RSa207-208). Beginning in 2022, Google also began adding the name of the business sponsoring the ad, along with its URL, above the title of the ad, to provide clarification for users. (RSa71-72). And the Federal Trade Commission has issued guidance requiring search engines to ensure that advertisements are clearly distinguished from natural search results. (RSa79).

If an advertiser purchases the name of a competitor as a keyword, but the competitor does not participate in paid search advertising, the competitor’s information would not appear in the paid search area of the SERP. But the competitor’s information could still appear in a prominent place as an organic

search result. (RSa30; RSa65-66; RSa111; RSa196-197). An individual or company does not need to have a website to appear in response to a keyword search. Ibid.

Keyword advertising campaigns offer a number of benefits to advertisers. (RSa25; RSa55; RSa102-103). Marketing based solely on SEO techniques can be slow and ineffective; purchasing keywords can produce results quickly, and enable advertisers to target audiences, maximizing desired exposure. Ibid.

There are a number of options available to advertisers who wish to engage in a keyword marketing campaign. They may specify how closely the purchased keyword(s) must align with the word or phrase inputted by the user. (RSa26-27; RSa56-60; RSa106-107; RSa164-165). For example, Google offers three keyword match types: “broad match,” which displays ads that relate to the keyword; “phrase match,” which presents ads that include the meaning of the keyword or phrase; and “exact match,” that displays ads that mirror the phrase or a close variant. Ibid. Advertisers may also choose to engage in “dynamic” search campaigns through which the search engine generates ad headlines and landing pages based on the content of the advertiser’s website. The search engine determines when the ads should appear, based on the keywords entered, and produces headlines and landing pages based on the user’s query. (RSa26-27; RSa44-45; RSa106-107; RSa160-161). And advertisers may designate

“negative keywords,” meaning that their ads would not appear when a user entered those keywords. (RSa22; RSa61; RSa106; RSa181).

The search engines have their own guidelines governing use of keywords, and generally prohibit selection of keywords related to adult content, recreational drugs, and products or services that enable dishonest behavior. (RSa29-30; RSa63; RSa110-111; RSa190-192). Their policies also prohibit misleading advertisements; as one expert explained “there are stringent guidelines in place to maintain the integrity and trustworthiness of advertisements.” (RSa63). And while there are limits on the use of trademarks in ads of a direct competitor, the search engines permit advertisers to bid on trademarks and names as keywords. (RSa30; RSa63-64; RSa111-112).

One measure of success of a paid keyword marketing campaign is the “click through rate,” or “CTR.” (RSa22; RSa48; RSa91; RSa166). This is a calculation of the ratio of the number of users who clicked on the ad to the number of users who viewed the ad. Ibid. A higher CTR could indicate that an ad is more relevant and appealing to users. (RSa48; RSa60). In general, search results in higher positions on a SERP receive higher click through rates. (RSa34; RSa74; RSa156). As noted, ads may appear at the top of the SERP; they may also appear below organic results or to the side. (RSa32; RSa68-69; RSa114-115; RSa205-206).

Some studies have shown that users have difficulty distinguishing between paid and organic search results. (RSa35; RSa130). But digging deeper, the evidence is more nuanced. For example, a recent study showed that the top paid search result received a higher CTR (2.1%) than the second and third paid results (1.4% and 1.3%, respectively). (RSa74; RSa102). Yet organic search results surpass all of those, suggesting that users can distinguish between the two, and prefer to click on organic results. The top organic position had a CTR of 39.8%, the second was 18.7%, and positions three through ten (with CTRs of 10.2% through 2.2%) exceeded the top paid search result. Ibid. As Judge Jablonski observed, “[t]he experts agree that paid search ads do not receive an inherent advantage over organic searches. Properly optimized websites that follow search engine guidelines lead to more effective organic listings, which are often considered as more authentic and trustworthy than the paid keyword.” (RSa34; RSa74; RSa219-220). On the other hand, a 2019 study of 500 users found that 75% said that paid search ads made it easier to find the information they were seeking. (RSa80).

3. Judge Jablonski’s Recommendations

The Court’s Order invited the Master to “address and propose changes to the RPCs that relate to the keyword search term issue.” (RSa5). Judge Jablonski noted that RPC 8.4(c) currently prohibits attorneys from engaging in conduct

that involves dishonesty, fraud, deceit or misrepresentation. (RSa37). The Rules also prohibit attorneys from “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). Ibid. He concluded that “[s]ince the question to be answered by the Court is whether competitive attorney keyword advertising deceives internet users or whether this practice is dishonest and results in fraud or misrepresentation, the current RPCs, as drafted, are sufficient to address any deviation from this goal.” (RSa38).

ARGUMENT

THE ACPE’S DECISION THAT THE USE OF A COMPETITOR’S NAME AS A SEARCH KEYWORD DOES NOT VIOLATE THE RULES OF PROFESSIONAL CONDUCT SHOULD BE UPHELD BECAUSE SUCH CONDUCT IS NOT MISLEADING, DECEITFUL OR FRAUDULENT, NOR DOES IT PREJUDICE THE ADMINISTRATION OF JUSTICE.

The Committee considered the narrow question of whether the practice by an attorney of using a competitor’s name as a keyword violated Rule 8.4 of the Rules of Professional Conduct. It concluded that this challenged practice is not conduct that involves dishonesty, fraud, deceit, or misrepresentation, and so was

not prohibited under the RPCs. That decision was reasonable and should be upheld.

An attorney violates RPC 8.4(c) when they engage in conduct that is actually dishonest, deceitful, fraudulent, or involves misrepresentations. Longstanding precedent teaches that the Rule is aimed at deliberately deceptive or illegal misconduct, such as filing false documents with the court (In re Telson, 138 N.J. 47 (1994), In re Wysoker, Dkt. No. DRB-00-219 (Bba6)); misappropriating client or law firm funds (Matter of Imbriani, 149 N.J. 521 (1997), In re Siegel, 133 N.J. 162 (1993), In re Kelly, 164 N.J. 173 (2000)); and making misrepresentations to the client (In re Marlowe, 121 N.J. 236 (1990)). In each of these matters where the court found a violation of RPC 8.4(c), the offending attorney made a statement, or engaged in a type of conduct, that perpetuated a falsehood.

But that is not the case here. The advertising attorney is not making a false statement to the internet user. All that occurs is that an ad for that attorney appears among the myriad of search results that are generated when the user inputs a search query that includes the name of a rival attorney. The ad for the attorney, like all advertisements, is labeled in a way that indicates that it is sponsored content. (RSa33-34; RSa71-73; RSa119-124; RSa207-208). A link to the searched-for attorney's website will appear as an organic search result,

and as a paid result if the searched-for attorney purchased their name as a keyword. Thus, so long as the attorney's advertisement is clear and does not in any way suggest that they have an association with the searched-for attorney, there is no misrepresentation.³

Nor does the challenged practice violate RPC 8.4(d), which prohibits a lawyer from engaging in conduct that is "prejudicial to the administration of justice." As this Court has held, "the broad language of the rule 'takes on sufficient definition to pass constitutional muster' when its scope is narrowed to 'particularly egregious conduct.'" In re Helmer, 237 N.J. 70, 83 (2019) (quoting In re Hinds, 90 N.J. 604, 632 (1982)). Purchasing a rival's name as a keyword so that an attorney's advertisement, containing truthful, factual information about the attorney's practice, will appear in response to a search, does not amount to conduct "that flagrantly violat[es]. . . accepted professional norms." Ibid.

As the hearing before Judge Jablonski showed, search engines are designed to deliver relevant and useful content to the users. Thus, a SERP may include organic search results, paid advertisements, knowledge panels, related

³ The analysis would be different if the resulting advertisement did falsely proclaim an association with the searched-for attorney, or contained language to falsely mislead the user that clicking on the ad would lead to the searched-for attorney's website.

questions (and answers), images and videos, local listings, and other results tailored to be relevant and helpful to the user. (RSa24; RSa46-47; RSa95-101; RSa173-174). All of this content, including paid advertisements, is ubiquitous on the internet. That includes advertisements by attorneys for their legal services.

Petitioners have argued that a paid search result that appears in response to a keyword search for a different attorney's name is inherently misleading and deceptive. But the record developed during the hearing before Judge Jablonski did not bear this out. While some studies have shown that users may have difficulty distinguishing between paid and organic results, studies also show that organic content has a higher CTR, leading experts to believe that users perceive those responses to be more trustworthy. (RSa34). And it logically follows that if users perceive organic results to be more trustworthy, and click on them at a higher rate, they are able to distinguish between paid and organic results. In any event, the point is that all of this content offers users options. In fact, many users find that paid search ads help them find the information that they are seeking. (RSa80).

An internet user engages in a keyword search to obtain information. The point of keyword ads, like any advertising on line, is to target content to users who are seeking that information. Users then have the ability to filter through

the search results to find the most relevant and useful answers to their query. So, for example, if a user enters the name of an attorney or firm into a search box, it could be that the user only wants to contact that attorney or firm. If that is the case, the user can either ignore the content labeled as ads that may appear on the SERP, or if they accidentally click on an ad, click back to find a link to the desired attorney. On the other hand, it is also possible that the user inputs an attorney or firm's name, but is actually interested in finding that or similar attorneys that practice in the same area. Under those circumstances, paid advertisements may be quite useful to the user, because they could help them find legal services at a more competitive price or more convenient location. As the Committee found, "[t]he user can choose which website to select. . . . This is not deceptive, fraudulent, or dishonest conduct within the meaning of [the RPCs]." (Bba3).

The Committee supports measures to ensure that attorneys licensed in New Jersey comport themselves in accordance with the highest standards of the profession. The RPCs already prohibit false or misleading advertisements and conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation. RPC 7.1; 8.4. Should the types of advertisements challenged here contain content that is on its face misleading or deceptive, the Committee supports measures to prohibit that behavior, which,

as Judge Jablonski found, already exist in the current Rules. But the Committee found that the mere fact that a paid advertisement for one attorney may appear in response to a search for the name of another attorney is not itself a deceptive, misleading or egregious act that would warrant sanctions under the ethics rules. That determination was reasonable and should be upheld.

CONCLUSION

For these reasons, the ACPE's decision should be upheld.

Respectfully submitted,

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