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Via Hand Delivery

Heather Joy Baker, Clerk
Supreme Court of New Jersey
Richard J. Hughes Justice Complex
25 W. Market Street, P.O. Box 970
Trenton, New Jersey 08625

Re: In re ACPE Opinion 735
Docket No. 083396 (A-61/62-19)
Supplemental Reply Brief on Behalf of ACPE

RECEIVED

AUG 14 2024

SUPREME COURT
OF NEW JERSEY

Dear Ms. Baker:

Please accept this letter brief as the reply supplemental submission by the Advisory Committee on Professional Ethics (ACPE) in the above-referenced matter.

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ARGUMENT

**NEITHER THE RECORD NOR ESTABLISHED
CASELAW SUPPORT PETITIONERS’ POSITION
THAT THE MERE PURCHASE OF ANOTHER
ATTORNEY’S NAME AS A KEYWORD IS
INHERENTLY MISLEADING OR DECEPTIVE;
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The crux of this matter turns on a simple question: whether an attorney’s purchase of another attorney’s name as a keyword, so that an ad for the purchasing attorney may appear in an Internet search for the other attorney’s name, is inherently misleading, deceptive, or unjust such that it amounts to a violation of the Rules of Professional Conduct. The ACPE’s position is that as long as the resulting ad is factual and does not, through its content or appearance, suggest a relationship between the searched-for attorney and the advertising attorney, the mere purchase of a keyword, without more, is not misleading or deceptive. Petitioners argue that such paid keyword ads are always misleading, that they represent an intentionally deceptive practice by attorneys, and that the testimony of attorneys at the hearing supports their position. As set forth below,

their claims are belied by the record and a long line of federal caselaw interpreting an analogous question in trademark law.

1. The Mere Purchase of Another Attorney's Name as a Keyword is Not Inherently Misleading or Confusing to Consumers.

Petitioners argue that the purchase of another attorney's name as a keyword is always confusing to users, relying on a study that showed that the majority of users have difficulty distinguishing between organic and paid search results. (SBsb5; BBsb6; RSa35 RSa130¹). But there are three problems with this position: it disregards other evidence in the record, it conflates the difficulty distinguishing paid from organic results with confusion over the source of the ad, and it disregards a trove of federal caselaw on the subject.

In arguing that users are unable to distinguish paid ads from organic results, Petitioners ignore countervailing evidence: a recent study showed that the top ten organic search results have a higher click-through rate than the top paid search position. (RSa74; RSa102). Logically, that leads to the conclusion that users, at least subconsciously, are able to distinguish between ads and organic results, which are considered more trustworthy. See, RSb12.

¹ "SBsb" refers to the supplemental brief of the State Bar Association, "BBsb" refers to the supplemental brief of the Bergen County Bar Association, "RSa" refers to the Committee's appendix to its supplemental brief, and "RSb" refers to the Committee's supplemental brief.

But even accepting the premise that users have difficulty differentiating paid from organic search results, that does not justify leaping to the conclusion that they cannot distinguish between the sources of search results. The study relied on by Petitioners and Judge Jablonski¹ compared paid ads and organic results from the same source. For example, a user may input the name “Lowes” into a search bar, and receive among the results a paid ad for Lowes, an organic result for Lowes, and an ad for Home Depot. The user may not know which of the Lowes results, which may appear very similar, is the ad, but nothing in the record suggests that they could not distinguish the result for Lowes from that of Home Depot. That is critical; there is no deception if the user can readily see that a particular result does not relate to the search term they used. For that reason, the ACPE concluded that as long as the ad is clear as to its source, the fact that it appears in response to a search is not inherently misleading.

Finally, as amicus NJCJI points out, the ACPE’s conclusion is consistent with a long line of federal caselaw interpreting the Lanham Act, 15 U.S.C. §§ 1051 et seq. At issue in those cases is whether the use of a competitor’s trademark as a keyword leads to “initial confusion” in violation of the law. The majority of cases have rejected the claim that mere appearance of a competitor’s

¹ <https://varn.co.uk/09/22/latest-google-ads-research-2022-varn/> (last accessed 8/11/24) referenced at RSA130.

ad, as a result of a keyword purchase, is itself misleading or confusing. See, e.g., Network Automation, Inc v Advanced Sys. Concepts, Inc., 638 F.3d 1137 (9th Cir. 2011)(holding that the court must consider the content of the ads, their appearance, labeling, and surrounding context to determine whether the ads are confusing.) The recent case of Lerner & Rowe PC v. Brown Engstrand & Shely LLC, 673 F. Supp. 3d 1017 (D. Ariz. 2023), is directly on point. There, one law firm sued another alleging that the defendant violated trademark law by purchasing the plaintiff firm's name and associated trademarks as keywords. The court found that because the advertising firm's ads clearly identified the name of the firm and were labeled as ads, the consumer would know they were seeing an ad for another law firm, and could easily click back if they reached an undesired website. And "[t]his is not confusion; this is typical Internet searching." Id. at 1038.

So to the extent that the opinions in other states (SBsb13-16; BBsb11-14) rely on the assumption that paid keyword advertising is inherently misleading, that conclusion is at odds with this closely related line of federal cases and common contemporary internet practice. The ACPE's conclusion that the keyword advertising practice is not, by itself, misleading or deceitful, was reasonable and should be upheld.

2. Nothing in the Record Supports Petitioners' Claim that the Advertising Attorney's Sole Motivation is to Deceive Consumers or to Profit from Another Attorney's Reputation.

Petitioners also argue that attorneys who purchase another attorney's name as a keyword have nefarious motivation. They claim, for example, that advertising attorneys are trying to "capitaliz[e] on an attorney's life work. . . for the purpose of gaining an economic advantage," (SBsb1), or that they are trying to "gain an economic benefit from the other attorney's reputation." (BBb5). Even assuming that an attorney's motivation, absent any actual confusion or deception, is relevant to an ethics query, Petitioners' claims are based on pure speculation. No one testified at the hearing as to why they engaged in this practice. It is just as likely that attorneys purchase others' names as a keyword because it is a very common and accepted form of proximity advertising.

As the Lerner court explained, "just as retailers sit between manufacturers and consumers in the distribution chain, online intermediaries now effectively sit between consumers and retailers in that chain. The results page of the search engine — like the . . . salesperson — informs the consumer of alternatives." Lerner, 673 F. Supp. 3d at 1035 (cleaned up). Another court analogized it to a situation "when a consumer asks a pharmacist for Advil, the pharmacist directs the consumer to an aisle where the consumer is presented with any number of different pain relievers, including Tylenol." 1-800 Contacts, Inc. v. Lens.com,

Inc., 755 F. Supp. 2d 1151, 1173 (D. Utah 2010), aff'd in part, rev'd in part, 722 F.3d 1229 (10th Cir. 2013). Outlawing this practice, observed one court, "logically culminates in the destruction of common Internet advertising methods and unreasonably encumbers generally accepted competitive practices." USA Nutraceuticals Grp., Inc. v. BPI Sports, LLC, 165 F. Supp. 3d 1256, 1267 (S.D. Fla. 2016)

Relevant here, the practice of purchasing the name of another attorney as a keyword is a way of leveling the playing field and enabling smaller players to get exposure on the internet. A new solo practitioner may not be able to compete with more resource rich firms in bidding on generic keywords describing their practice. By purchasing the name of another attorney, the advertiser increases the chance that their ad may appear in response to a search. Given that many users expect ads to appear and find them to be helpful in their internet searches, (RSa80), this is a legitimate form of competition and a way of providing more options to consumers of legal services. As this Court has explained, attorney advertising benefits consumers by helping "them better determine their need for and selection of counsel and to encourage price competition among attorneys." Petition of Felmeister & Isaacs, 104 N.J. 515, 552 (1986).

So even if an attorney's motivation for purchasing another's name as a keyword were relevant to the ethics question in the absence of actual confusion

to the consumer, there is no support for Petitioners' claim. Rather, the advertising attorneys are simply competing with other attorneys, and enabling the public to compare their services with others. So long as the content of their ad is truthful and not misleading, this is a widely accepted practice and, as the ACPE found, does not amount to a violation of the RPCs.

3. Nothing in the Testimony of the Attorneys Proffered by Petitioners Changes the Above Analysis.

Petitioners presented responses to interrogatories and testimony by seven attorneys who claimed to have been victimized by paid keyword advertising, but nothing they said contradicts the ACPE's reasoning. In fact, the presentations of two of the attorneys reinforce the ACPE's line drawing, and the testimony of one shows how difficult it would be to enforce the type of ruling Petitioners' seek.

Two of the witnesses, Misty Avallone, Esq. and Diane Lynn Helmer, described situations that the ACPE agrees constitute misleading or confusing advertising. In both, typing in the name of the attorney/law firm resulted in a paid ad with content that was inaccurate and suggested a relationship between the searched-for name and the advertised result. (Exhibits C-5 and C-6). Both ads contained headlines with the name of the searched-for attorney or firm with a link to the advertising firm, and nothing in the accompanying text indicated

that the advertising firm was not related to the searched-for name. Ibid. Misleading ads such as these are prohibited by RPC 7.1.

Other attorneys, Cary Cheifetz, Esq., Rosanne DeTorres, Esq., Richard Weiner, Esq., and Robert Papa, Esq. (Exhibits C-8; C-9; C-10; C-11), learned that their names, or the names of their firms, had been purchased as keywords. None of them claimed that the text or content of the resulting ads were misleading or suggested that there was a connection between them (the searched-for attorneys) and the advertising attorney. Ibid.

Finally, Laura Ruvolo Lipp, Esq., described a different scenario. She complained that because her name was still embedded in the metadata of her former firm, a search for her name resulted in an organic result for that firm. While the former firm acceded to her request to scrub its metadata of her name, her testimony points to the difficulty of policing the Internet for ads or organic results that might appear in response to a keyword search. There are numerous reasons why another attorney's name might be encoded on a law firm's website, including a prior relationship with the firm or involvement in the same litigation. And the search engines themselves generate organic results based on the user's prior preferences and location. To suggest, as Petitioners appear to do, that results for any other attorney that appear following a search for a particular

attorney by name should be subject to scrutiny under the RPCs would simply be impracticable.

Rather, a more common-sense approach is to continue to enforce RPC 7.1, which prohibits attorneys from making false or misleading communications, and Attorney Advertising Guideline 1, which requires that attorneys' ads include contact information for the attorney or law firm. While enforcement of those provisions should be sufficient to avoid confusing or misleading ads on the Internet, this Court could also consider amending Attorney Advertising Guideline 1 to say that any such ad must also clearly indicate the name of the advertising attorney or firm. The Committee believes that focusing on the content and appearance of attorney ads will be sufficient to ensure that such advertising conforms to the Rules of Professional Conduct.

CONCLUSION

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

Respectfully submitted,

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