Advocacy, Ethics and the NJSBA

The New Jersey State Bar Association has had a productive year protecting the rights, interests and livelihood of attorneys. The advocacy work of countless NJSBA members and its leadership moved the needle on several significant issues to the practice of law, benefiting New Jersey attorneys and the state's most vulnerable residents. From working to preserve referral fee payments to out-of-state attorneys to championing improvements to the state's ineffective system of assigned counsel, the results achieved through NJSBA's advocacy aim to have a lasting positive impact. Join this conversation to discuss topics like Google ad buys, attorney fee awards, and more. Hear form the attorneys who were part of the amicus effort discuss the cases, as well as what attorneys need to know about navigating these waters ethically, what the Rules of Professional Conduct say and how the practice will change in the years to come.

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NJ CLE: This program has been approved for 1.5 credits (50 minute hour), including 1.5 ethics/professional credits
NY CLE (Non-transitional): 1.5 ethics credits
PA CLE: 1.0 ethics credit pending

NEW JERSEY STATE BAR ASSOCIATION
MID YEAR MEETING, DUBLIN 2024
ETHICS

Advocacy, Ethics and the NJSBA

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Introduction:

I currently completed service on the Supreme Court Committee on Character for Part 1 (Bergen, Hudson and Passaic County) on behalf of the New Jersey Board of Bar Examiners (where I review applications from candidates for admission to the New Jersey Bar. I sat on the Office of Attorney Ethics of the Supreme Court, District VI, Fee Arbitration Committee from 2004 through 2009, becoming its chairperson in 2009. I currently sit as a trustee for New Jersey Lawyers' Fund for Client Protection (where I review applications from clients whose money was stolen by suspended or disbarred attorneys and monitor the subrogation actions against said attorneys). As such, I am witness to the range of attorney misconduct issues from their admission to their departure from the practice.

Character and Fitness Committee

Bar Admission candidates get flagged for the following:

- Incomplete documents (business incorporations, civil suits, credit reports, municipal tickets, real estate license, broker license, notary public status)
- Credit issues (non-payment, loan deferrals)
- Undergraduate/law school issues (plagiarism, academic issues, underage drinking)
- Family law issues (divorce proceedings, custody proceedings)
- Multiple criminal proceedings
- Failure to disclose issues to law school/undergraduate/graduate institutions.
- Lack of remorse/candor at hearings

Be open, disclose as much as you can, make sure all documents are uploaded to avoid delay.

Client Protection Fund

See Rule Rule 1:28 - New Jersey Lawyers Fund for Client Protection for details on Fund

Lawyers are the only profession that maintains such a fund

Fund exists to return client trust monies that have been stolen by disciplined or deceased New Jersey attorneys; 17 S.C. committees; Fund is only one with mission set forth by Court Rule

Jurisdiction comes from discipline or death

Types of claims: personal injury settlements; real estate deposits; mortgage proceeds (unpaid at closing); unearned retainers (difference between compensable & non-compensable – no work done vs. malpractice); estate assets & proceeds; matrimonial matters; sham investments (but not bad investments)

Most common reasons for lawyers to get caught up with the Fund:
- Mostly solo practitioners (3/4 of NJ bar) because it is harder to steal with other eyes on account
- Greed/pathological personality (smallest number)
- Addiction: drug/alcohol addiction.
- Gambling: More difficult to spot than addiction or health issues.
- Illness: Mental and physical illness; Illness of family member
- Death (must return that which is not earned)
- Ponzi schemes
- Theft for lifestyle: divorce, child college, destination weddings, runaway consumerism

Client must prove the following:
- Attorney client relationship (retainer)
- Receipt of money in trust/business account (checks, cash receipts, bank statements, testimony)
- Theft by Respondent and/or for Respondent's benefit (went to family members)
- Dishonest conduct (not just that money is missing)

How proven:
– Forensic accounting
- Subpoena power
- Hearings
- Investigators
- File/record review

What is NOT compensable:
- Legal malpractice
- No theft by respondent (even if others stole)
- Fee disputes (these matters go to fee arbitration)

Subrogation Department of the Fund- claws back monies paid out by the Fund
- Files complaints in court
- Pursues banks (forged endorsements)
- Pursues title companies (approved agents)
- Pursues law partners (negligent supervision)
- Pursues insurance companies
- Pursues respondent lawyers and their spouses/family members (payment plans, assets, credit reports)
- Comprehensive enforcement program; judgment liens (for when property sold);
- Claims are nondischargeable in bankruptcy

- Pursues estates

Succession Planning importance
- You do not want your family to receive notification of unethical behavior post death
- If you are a solo, designate someone as a law practice successor

Difficult claims
- Immigration
- Federal jurisdiction (is it a New Jersey claim?)
- Sophistication of claimants (possible collusion?)
- Immigration status not a factor
- Crime not necessarily a factor (can pay back inmates, etc.) but unclean hands/ill gotten gains can be a factor
- Is attorney client relationship established—is relationship related to legal work or an investment scheme?
- Is money lost part of loan? Investment from settlement proceeds?
- Theft by staff (associate/secretary)

What lies between the cradle and the grave—the potential ethical problems in the practice of law.

A. Statistics

According to the ABA, 6% of all attorneys will get sued every year. 1/3 of those lawsuits will result in a settlement or a verdict against the attorney. Lawyers, unlike doctors, do not get the benefit of the doubt from the average juror.

Area of practice at most risk of a legal malpractice claim:

Real Estate…… 20%
Personal Injury……. 16%
Family Law/Divorce…… 12%
Trusts and Estates…… 11%
PI Defense…… 10%
Other……. 31%

Source of Mal practice Claim

Intentional Wrongs: 10%
Substantive Errors: 45%
Client Relations: 15%
Administrative Errors: 30%

Top 5 Mistakes
1. Failure to know the law = 11%
2. Planning Error = 9%
3. Poor discovery/investigation = 9%
4. Failure to run calendar = 7 %
5. Failure to file documents = 9%

B. General Suggestions

Avoid the Temptation to Dabble

Learning to say "NO" to what you do not know. The combination of the narrowing of the legal profession along with the temptation to dabble leads to a malpractice claim. Increased specialization and boutique practices have developed because of the growing complexity of the law (such as FMLA, HIPPAs, Tort Claim issues, Immunities, Arbitration clauses, Increased government regulation, Sarbanes-Oxley, etc.). There has also been an increase in the number of law firms actively advertising for and engaged in legal malpractice claims. I anticipate that in the future there will be lawyers advertising for disgruntled clients whose lawyers did not settle for the "full value of their claim".

The temptation to dabble comes from increased competition from more attorneys, competition from out of state firms (NY/PA abrogation of the bona fide office rule) and "mega" firms. There are also fewer clients because of business consolidation, especially in the banking, accounting, real estate and medical fields.

Common Pitfalls

Estate Planning
Real Estate (razor thin margins)
Out of state cases taken pre-suit
Federal Tort Claims Act Cases
Matrimonial cases
Tangential Issues that come up in Personal Injury cases (Bankruptcy, Divorce, Tax issues, Disability issues, health care lien issues, immigration issues)

What to Do?

Know your strengths. Know your limitations. Otherwise, your client will look to you for damages. A client will more likely come back to you for advice if you previously referred them to a lawyer with the appropriate area of expertise. This also allows you to build a referral relationship with the lawyers you refer cases to that are outside your area of expertise.

You can still get paid if you refer to a certified specialist under Rule 1:39. See also Rule 1:39-6(d) and Advisory Opinion 613. But see Opinion 745!?!?

C. Retainers

Required on every case for every potential client. It gives you protection on the scope of your representation. In writing with full explanation of scope and limits.

Issues come up with retainers on return clients, friends/family, multiple parties and accidental retentions.

The issue of accidental retention: When an existing client talks to you about other legal issues when you are discussing the case you are handling for them.

What is permissible in a retainer? See Rule 1.5(c) and new contingency fee Rule 1:21-7. Note that it applies only to personal injury matters.

Contingency Fee—must offer an hourly rate.

Hourly Retainers-See Rule 1.5. Make clear what you will charge for, when you will bill, how you will bill and who you will bill.

Who is bound? See Staron v. Weinstein, 305 N.J. Super 236 (App. Div. 1997) (Of counsel's use of a retainer is "apparent authority" to bind the law firm even though the client was hiring the lawyer and not the law firm.

Accidental Retention: verbal conversations, consultations, accompanying a family member or friend to a legal proceeding, writing a letter for a friend, blogs.

Be especially vigilant of agreements with 3rd parties through releases (agreement of firm and client to indemnify defendant), Letters of Protection (do you represent the client or the doctor?) and Loans on Settlements (do you represent the client or the loan company)

Exit Clauses: Do you have an obligation to appeal a no cause or summary judgment? See Rule 1:11-2.

SAMPLE EXIT LANGUAGE FOR A MOTOR VEHICLE CASE" If this is a Motor Vehicle Case involving the applicability of the Verbal Threshold or a case involving a Public Entity and the Tort Claims Act, the CLIENT acknowledges that certain restrictions may apply to his/her case which may limit the CLIENT'S recovery. Due to the nature of these cases, the LAW FIRM and the CLIENT agree to that after investigation which may occur after the lawsuit is filed, the LAW FIRM may determine that the CLIENT will not have a likelihood of success and

the CLIENT hereby consents to either allowing the matter to be dismissed or continue with another attorney of the CLIENT'S choice.

SAMPLE EXIT LANGUAGE FOR A CLIENT WITH UNREASOANBLE EXPECTATIONS: If an offer has been made to settle this case before trial and the CLIENT, in contradiction to the LAW FIRM'S legal advice, wishes reject the offer and proceed to trial, the CLIENT shall pay for all costs and expenses associated with the trial or consent to the LAW FIRM to withdraw from the case.

SAMPLE EXIT LANGUAGE FOR A CLIENT WHO MISLEADS: The decision to take this case and represent the CLIENT in this matter is based on the information the CLIENT has provided the LAW FIRM. If the information the CLIENT has provided is determined to be inaccurate, false or misleading, the CLIENT consents to allow the LAW FIRM to be relieved as counsel;

Despite exit language, some courts will keep you in.

D. Scope of Representation

Example of Expectations:
Real Estate closings
Not often used.
If dispute re: zoning … what is expectation of client?
Non-return of deposit … what is expectation of client?
Appeals …
Land use …
LIMIT YOUR SCOPE IN YOUR RETAINER!!!

Expectations in ALL CASES!
Personal Injury: Will you handle the appeal? Bankruptcy? Immigration?
Workers Compensation: Advise on potential Third Party Claims!
Estate Planning: Tax implications
Business Transactions: Business advice?
Do you represent the principals? See Petit-Clair v. Nelson, 344 NJ Super 538 (App. Div. 2001) (Attorney who enters into an agreement to represent the corporation may establish an attorney/client relationship with the principals of the business where the retainer is not expressly limited and the dealings with the client are through the individuals)

Beware of representing multiple claimants where there is a limited policy—whose interests are you representing?

How to deal with difficult clients: Difficult clients are not automatically high-risk clients. Some of the biggest fees come from difficult clients.

High risk clients: history of suing lawyers (or suing everyone), have shopped the case, have had previous lawyers on case, try to inject peripheral issues and cases into the matter you are handling, suggest legal strategy/action to you.

E. Communication Issues

RPCs require all communications to be truthful, accurate and complete. Any misleading information to the client is actionable.

NOTE: A missed statute is not unethical. It is malpractice. Covering up for a missed statute is unethical. The cover-up is usually worse than the crime.

Good habits: Return calls (even if it has to be done after hours)! Note file EVERY time you speak with a client, adjuster, doctor or the courts on a file—have your staff get into the same habit. Deliver the bad news when it happens—helps later.

Good habits: Forward every key document to the client: offers/denials, motions, medical reports/bills. See RPC 1.4 (c)

F. Common Scope of Legal Knowledge Issues

Special Tort Claims, time limitations and Forum Issues:

- Native American Casinos
- Cruise Ships
- U.S. Postal Service
- Port Authority (1 Year)
- NYC Metro Bus System (1 Year)
- CEPA claims (1 Year)
- Amusement Parks/Carnival accidents (90 day Notice of Claim)
- Employment Contracts
- Notice of Claim under Title 59 (Who is a public actor?)
- Affidavit of Merit in malpractice cases
- Certificate of Permanency in Auto cases

G. Settlements

Authority: Actual authority? Do what you think is best. Acceptance before a child support lien emerges. Duty to pay liens/unpaid medicals/co-payments and deductibles

Put all settlements in writing with disclaimer for unknown medicals/costs/liens being client's responsibility.

Tax implications of a settlement: Do not give advice—tell client to speak to their accountant. Could be a dual citizen. Could be for lost income.

H. Staff Infection Issues

Must train, review and supervise staff. Have a calendar system. Conduct inventories regularly. Encourage questions. Emphasize importance of mail receipt, mail recording and quick distribution to lawyer of motions/to client of dates.

Must be wary of what the staff communicates to clients (especially the ones that call on a constant basis).
Be wary of any susceptibility to lose or misplace files or documents.

I. Claims

When does a problem become a potential claim? What is a risk your insurance carrier needs to know? Do you report everything?

Risks of not reporting: Denial, cancellation and non-renewal.

If there is a claim, what changes did you make to avoid another claim?: Change of staff, change of office policy, new reminder system, new supervisor, etc.

Claims issues: Senior attorneys, part time attorneys, of counsel, new lawyers, mergers, etc.

J. Avoiding Ethics Complaints

Audits: You may want to hire an accountant AND a lawyer. See **In Re Wade**, DRB 20-274 (N.J. Jun. 28, 2021)

New Jersey is one of the few states where disbarment is permanent.

Investigation does not equal complaint—most complaints/queries do not go anywhere once an investigation is commenced—communicate with the ethics committee!

A call from Ethics investigator is your opportunity to explain, not go to battle.

The goal of an ethics investigator is to determine if there is clear and convincing evidence of ethical misconduct—most inquiries look for a basis to avoid a finding of misconduct.

If a complaint is filed, hire a lawyer after you consult with your malpractice carrier. Note that malpractice does not always equal an ethics violation and an ethical violation does not always result in malpractice.

Common ethics violations:
- Failure to communicate with client
- Conflict of interest
- Trust account errors
- Poor retainer language
- Treating client with a lack of respect (easy to avoid/sometimes to remedy)
- Failure to begin or end a client relationship properly

Things to avoid:
- Do not engage in business with a client
- Lax staff supervision/too much delegation to staff
- Providing advice to client on matters outside what you are representing them for
- Improper solicitation/gifts to referral sources
- Client loans
- Personal relationship with client- no romance/refer family to other lawyers

K. Duty of Competence and ESI

RPC 1.1 Competence
A lawyer shall not:
(a) Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence.
(b) Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally.

The law generally follows science, society and economics at slightly behind the technology curve. It takes a while for the law to adjust to changes in society. As practitioners, we are not allowed that luxury and must keep up to date with the changes in the way people communicate, store information and conduct business.

The 2012 Amendments to the ABA Model Rules of Professional Conduct requires lawyers to "keep abreast of changes in the law and its practice" and this includes "the benefits and risks associated with technology".

California's standing committee on professional responsibility and conduct issued an opinion (No. 2015-193, June 30, 2015) stating that lawyers should have the technical competence and skill—either by themselves, co-counsel or expert consultants- assess ESI discovery needs and issues, to implement appropriate ESI preservation procedures and to analyze and understand a client's ESI systems and storage. This can be an expensive proposition for a small firm or solo practitioner.

Lawyers must be sufficiently competent to comply with discovery requests for ESI. The Federal Rules of Civil Procedure were amended specifically to address a litigant's rights with regard to ESI. See Rule 34:

> **Rule 34 – Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes**
>
> (a) In General. A party may serve on any other party a request within the scope of Rule 26(b):
>
> (1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:
>
> (A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or
>
> (B) any designated tangible things; or
>
> (2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.
>
> (b) Procedure.
>
> (1) *Contents of the Request*. The request:
>
> (A) must describe with reasonable particularity each item or category of items to be inspected;
>
> (B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and
>
> (C) may specify the form or forms in which electronically stored information is to be produced.
>
> (2) *Responses and Objections*.
>
> (A) Time to Respond. The party to whom the request is directed must respond in writing within 30 days after being served or — if the request was delivered under Rule 26(d)(2) — within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.
>
> (B) Responding to Each Item. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production

must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) Objections. An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

(D) Responding to a Request for Production of Electronically Stored Information. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use.

(E) Producing the Documents or Electronically Stored Information. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

(c) Nonparties. As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

A lawyer must stress the importance of ESI preservation to their client. A lawyer must be able to perform a diligent search for ESI during discovery. In Wachtel v. Health Net, Inc. 239 F.R.D. 81 (D.N.J. 2006), a New Jersey federal court imposed significant sanctions for failing to properly search and inadequately maintain ESI. These sanctions included: 1. Deeming certain facts admitted by defendant for all purposes, 2. Precluding evidence not produced, 3. Striking privileges, 4. Awarding attorney costs and fees, 5. Imposing fines, and 6. Appointing a discovery master at defendant's expense.

Be aware that many ESI programs contain "automatic deletion" programs that must be shut off once the litigation commences. See Peskoff v. Faber, 2007 U.S. Dist. LEXIS 62595 (D.C.C. Aug. 27, 2007) (Once litigation can reasonably be anticipated, any automatic deletion programs must be terminated).

The seminal case in New Jersey on ESI preservation is In re Prudential Ins. Co. of Am. Sales practices Litigation, 169 F.R.D. 598 (D.N.J. 1997) which is also one of the earliest cases to deal with ESI issues. Prudential was ordered by the court to preserve all documents. Prudential communicated this order to its employees through e-mails. The problem was that many Prudential employees did not have e-mail (this was 1997) and many who did routinely ignored e-mails from the particular sender. A $1 million sanction was imposed.

The inability to keep up with technology changes and monitor your client's obligations to comply with ESI requests can lead to some painful results. See CPH (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc., 2005 WL 679071 (Fla. Cir.Ct., Mar. 1, 2005) rev'd on other grounds, 955 So. 2d 1124 (Fla. Dist. Ct. App. 2007). In CPH the trial judge found that Morgan Stanley initially certified that all relevant ESI had been produced, but then repeatedly uncovered new back up ESI months after the discovery deadline had passed. Based on these late submissions, the judge found that Morgan Stanley had deliberately failed to comply with ESI discovery and instructed the jury to assume that Morgan Stanley helped defraud the Plaintiff. The verdict was $1.45 billion.

In Zubulake v. UBS Warburg LLC, 229 F.R.D. 422 (S.D.N.Y. 2004) UBS violated a "litigation hold" of ESI by deleting relevant e-mails. The court held that UBS willfully destroyed potentially relevant e-mails an imposed an adverse spoliation inference that led to a $29.3 million judgment.

In UMG Recordings, Inc. v. Hummer Winblad Venture Partners, 462 F. Supp. 2d 1060 (D. Cal. 2006) the deletion of potentially relevant e-mails led to an award of attorney fees despite the finding that the deletions did not constitute a pattern of deliberately deceptive litigation practices.

In some circumstances, even deleted e-mails and ESI can be sought and must be produced. See Antioch Co. v. Scrapbook Borders, Inc., 210 F.R.D. 645 (D. Minn. 2002) (deleted ESI discoverable); Simon Property Group L.P. v. MySimon, Inc., 194 F.R.D. 639 (S.D.N.Y. 2000) (allowing expert to be appointed to retrieve deleted ESI).

Be aware of metadata—ESI that is not visible on the face of the document or computer screen but is embedded in the software and retrievable by various means. This is important with property damage and scene photos taken by smart phones or other devices. Metadata contains the time the photo was taken and often the location. This can uncover fraud or misrepresentation by the offering party of said documents. It can also show if a document has been modified and when modification occurred—especially relevant in medical malpractice or nursing home matters. Discovery requests should include, where appropriate, a request for the preservation and production (or at least access to) metadata. Courts have sanctioned parties for the deletion of metadata. See Williams v. Sprint United Mgt., 230 F.R.D. 640 (D. Kan. 2005); In re Seroquel Products Liability Litigation, 2007 U.S. Dist. LEXIS 61287 (M.D. Fl. August 21, 2007).

A search of ESI/Social media can reveal a wealth of information on many different participants to a litigation: the responding police, the ER doctors, the ER hospital, your client, adverse party, your adversary, your experts, adverse experts, the judge, jurors, etc. It can reveal their locations, associates, work status, drinking behavior, photographs, videos, political affiliations, family history, criminal history, litigation history, etc.

A lawyer has an obligation to search their own client's ESI and social media to confirm that there are no harmful things present—prior/subsequent injuries, friendships/communication with witnesses, prior/subsequent jobs, odd hobbies, what places they frequent, etc.

A lawyer has an obligation to search their experts ESI and social media. You do not want to retain an expert for your client with a past act that will subject the witness to disqualification or harmful cross examination.

A lawyer has an obligation to search ESI and social media on adverse parties, lay witnesses and expert witnesses.

Does a lawyer have a duty to obtain the jury list before trial and conduct a search of the social media of prospective jurors? See Carino v. Muenzen, 2010 WL 3448071 (App.Div. 2010) (lawyer's use of laptop to search backgrounds of prospective jurors not an unfair advantage).

This information can be used for trial, for settlement leverage and to set realistic settlement expectations.

Note that attempts to secure social media information directly from providers such as Facebook and Twitter through subpoenas are generally resisted by these providers through the invocation of the Stored Communications Act that prohibits disclosure to non-governmental third parties through the use of subpoenas or court orders. The SCA was adopted in 1986 by Congress to protect the privacy of internet users. See Crispin v. Christian Audigier, Inc., 717 F. Supp. 2d 965 (C.D. Cal. 2010) (the first case to hold that social networks are protected from disclosing some information by the SCA).

In Liebeskind v. Rutgers University, Docket No. A-0544-12T1 (N.J. App. Div. Jan. 22, 2015) plaintiff alleged, based on the dates in one field of the browsing history report that Defendant representative actually hacked into plaintiff's personal email and other personal accounts and put over 1500 false entries into the report. Plaintiff declined to get an expert to prove this claim concerning the specifics of a computer software application. The trial judge appropriately dismissed this claim as an expert is required where, as here, the subject matter is so esoteric that jurors of common knowledge and experience cannot form a valid opinion without it.

L. Performing Ethical Social Media Searches

RPC 4.2 forbids a lawyer from communicating with a person whom the lawyer knows is represented by counsel without first obtaining consent from the person's lawyer. As such, a lawyer cannot send a Facebook friend request or a LinkedIn invitation to opposing parties.

As a lawyer you or your employees/agents cannot deceptively "friend" adverse parties in a litigation to obtain information. See John J. Robertelli v. The New Jersey Office of Attorney Ethics, 224 N.J. 470 (2016). While Robertelli deals with jurisdiction issues involving the office of attorney ethics, the underlying facts involve the "friending" of a plaintiff by a paralegal at a defense firm.

Be careful with LinkedIn and Facebook's "People you may know" feature—they reveal to your investigation target that you are reviewing their social media.

Be careful when you sue a large corporation or public entity—you may have friends on social media who you have overlooked or forgotten have jobs with these entities.

Viewing the "public" profile portions of social media is not generally prohibited and has been looked upon by the courts as akin to reading a magazine article about that person. See Oregon Ethics Opinions 2013- 189 and 2005-164.

The few jurisdictions that have addressed the issue of communicating with unrepresented parties indicate that a lawyer or his agents may not attempt to gain access to non-public social media content through subterfuge, trickery, dishonesty, deception, pretext, false pretense or an alias. See Oregon Op. 2013-189, Kentucky Op. KBA E-434, New York State Op. 843 and New York City Op. 2010-2.

What happens when your client is friends with an adverse party? Can he provide you with information that would otherwise be inaccessible?

Be careful delegating these investigations to staff, law clerks or outside experts. You have a duty to make sure they conduct their searches as properly and ethically as if you were conducting it yourself. See NJ RPC 5.3

> **RPC 5.3 Responsibilities Regarding Nonlawyer Assistance**
> With respect to a nonlawyer employed or retained by or associated with a lawyer:
> (a) every lawyer, law firm or organization authorized by the Court Rules to practice law in this jurisdiction shall adopt and maintain reasonable efforts to ensure that the conduct of nonlawyers retained or employed by the lawyer, law firm or organization is compatible with the professional obligations of the lawyer.
> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of t he Rules of Professional Conduct if engaged in by a lawyer if:
> (1) the lawyer orders or ratifies the conduct involved;
> (2) the lawyer has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action; or
> (3) the lawyer has failed to make reasonable investigation of circumstances that would disclose past instances of conduct by the nonlawyer incompatible with the professional obligations of a lawyer, which evidence a propensity for such conduct.

M. Preserving Confidentiality

In turning over ESI, especially where your client conducts his business through his personal e-mails, you run the risk of turning over privileged communications or work product. This is especially true if your client is involved in multiple matters that require contact with counsel.

Make sure that what you turn over is not privileged. This can be cumbersome in legal malpractice and claims for diminished earnings in personal injury matters.

You can inadvertently disclose privileged information through social posts, blogs and even through geographic tagging.

Inadvertent communications fall under NJ RPC 3.5 and 4.2

> **RPC 3.5 Impartiality and Decorum of the Tribunal**
> A lawyer shall not:
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
> (b) communicate ex parte with such a person except as permitted by law;
> (c) engage in conduct intended to disrupt a tribunal; or
> (d) contact or have discussions with a judge or other adjudicative officer, arbitrator, mediator, or other third-party neutral (hereinafter "judge") about the judge's post-retirement employment while the lawyer (or a law firm with or for whom the lawyer is a partner, associate, counsel, or contractor) is involved in a pending matter in which the judge is participating personally and substantially.

> **RPC 4.2 Communication with Person Represented by Counsel**
> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter, including members of an organization's litigation control group as defined by RPC 1.13, unless the lawyer has the consent of the other lawyer, or is authorized by law or court order to do so, or unless the sole purpose of the communication is to ascertain whether the person is in fact represented. Reasonable diligence shall include, but not be limited to, a specific inquiry of the person as to whether that person is represented by counsel. Nothing in this rule shall, however, preclude a lawyer from counseling or representing a member or former member of an organization's litigation control group who seeks independent legal advice.

Social media accustoms people to casually comment on daily activity and travels. As a lawyer, you must be careful not to comment on client work product, client health or employment information and travel.

Lawyers often disclose their day to day frustrations with judges, court staff, adversaries and clients. Jurors and clients can see these posts.

Lawyers post on great victories and great injustices that involve their clients. If these posts reveal health, employment or client family information, it can be a violation of NJ RPC 1.6:

> **RPC 1.6 Confidentiality of Information**
> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are

impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c), and (d).
(b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:
(1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another;
(2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.
(c) If a lawyer reveals information pursuant to RPC 1.6(b), the lawyer also may reveal the information to the person threatened to the extent the lawyer reasonably believes is necessary to protect that person from death, substantial bodily harm, substantial financial injury, or substantial property loss.
(d) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
(1) to rectify the consequences of a client's criminal, illegal or fraudulent act in the furtherance of which the lawyer's services had been used;
(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the conduct in which the client was involved; or
(3) to prevent the client from causing death or substantial bodily harm to himself or herself;
(4) to comply with other law; or
(5) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership, or resulting from the sale of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client. Any information so disclosed may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest.
(e) Reasonable belief for purposes of RPC 1.6 is the belief or conclusion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes prima facie evidence of the matters referred to in subsections (b), (c), or (d).
(f) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Travel to a certain location, court or office can reveal confidential client business travel. This can reveal to an adversary where a case, deal or legal investigation is headed.

Be careful in responding to the situation where a client who you have obtained the best possible result for under the circumstances starts bashing your legal skills on social media. See In re Skinner, 740 S.E.2d 171 (Ga. 2013) (lawyer was sanctioned for disclosing client information online about a former client in response to a negative review by that client on a consumer

website); In re Peshek, M.R. 23794 (Ill. May 18, 2010) (assistant pubic defender suspended for blogging about clients and implying that a client may have committed perjury). But See Hunter v. Virginia State Bar, 744 S.E.2d 611 (Va. 2013) (lawyer not prohibited from posting non-privileged information about a client where information is related to closed cases and the information was publically available from court records).

Stengart v. Loving Care Agency, 201 N.J. 300 (2010) was the case that provided guidance to employees as to what extent they may expect privacy and confidentiality in personal e-mails composed on company-owned computers. Through its decision, the court ruled on two key issues which concluded that there should be a "reasonable" expectation of privacy in personal e-mails on company computers, and that attorney–client communication privileges and privacy should not be violated. On March 30, 2010, Chief Justice Stuart Rabner and the New Jersey Supreme Court affirmed the appellate court's decision by overturning the previous ruling made by the trial court. The trial court previously determined that a company-created policy provided sufficient warning to employees that all communications and activities performed on company-owned computers were subject to review by the employer and that there should be no expectation of privacy because of such policies

N. Ethical Preparation of Witnesses for Deposition/Trial

Do not text your client during depositions. See Wei Ngai v. Old Navy, 2009 U.S. Dist. LEXIS 67117 (D.N.J. July 31, 2009). During a video taped deposition, counsel for defendant witness was texting the witness during the deposition. The communications lost their privilege.

What happens when you inadvertently receive ESI from your adversary or a third party that you were not meant to receive? See NJ RPC 4.4

> **RPC 4.4 Respect for Rights of Third Persons**
> (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
> (b) A lawyer who receives a document or electronic information and has reasonable cause to believe that the document or information was inadvertently sent shall not read the document or information or, if he or she has begun to do so, shall stop reading it. The lawyer shall (1) promptly notify the sender (2) return the document to the sender and, if in electronic form, delete it and take reasonable measures to assure that the information is inaccessible.
> A lawyer who receives a document or electronic information that contains privileged lawyer-client communications involving an adverse or third party and who has reasonable cause to believe that the document or information was wrongfully obtained shall not read the document or information or, if he or she has begun to do so, shall stop reading it. The lawyer shall (1) promptly notify the lawyer whose communications are contained in the document or information (2) return the document to the other lawyer and, if in electronic form, delete it and take reasonable measures to assure that the

information is inaccessible. A lawyer who has been notified about a document containing lawyer-client communications has the obligation to preserve the document.

Official Comment (August 1, 2016)

Lawyers should be aware of the presence of metadata in electronic documents. "Metadata" is embedded information in electronic documents that is generally hidden from view in a printed copy of a document. It is generated when documents are created or revised on a computer. Metadata may reflect such information as the author of a document, the date or dates on which the document was revised, tracked revisions to the document, and comments inserted in the margins. It may also reflect information necessary to access, understand, search, and display the contents of documents created in spreadsheet, database, and similar applications.

A lawyer who receives an electronic document that contains unrequested metadata may, consistent with Rule of Professional Conduct 4.4(b), review the metadata provided the lawyer reasonably believes that the metadata was not inadvertently sent. When making a determination as to whether the metadata was inadvertently sent, the lawyer should consider the nature and purpose of the document. For example, absent permission from the sender, a lawyer should not review metadata in a mediation statement or correspondence from another lawyer, as the metadata may reflect attorney-client communications, work product or internal communications not intended to be shared with opposing counsel. The lawyer should also consider the nature of the metadata at issue. Metadata is presumed to be inadvertently sent when it reflects privileged attorney-client or work product information. Metadata is likely to be inadvertently sent when it reflects private or proprietary information, information that is outside the scope of discovery by agreement or court order, or information specifically objected to in discovery. If a lawyer must use forensic "mining" software or similar methods to reveal metadata in an electronic document when metadata was not specifically requested, as opposed to using simple computer keystrokes on ordinary business software, it is likely that the information so revealed was inadvertently sent, given the degree of sophistication required to reveal the metadata.

A document will not be considered "wrongfully obtained" if it was obtained for the purposes of encouraging, participating in, cooperating with, or conducting an actual or potential law enforcement, regulatory, or other governmental investigation. Government lawyers, namely, lawyers at the offices of the Attorney General, County Prosecutors, and United States Attorney, who have lawfully received materials that could be considered to be inadvertently sent or wrongfully obtained under this Rule are not subject to the notification and return requirements when such requirements could impair the legitimate interests of law enforcement. These specified government lawyers may also review and use such materials to the extent permitted by the applicable substantive law, including the law of privileges.

Once you are retained, advise your client not to purposely delete ESI or social media content. You can advise them to change their profile to private on social media. You can tell them to be careful because they will be monitored. See Gatto v. United Air Lines, Inc., No. 10-cv-1090-ES-SCM (D.N.J. March 25, 2014 (Court instructed jury that it can draw an adverse inference against the plaintiff for failing to preserve his Facebook account).

In Lester v. Allied Concrete Co., No. CL.08-150 (Va.Cir.Ct. Sept. 1, 2011) a wrongful death verdict of $10.6 million was reduced by half and sanctions of $722,000 were imposed on the lawyer where it was revealed that the attorney's office had instructed client to clean up his Facebook account. Instead of cleaning it up, the client deactivated his account so that he could testify during discovery that he did not have a Facebook account.

O. Abuse of Witnesses on Examination

Unrepresented witnesses and expert witnesses do not have the same amount of protection as represented parties. One can arguably do a greater degree of "snooping" into the social media history of such individuals and there does not seem to be current legal guidance on this issue other than NJ RPC 4.1 (Truthfulness in Statements to Others), 4.4 (Respect for Rights of Third Persons) and 8.4 (Misconduct).

RPC 4.1 Truthfulness in Statements to Others
(a) In representing a client a lawyer shall not knowingly:
(1) make a false statement of material fact or law to a third person; or
(2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.
(b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.
Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 4.2 Communication with Person Represented by Counsel
In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter, including members of an organization's litigation control group as defined by RPC 1.13, unless the lawyer has the consent of the other lawyer, or is authorized by law or court order to do so, or unless the sole purpose of the communication is to ascertain whether the person is in fact represented. Reasonable diligence shall include, but not be limited to, a specific inquiry of the person as to whether that person is represented by counsel. Nothing in this rule shall, however, preclude a lawyer from counseling or representing a member or former member of an organization's litigation control group who seeks independent legal advice.

RPC 4.3 Dealing with Unrepresented Person; Employee of Organization
In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. If the person is a director, officer, employee, member, shareholder or other constituent of an

> organization concerned with the subject of the lawyer's representation but not a person defined by RPC 1.13(a), the lawyer shall also ascertain by reasonable diligence whether the person is actually represented by the organization's attorney pursuant to RPC 1.13(e) or who has a right to such representation on request, and, if the person is not so represented or entitled to representation, the lawyer shall make known to the person that insofar as the lawyer understands, the person is not being represented by the organization's attorney.

What about calls to the offices of expert witnesses to reveal that they are not actually practicing engineers, doctors or accountants? Can you call a doctor to schedule an appointment for a private visit to establish that they only see people for forensic examinations? See RPC 4.1.

P. Advertising with Social Media

Many marketing consultants stress the use of social media to advertise and expand your practice. These social media outlets include LinkedIn, Facebook, Twitter and Google. The methods include professional profile pages, blogs and articles. These methods may constitute legal advertising and be subject to ethics rules.

Some examples of blogging or social media posts include: "Just won a million dollar verdict in Hudson County! Congratulations to my client and my staff", "Just won a million dollar verdict, please share with your friends and family", "Just won a million dollar verdict on a medical malpractice case! Do you know anyone who may have a malpractice case? Tell them to call me!", or "Just lectured on legal ethics, please forward these materials to anyone who may be under investigation?"

The Florida Supreme Court recently overhauled their attorney advertising rule and now state that law firm web sites are subject to the same restrictions that apply to other law firm advertising.

There are lawyers that post updates on current trials and cases on social media. That is dangerous as jurors, judges, adversaries, adjusters and adjusters can see this information if you have an open profile. Never disparage a judge or adversary on these platforms.

California Ethics Rule 2012-186 found that lawyer advertising rules apply to social media posts. If New Jersey were to follow this rule, any post on Facebook announcing a big settlement or verdict may have to come with a disclaimer stating that past achievements do not guarantee future results. See RPC 7.1.

> **NJ RPC 7.1 Communications Concerning a Lawyer's Service:**
>
> (a) A lawyer shall not make false or misleading communications about the lawyer, the lawyer′s services, or any matter in which the lawyer has or seeks a professional involvement. A communication is false or misleading if it:
>
> (1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

New Jersey lawyers have to be careful not to engage in open platforms (List Serves open to the public or websites that ask legal questions) where they give advice on areas outside their expertise. They also have to be careful with what specialties they advertise on their web sites. You cannot mislead the public into thinking you specialize in an area of the law that you do not practice in. This may violate RPC 7.1(a).

"Friending" someone on Facebook or sending an Invitation to someone on LinkedIn that you do not have a prior relationship with for the sole purpose of soliciting legal work may constitute a prohibited legal solicitation under the RPC 7.3.

RPC 7.3 Personal Contact with Prospective Clients

(a) A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment, subject to the requirements of paragraph (b).
(b) A lawyer shall not contact, or send a written or electronic or other form of communication to, a prospective client for the purpose of obtaining professional employment if:
(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer; or
(2) the person has made known to the lawyer a desire not to receive communications from the lawyer; or
(3) the communication involves coercion, duress or harassment; or
(4) the communication involves unsolicited direct contact with a prospective client within thirty days after a specific mass-disaster event, when such contact concerns potential compensation arising from the event; or
(5) the communication involves unsolicited direct contact with a prospective client concerning a specific event not covered by section (4) of this Rule when such contact has pecuniary gain as a significant motive except that a lawyer may send a letter by regular mail to a prospective client in such circumstances provided the letter:
(i) bears the word "ADVERTISEMENT" prominently displayed in capital letters at the top of the first page of text and on the outside envelope, unless the lawyer has a family, close personal, or prior professional relationship with the recipient. The envelope shall contain nothing other than the lawyer's name, firm, return address and "ADVERTISEMENT" prominently displayed; and
(ii) shall contain the party's name in the salutation and begin by advising the recipient that if a lawyer has already been retained the letter is to be disregarded; and
(iii) contains the following notice at the bottom of the last page of text: "Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision."; and
(iv) contains an additional notice also at the bottom of the last page of text that the recipient may, if the letter is inaccurate or misleading, report same to the Committee on Attorney Advertising, Hughes Justice Complex, P.O. Box 037, Trenton, New Jersey

08625. The name and address of the attorney responsible for the content of the letter shall be included in the notice.

EXAMPLE: LinkedIn has a feature that copies your e-mail address book and sends out messages to everyone on that list. If you exchanged e-mails with people pre-suit who are now defendants or plaintiffs in a pending litigation, this can be an ex-parte communication in violation of NJ RPC 4.2.

Websites, blogs or social media platforms that allow legal questions to be asked and answered may inadvertently create attorney-client relationships. You must also be wary of providing legal advice on blogs or websites. See RPC 1.18:

RPC 1.18 Prospective Client
(a) A lawyer who has had communications in consultation with a prospective client shall not use or reveal information acquired in the consultation, even when no client-lawyer relationship ensues, except as RPC 1.9 would permit in respect of information of a former client.
(b) A lawyer subject to paragraph (a) shall not represent a client with interests materially adverse to those of a former prospective client in the same or a substantially related matter if the lawyer received information from the former prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (c).
(c) If a lawyer is disqualified from representation under (b), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except that representation is permissible if (1) both the affected client and the former prospective client have given informed consent, confirmed in writing, or (2) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom and written notice is promptly given to the former prospective client.
(d) A person who communicates with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a "prospective client," and if no client-lawyer relationship is formed, is a "former prospective client."
Official Comment (August 1, 2016)
A person who communicates with a lawyer to disqualify that lawyer is not considered a prospective client. For example, an uninvited electronic communication is not, without more, considered to be a consultation with a prospective client.

Be careful when posting on blogs that you do not take positions that conflict with positions taken on behalf of clients. See NJ RPC 1.7 and 1.8.

RPC 1.7 Conflict of Interest: General Rule
(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.
(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
(1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, provided, however, that a public entity cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved;
(2) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(3) the representation is not prohibited by law; and
(4) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

RPC 1.8 Conflict of Interest: Current Clients; Specific Rules
(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
(1) the transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be understood by the client;
(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel of the client's choice concerning the transaction; and
(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
(b) Except as permitted or required by these rules, a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client after full disclosure and consultation, gives informed consent.
(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.
(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and
(3) a legal services or public interest organization, a law school clinical or pro bono program, or an attorney providing qualifying pro bono service as defined in R. 1:21-11(a), may provide financial assistance to indigent clients whom the organization, program, or attorney is representing without fee.
(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
(1) the client gives informed consent;
(2) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship; and
(3) information relating to representation of a client is protected as required by RPC 1.6.
(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or no contest pleas, unless each client gives informed consent after a consultation that shall include disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.
(h) A lawyer shall not:
(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client fails to act in accordance with the lawyer's advice and the lawyer nevertheless continues to represent the client at the client's request. Notwithstanding the existence of those two conditions, the lawyer shall not make such an agreement unless permitted by law and the client is independently represented in making the agreement; or
(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advise of independent legal counsel in connection therewith.
(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien granted by law to secure the lawyer's fee or expenses, (2) contract with a client for a reasonable contingent fee in a civil case.
(j) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.
(k) A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client.
(l) A public entity cannot consent to a representation otherwise prohibited by this Rule.

Regarding competency, be wary of unauthorized practice of law violations. The internet crosses state and national borders. Persons in California may be relying on your interpretation of law as a New Jersey or New York licensed attorney. The ethics rules prohibit the practice of law in jurisdictions where a lawyer is not admitted to practice. See NJ RPC 5.5

RPC 5.5 Lawyers Not Admitted to the Bar of This State and the Lawful Practice of Law

(a) A lawyer shall not:

(1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

(b) A lawyer not admitted to the Bar of this State who is admitted to practice law before the highest court of any other state, territory of the United States, Puerto Rico, or the District of Columbia (hereinafter a United States jurisdiction) may engage in the lawful practice of law in New Jersey only if:

(1) the lawyer is admitted to practice pro hac vice pursuant to R. 1:21-2 or is preparing for a proceeding in which the lawyer reasonably expects to be so admitted and is associated in that preparation with a lawyer admitted to practice in this jurisdiction; or

(2) the lawyer is an in-house counsel and complies with R. 1:27-2; or

(3) under any of the following circumstances:

(i) the lawyer engages in the negotiation of the terms of a transaction in furtherance of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice and the transaction originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;

(ii) the lawyer engages in representation of a party to a dispute by participating in arbitration, mediation or other alternate or complementary dispute resolution program and the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission pursuant to R. 1:21-2 is required;

(iii) the lawyer investigates, engages in discovery, interviews witnesses or deposes witnesses in this jurisdiction for a proceeding pending or anticipated to be instituted in a jurisdiction in which the lawyer is admitted to practice;

(iv) the out-of-state lawyer's practice in this jurisdiction is occasional and the lawyer associates in the matter with, and designates and discloses to all parties in interest, a lawyer admitted to the Bar of this State who shall be held responsible for the conduct of the out-of-State lawyer in the matter; or

(v) the lawyer practices under circumstances other than (i) through (iv) above, with respect to a matter where the practice activity arises directly out of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, provided that such practice in this jurisdiction is occasional and is undertaken only when the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client.

(c) A lawyer admitted to practice in another jurisdiction who acts in this jurisdiction pursuant to paragraph (b) above shall:
(1) be licensed and in good standing in all jurisdictions of admission and not be the subject of any pending disciplinary proceedings, nor a current or pending license suspension or disbarment;
(2) be subject to the Rules of Professional Conduct and the disciplinary authority of the Supreme Court of this jurisdiction;
(3) consent in writing on a form approved by the Supreme Court to the appointment of the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions against the lawyer or the lawyer's firm that may arise out of the lawyer's participation in legal matters in this jurisdiction, except that a lawyer who acts in this jurisdiction pursuant to subparagraph (b)(3)(ii) or (b)(3)(iii) above shall be deemed to have consented to such appointment without completing the form;
(4) not hold himself or herself out as being admitted to practice in this jurisdiction;
(5) comply with R. 1:21-1(a)(1); and
(6) except for a lawyer who acts in this jurisdiction pursuant to subparagraph (b)(3)(ii) or (b)(3)(iii) above, annually register with the New Jersey Lawyers' Fund for Client Protection and comply with R. 1:20-1(b) and (c), R. 1:28-2, and R. 1:28B-1(e) during the period of practice.

Keep in mind that regardless of where unethical conduct or unauthorized legal practice occurs, a lawyer licensed in New Jersey is subject discipline in New Jersey. See NJ RPC 8.5

RPC 8.5 Disciplinary Authority; Choice of Law

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is subject also to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

WADE COMMISSION (New Jersey Supreme Court Special Committee on the Duration of Disbarment for Knowing Misappropriation)

The New Jersey Supreme Court Special Committee on Wade issues voted 21-5 in favor of establishing a pathway for attorneys to readmission following disbarment for the knowing misappropriation of client funds.

The Committee was formed following the Court's 2022 ruling In re Wade, and has recommended a series of mandatory conditions to be met by applicants for readmission.

In a Notice to the Bar dated June 29, 2023, the New Jersey Supreme Court Special Committee on the Duration of Disbarment for Knowing Misappropriation (often referred to as the "Wade Committee") announced its recommendation, reached by a substantial majority, for a pathway for attorneys to readmission following disbarment.

The Wade Committee was formed under former Justice Virginia A. Long's Chairmanship as a consequence of the Court's 2022 decision In the Matter of Dionne Larrel Wade, which reaffirmed that disbarment was mandatory where a lawyer knowingly misappropriated client and escrow funds. Because Ms. Wade admitted to the knowing unauthorized use of client and escrow funds, she was disbarred.

The Wade Court, however, noted that unlike in a vast majority of other states, disbarment in New Jersey is permanent. Recognizing the harshness of that comparison, the Court directed the formation of a Special Committee to examine and recommend whether there should be a pathway to readmission following disbarment. If so, the Committee was charged with recommending what that process should be, including what factors should be considered to qualify a person for readmission and any conditions to be imposed.

Leaving untouched the disbarment mandate for knowing misappropriation, the Wade Committee has now recommended that disbarred lawyers in those cases should be given an opportunity for a second chance with appropriate safeguards. Those mandatory conditions are as follows:

Potential readmission should be extended for any type of knowing misappropriation to be determined on a case-by-case basis;

A five year waiting period should be imposed consistent with the majority of jurisdictions and ABA recommendations;

The procedures in New Jersey Court Rule 1:20-21 for suspended attorneys should be followed and the same clear and convincing standard used;

Requiring any applicant to demonstrate competency on the Model Rules of Ethics examination and a retaking of the bar exam could be required if warranted by specific facts;

Makeup CLE credits should be required, although the number of those credits remains open;

Notice should be required to the grievant on the matter leading to disbarment, those whose docketed complaints were dismissed because of disbarment, and clients who were reimbursed by the Lawyer Fund for Client Protection;

Readmission applicants could only proceed after fully reimbursing the Fund;

Reapplication should not be available after a second disbarment, and;

A sixth month waiting period to file a new application should be imposed if an applicant is denied readmission on the first application.

The Wade Committee also recommended discretionary conditions that could be imposed in a particular case. Examples of these conditions are annual audits, client disclosure of prior disbarment, mandatory professional liability insurance, CLE in trust accounting, and treatment for mental health conditions, substance abuse and other addictive behavior. The Committee acknowledged the possible effects of bias in the disbarment and readmission processes and recommended review of the processes and outcomes to address equity concerns. Finally, the

Committee concluded that the readmission option should be extended to all attorneys disbarred for any reason and not just in cases involving knowing misappropriation.

Norberto A. Garcia is a trial attorney with offices in Chatham, North Bergen and Jersey City. He is a partner at Blume Forte Fried Zerres & Molinari. He serves on the executive committee and the board of governors of the New Jersey Association for Justice. He is a past president of the Hudson County Bar Association where he has been a trustee since 2000. He is a past president of the New Jersey State Bar Foundation and the first vice president of the New Jersey State Bar Association where he serves on a number of committees. Mr. Garcia has been certified by the New Jersey Supreme Court as a civil trial attorney since 2001. He has been active in the Hudson County Inns of Court program since 1996. He served as president of the North Hudson Lawyers Club in 2003. He has been co-chairperson of the Hudson County Civil Practice Committee since 2003. He was the co-chair of the New Jersey State Bar Diversity Committee and is a member of the executive committee of the New Jersey State Bar Civil Trial Section. He is a member of the State of New Jersey Bar Examination Committee on Character. He is a trustee of the New Jersey Lawyers' Fund for Client Protection. He served on the Office of Attorney Ethics of the Supreme Court, District VI, Fee Arbitration Committee from 2004 through 2009, becoming its chairperson in 2009. From 2005 through 2008 he served on the Supreme Court Committee on Minority Affairs. He has been a member of the American Board of Trail Advocates since 2004. He has a B.A. cum laude in history from Seton Hall University and graduated from the University of Pennsylvania Law School. He has been admitted to the bars of New Jersey, New York and Pennsylvania. Mr. Garcia resides in Kinnelon, New Jersey with his wife and two sons.

Issued by ACPE June 25, 2019

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

Appointed by the Supreme Court of New Jersey

ACPE OPINION 735

Lawyer's Use of Internet Search Engine Keyword Advertising

The Advisory Committee on Professional Ethics received an inquiry asking whether a lawyer may, consistent with the rules governing attorney ethics, purchase a Google Adword℠ or

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. Internet search engine advertising programs permit businesses to purchase certain keywords or phrases; when a person searching on the internet uses those words in the search, the websites of purchasers of the keywords will appear in the search results, ordinarily presented as paid or "sponsored" ads. The same keywords or phrases usually can be purchased by more than one business.

Inquirer further asked whether, consistent with the rules governing attorney ethics, a lawyer may insert, or pay the internet search engine company to insert, a hyperlink on the name of a competitor lawyer that will divert the user from the searched-for website to the lawyer's own law firm website. Assuming (without finding) that internet search engine advertising programs can generally operate in this manner, the Committee considers the inquiry presented: may a lawyer insert, or pay an internet search engine company to insert, a hyperlink

on the name of a competitor lawyer that will divert the user from the searched-for website to the lawyer's own law firm website.

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."

The Advisory Committee on Professional Ethics considered whether this conduct violates Rule of Professional Ethics 1.4 ("Communication"). Rule of Professional Conduct 1.4 provides that a lawyer shall inform a prospective client of how, when and where the client may communicate with the lawyer. There is no interaction, much less communication, between the lawyer who purchases a competitor lawyer's name as a keyword and the person searching on the internet. Rule of Professional Conduct 1.4 does not apply in this situation.

The Committee also considered whether purchasing a keyword of a competitor lawyer's name violates Rule of Professional Conduct 8.4 ("Misconduct"). This Rule states that it is "professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . [or] engage in conduct that is prejudicial to the administration of justice . . . ." RPC 8.4(c) and (d).

There has been some disagreement among other jurisdictions on this issue. The Texas State Bar Professional Ethics Committee found that, "given the general use by all sorts of businesses of names of competing businesses as keywords in search-engine advertising, such use by Texas lawyers in their advertising is neither dishonest nor fraudulent nor deceitful and does not involve misrepresentation." State Bar of Texas Professional Ethics Committee Opinion No. 661 (July 2016). See also Habush v. Cannon, 828 N.W.2d 876, 881-82 (Wisc. App. Ct. 2013) (a lawyer's purchase of competitor lawyers' names as keywords in internet search engines does not violate the Wisconsin right of privacy statute because the "use" of the competitors' names is not visible to the consumer). But see

North Carolina State Bar 2010 Formal Ethics Opinion 14 (April 27, 2012) (purchasing another lawyer's name as keyword for internet search is dishonest conduct in violation of RPC 8.4(c)).[1]

The Committee concurs with the approach of Texas and Wisconsin and finds that purchasing keywords of a competitor lawyer's name is not conduct that involves dishonesty, fraud, deceit, or misrepresentation. The websites of the keyword purchaser's law firm and the competitor's law firm will, presumably, both appear in the resulting search. The keyword purchaser's website ordinarily will appear as a paid or "sponsored" website, while the competitor lawyer's website will appear in the organic results (unless the competitor has purchased the same keyword, in which case it will also appear as a paid or "sponsored" website). The user can choose which website to select and the search engine ordinarily will mark the keyword-purchased website as paid or "sponsored." This is not deceptive, fraudulent, or dishonest conduct within the meaning of Rule of Professional Conduct 8.4(c).

The Committee further finds that purchasing keywords of a competitor lawyer's name is not conduct prejudicial to the administration of justice. The standard for conduct prejudicial to the administration of justice is high; this Rule applies to "particularly egregious conduct," or conduct that "flagrantly violat[es] . . . accepted professional norms." In re Helmer, 237 N.J. 70, 83 (2019) (quoting In re Hinds, 90 N.J. 604, 632 (1982)). Purchasing keywords that are the name of a competitor lawyer is not egregious or flagrant conduct.

Inquirer also asked whether a lawyer may pay Google to insert a hyperlink on a competitor lawyer's name that diverts the user to the first lawyer's website. The Committee finds that surreptitiously redirecting a user from the competitor's website to the lawyer's own website is purposeful conduct intended to deceive the searcher for the other lawyer's website. Such deceitful conduct violates Rule of Professional Conduct 8.4(c).

Accordingly, 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. This conduct 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).

A lawyer may not, however, consistent with the rules governing attorney ethics, insert, or pay the internet search engine company to insert, a hyperlink on the name or website URL of a competitor lawyer that will divert the user from the searched-for website to the lawyer's own law firm website. Redirecting a user from the competitor's website to the lawyer's own website is purposeful conduct intended to deceive the searcher for the other lawyer's website. Such deceitful conduct violates Rule of Professional Conduct 8.4(c).

[1] In 2013, the Florida Bar's Standing Committee on Advertising proposed an opinion that would have found it to be a deceptive and misleading advertising technique for a lawyer to purchase the name of another lawyer or law firm as a keyword in search engines so that the lawyer's advertisement or sponsored website link appears when a person uses the other lawyer or law firm's name as a search term. This proposed opinion, however, was rejected by the Board Review Committee on Professional Ethics and withdrawn by the Florida Bar Board of Governors. See https://www.floridabar.org/ethics/etad/.

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SUPREME COURT OF NEW JERSEY
DOCKET NO. 083396

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

NEW JERSEY STATE BAR ASSOCIATION
BRIEF IN SUPPORT OF PETITION FOR REVIEW OF ACPE OPINION 735

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PRELIMINARY STATEMENT

The Advisory Committee on Professional Ethics (ACPE or Committee) issued Opinion 735 to answer the question of whether it violates the Rules of Professional Conduct to purchase a competitor lawyer's name as a keyword in an internet search as part of a search engine's ad campaign in order to display the lawyer's own law firm website in the search results when a consumer searches for the competitor. The Committee determined it did not violate the Rules of Professional Conduct, specifically RPC 8.4(c).

The New Jersey State Bar Association (NJSBA) asks the Supreme Court to review the conclusion the Committee reached as this issue is ripe given the pace of technological changes facing the profession and the unsettled nature of the question around the country. Opinion 735 is one of three ethics opinions nationally which addresses this issue. Texas and Wisconsin determined purchasing another lawyer's name as a keyword for internet search advertising was not unethical; North Carolina determined that it was.

The NJSBA is concerned that this conclusion condones gamesmanship over professionalism where, if an attorney has enough money to spend on advertising, an attorney can use a competitor's name to redirect a consumer to that attorney's website instead of the site the consumer originally intended. Competitive keyword advertising can take advantage of a consumer's interest in a

competing person's name, and does so without actually displaying the targeted competitor's name in the advertisement copy. Online consumers may not know that the first few ads provided in their search results are not the sites of the attorney searched. (This is distinguishable from descriptive keyword advertising where attorneys can pay to have their information appear in response to a search that includes certain descriptive words and not a specific person's or firm's name.)

The NJSBA believes a critical question exists about whether it is ethical for one lawyer to buy another lawyer's name for purposes of a keyword search, thereby capitalizing on someone else's good will and reputation. While Opinion 735 attempts to answer that question, the NJSBA believes it is based on several presumptions which may not always be accurate and could yield questionable conclusions. For example, Opinion 735 relies on the presumption that the website of a keyword purchaser's law firm and the competitor's law firm will "presumably both appear in the resulting search." This may not always be the case.

Opinion 735 also relies on the belief that consumers will understand the difference between a paid ad on the internet and an organic website of a competing lawyer. This presumption, however, is belied by the many consumers who are regularly taken advantage of by fraud on the web because they cannot distinguish the difference between an email which is fraudulent versus one which

is legitimate. Research suggests that even sophisticated tech users do not understand the difference between results that appear because they were paid to show up when certain words are searched and the organic results of using those words. The Federal Trade Commission has even issued warnings and guidelines distinguishing the two because consumers don't understand the distinction. See "FTC staff to search engines: Differentiate ads from natural results," ftc.gov/news-events/blogs/business-blog/2013/06/ftc-staff-search-engines-differentiate-ads-natural-results.

STATEMENT OF THE MATTER INVOLVED

Increasingly, lawyers have found that participating in search-based advertising programs offered by search engines such as Google can be an important source of obtaining prospective new clients.[1] There is no dispute that more and more, consumers rely on search engine results to find lawyers and that there is a great deal of competition on the web for legal services.[i]

There are two kinds of search results on the internet: organic and ad based. The organic search consists of a listing of websites which most closely matches a user's search query based on relevance. Paid search results are advertising where a website owner pays to have its pages displayed in response to a certain keyword query. Those who advertise pay a provider like Google to

[1]For purposes of this brief, Google AdWords campaign will be referred to as the applicable search engine as it is the dominant player in internet search.

ensure that their website will appear above any organic search results.

The purpose of paying for keywords is so that advertisers can draw in consumers who may not be aware of that specific advertiser's services. Consumers rely on search engines to search the web and find vendors to meet their need. For example, if you want a house painter and do not know the name of one to hire, you might search for "house painter in Mercer County." Once the results appear on your computer screen, you will then decide which vendor to research by clicking on the entry. This reflects the descriptive word advertising mentioned above.

Opinion 735 assumes that internet users are sophisticated enough to understand the difference between paid ads and organic searches. The NJSBA, however, has concerns about that assumption. Understanding human nature, consumers will believe that the search results which appear first, on the top of the page will be the "best" or closest response to the search question posed, i.e. house painter in Mercer County. Therefore, a potential litigant may respond to the first result they see which, in fact, may not reflect the consumer's actual intent in conducting a search at all. The results, therefore, could be misleading, even if that is not the actual intent.

QUESTIONS PRESENTED

1. Is it ethical to purchase a competitor lawyer's name as a search keyword for purposes of appearing on the top of the first page of an internet search?

2. Is the Committee's presumption that the keyword purchaser's law firm website and the competitor's law firm website will both appear in the resulting search applicable to all searches?

3. Is the Committee's assumption correct that consumers can readily distinguish between ad search results and organic search results?

4. Do the questions this inquiry raises require further examination by appropriate Supreme Court committees, as well as a larger audience, to ensure the Rules of Professional Conduct are appropriately responsive to evolving technological developments?

ERRORS COMPLAINED OF

The purchase of a competitor lawyer's name in order to appear in the ad search results above the organic search results of the law firm's website could potentially be a misleading communication pursuant to RPC 7.2(a) and could further mislead the public in violation of RPC 8.4(c). Because the conclusion in Opinion 735 relies on various assumptions that may or may not be accurate, the NJSBA contends that the inquiry requires additional study and broader input.

BASIS FOR GRANTING REVIEW

The Committee recognized that the question posed was a matter of great importance to New Jersey lawyers. When researching, it found only three jurisdictions in the country to address this question - Texas, North Carolina and Wisconsin. It noted that the Florida Bar's Standing Committee on Advertising had proposed an opinion, which would have determined such conduct deceptive and misleading. This opinion was rejected by Florida's Board Review Committee on Professional Ethics. Therefore, the three jurisdictions which addressed this issue are divided.

The Committee adopted the conclusion of the Texas and Wisconsin bars. The NJSBA contends that the underlying facts and questions posed to those bar groups and their legal analyses are not applicable to the question posed to the ACPE here.

TEXAS: The Texas State Bar did not address the exact question raised in New Jersey. Instead, it addressed whether Lawyer A's purchase of Lawyer B's name as a keyword search term is an advertisement that holds out Lawyer A to be a shareholder, partner, or associate of Lawyer B to the public. Texas focused on whether the keyword purchaser's ad misrepresented a lawyer's association with the other lawyer. Utilizing the "reasonable person standard" as to whether or not a reasonable person would believe that Lawyer A and Lawyer B were associated in some way, it concluded that the use of a competitor's name would not be

conduct involving dishonesty because 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 a webpage showing search results." It concluded that it would be "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 a lawyer whose name was used in the search." State Bar of Texas Professional Ethics Committee Opinion No. 661 (July 2016).

WISCONSIN: The second case which the Committee relied upon was Habush v. Cannon, 828 N.W. 2d 876,881-82 (Wisc. App. Ct. 2013). This Wisconsin case arose from a lawsuit based on an invasion of privacy. The legal analysis in that case was not pertinent to an analysis of whether or not the purchase of a competitor's name was unethical but whether or not the buying of another lawyer's name for use as a keyword search term invaded a lawyer's privacy. It was not an ethics Opinion by the Wisconsin Bar.

NORTH CAROLINA: The North Carolina opinion addresses the exact scenario presented to the Advisory Committee on Professional Ethics. The North Carolina State Bar 2010 Formal Ethics Opinion 14 (April 27, 2012) concluded that it is a violation of Rule of Professional Conduct 8.4(c) for Attorney A to purchase Attorney B's name as a keyword search term when

Attorney B never authorized Attorney A to use his name in connection with Attorney A's keyword search/advertisement. North Carolina decided this "conduct" shows a "lack of fairness or forthrightness." 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."

Looking at the paucity of opinions throughout the country on the ethical issues raised by internet advertising, and the division among the opinions that do exist, the NJSBA requests Supreme Court review of Opinion 735 and that it be referred for further study and broader input.

ARGUMENTS IN SUPPORT OF PETITION

Lawyers operate in a position of trust. One of the safeguards lawyers rely upon to preserve this position is the goodwill earned and the reputations developed over many years. In fact, many attorneys profit or fail based on their reputation. Therefore, to say that a competitor who appropriates an attorney's name, an embodiment of an attorney's goodwill and reputation, is not unethical cuts to the core of the professionalism standards to which an attorney is held. The NJSBA posits that the question of whether such action is ethical should not be decided in a vacuum and based on questionable presumptions. It should be thoroughly vetted with input from a broader audience.

For an attorney to appropriate another's name for their benefit certainly has the appearance of being underhanded. Not only could it be construed as the attorney aiming to gain a competitive advantage, but it also undermines the other lawyer's web presence. This does not comport with fairness, as North Carolina has concluded.

By purchasing a competitor's name as a keyword search term in a Google AdWord search, the Committee states that this "keyword" is not a "communication" governed by RPC 7.1 and therefore, the keyword purchase of a competitor lawyer's name is not "communication." The Committee does not address the results which ensue from buying that keyword, pushing the purchasing attorney's name to the top search engine result instead of the attorney searched for.

It flies in the face of a lawyer's obligation to be truthful if it is acceptable to appropriate another attorney's name to trigger search results so one's name is placed higher in the results, raising the likelihood of a consumer being directed to a different website than the one that was the subject of the search. A lawyer is held to a higher standard of conduct even in one's personal life, not just when representing clients. Our Supreme court has stated, "in the legal profession, there is a reverence for the truth." In re Hyra, 15 N.J. 252, 254 (1954). Lawyers must

demonstrate "honesty, truthfulness and reliability." Application of Matthews, 94 N.J. 59, 77 (1983).

Retention of legal counsel is fundamentally different from the purchase of ordinary consumer products. See Petition of Felmeister & Isaacs, 104 N.J. 515, 536 -37 (1987), which discussed at length the underpinning of the decision to permit attorneys to advertise. That case held that misleading advertising creates a danger that consumers will make "uninformed or ill-advised choices of counsel as legal representation that can affect a consumer's basics rights and have serious long-term consequences." Id. More often than not when people need to engage the services of a lawyer, they are in a vulnerable position - they have a problem and need urgent help. When litigants are contacting a lawyer, they want to hire someone they consider to be the best. The purchase of a competitor lawyer's name to elevate one lawyer's name over another in search results has an inherent bias and subverts this desire of a potential client to contact and hire the individual they believe is the best.

Opinion 735 states: "the websites of the keyword purchaser's law firm and the competitor's law firm will, presumably, both appear in the resulting search." (emphasis supplied). This sentence conveys the impression that there is a sense of equality in the positioning of the websites in the search results list. That is not correct. Google's algorithm varies from day to day and

decides which keyword purchaser gets the ads and in what order the ads appear in the search results. That listing and the ranking of an ad purchaser in the search results depends on how much money a lawyer is willing to pay. The entire system of advertising used by Google is the focus of a multistate investigation by a group of bipartisan attorneys general because of the amount of power and influence that advertising can exert on the public's day to day behaviors. nj.gov/oag/newsreleases19/pr20190909b.html.

Google is the world's largest search engine. Its algorithm for how it ranks results is perhaps its most valuable intellectual property in the world. Google uses over 200 ranking factors in its algorithm some of which are keywords. Therefore, the purchase of keywords could rank a competitor above the actual firm being searched. See backlinko.com/google-ranking-factors.

Using one law firm as an example, einhornharris, a search of that name on Aug. 30, 2019, returned 1,090,000 results. Suffice it to say, nobody is looking at all those results. As the Committee has stated, both the law firm and the competitor law firm will "presumably" both appear in the search results but here, there are 1,090,000 results. Einhorn Harris has an interest in making sure it appears on the first page as close as possible to the top of the page of the results which are displayed. EConsultancy, one of the foremost internet marketing and technology resources, referred to this practice as an "extortion scheme" where "you're forced to

pay up if you want to be found." econsultancy.com/state-antitrust-investigation-google-affect-marketing/.

The question then becomes: What happens if your website appears first in the search results? Here are some statistics from moz.com, a company focusing on search engine optimization whose metrics, according to PCMag, have become an industry standard: 75% of respondents either click on the first one or two results; then, they scan page one looking for the most relevant answer to their search query, or they visit multiple results on page one. Only 7% of respondents indicated that they browse beyond the first page of results to see as many results as possible. moz.com/blog/new-google-survey-results.

These facts about the consumer's behavior are even more relevant when a search is conducted on a mobile device where perhaps only three results appear without scrolling as opposed to viewing search results on a 22-inch screen where more searches are visible on the "first" page.

A second incorrect assumption the Committee made is that "the keyword purchaser's website ordinarily will appear as a paid or 'sponsored' website, while the competitor lawyer's website will appear in the organic results (unless a competitor has purchased the same keyword, in which case it will also appear as a paid or 'sponsored' website). The Committee assumes that because the user can choose which website to select in the search results that the

user will recognize if the keyword purchased website is paid or "sponsored."

It is true, a user can choose which site to click on. The question which remains is, will they? The same Moz study found "searchers age 60 and over are 200% more likely than 18- to 21-year-olds not to discriminate between a paid and organic listing." Id. Also, the Committee indicates that "the search engine ordinarily will mark the keyword purchased website as paid or sponsored. What if the search engine does not do that? How then does the public know which website they are being directed to if they click on the paid advertisement?

A quick look at a search for United (SBa1) shows that on the first line, all the letters are in large font. The second line contains a URL site containing the search word (United) in smaller font but it is not the United Airlines website but cheapflightfares and, the third line, in even smaller font, has a tiny square to the left where the word "ad" appears. (SBa1). The ad presents information which looks almost identical to that which would be the result of an organic search to an unsophisticated user. It is questionable to believe that the use of the tiny word "ad" protects consumers from being misdirected to a site they do not want.

Of equal importance is the fact that internet users of all ages generally do not know how to interpret the validity of the information they are presented with online. A recent FBI Internet

Crime Report demonstrates that users of all kinds believe what they see online and do not necessarily know how to process basic data, including even simple perceptions such as the differences between email and websites that are obviously fraud and those which are legitimate. fbi.gov/news/stories/ic3-releases-2018-internet-crime report-042219.

Importantly, as of September 2018, 91% of all cyber-attacks began with an email which a user clicked on believing it was a legitimate email without carefully scrutinizing the sender's address. See fifthdomain.com/industry/2018/09/14/91-percent-of-hacks-begin-with-an-email/. One only has to work in an office or regularly log on to Facebook to have been warned not to click on certain emails or sites as they are vehicles for wrongdoers to insert viruses on one's computer or for hackers to obtain personal data, hoping to capitalize on users not knowing the difference between what is fraudulent and what is legitimate.

Given the success of obviously fraudulent websites and emails, it is reasonable to assume that many consumers lack the basic understanding of how to interpret what they see on the internet. Accordingly, it also seems reasonable to assume that search engine keyword advertising can and will be used by competitors to divert potential clients to unintended websites. If advertising is meant to inform the public, Bates v. State Bar of Arizona, 4333 U.S. 350, 97 S. Ct. 2691 (1977), this conduct

arguably does the opposite and is ripe for further scrutiny and review before being declared ethical.

CONCLUSION

Purchasing another person's name for use as a keyword search term which results in an ad and leads a consumer to another website (not the one intended when the keyword was typed in) does not comport with a lawyer's obligation to be honest and truthful. The NJSBA contends that the critical and important question of whether such action is ethical should not be decided in a vacuum based on questionable presumptions nor in the context of a single inquiry. Rather, the NJSBA urges the Supreme Court to direct its appropriate committees to examine the advertising and soliciting possibilities now available as a result of evolving technology. That will allow a wide and learned audience to make recommendations about the issues raised, with the goal of ensuring that lawyers be held to the highest standards of ethics and professionalism, and that consumers remain protected from potentially misleading and deceiving practices in situations where they are most vulnerable.

Respectfully,
New Jersey State Bar Association

By Evelyn Padin/Sab
Evelyn Padin, Esq., President
Attorney ID Number: 001991992

Dated: 9/13/19

CERTIFICATION OF COUNSEL

The undersigned, general counsel for the New Jersey State Bar Association, certifies that this Petition presents a substantial question and if filed in good faith and not for purposes of delay.

Sharon A. Balsamo, Esq.
Attorney ID No. 013691994

Dated: 9/13/19

APPENDIX

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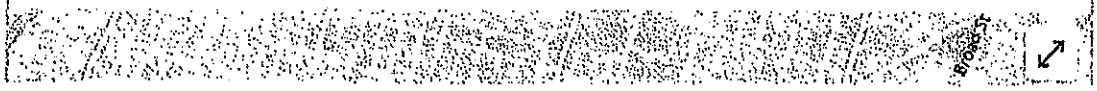

SBa1

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SUPREME COURT OF NEW JERSEY

A-61/62 September Term 2019

Docket No. 083396

In re Opinion No. 735
of the Supreme Court
Advisory Committee on
Professional Ethics

Matthew Platkin, Attorney General (Donna Arons & Thai Nguyen, Deputies Attorney General).

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REPORT OF THE SPECIAL ADJUDICATOR

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Introduction

Competitive keyword advertising or paid search marketing is a form of internet advertising that involves placing advertisements on an internet search engine that provides access to an advertiser's website. An advertiser that engages in this practice will choose a keyword that will direct a searcher to the advertiser's website. This case examines the ethical propriety of a form of this practice as it applies to attorney advertising.

The technique under scrutiny here permits an advertising attorney to pay a search engine to use the name of another attorney or law firm to obtain that advertising attorney's presence in the search results that are returned if the purchased attorney's name is searched. The Advisory Committee on Professional Ethics (ACPE) concluded that this practice is ethically permissible and does not violate Rule of Professional Conduct 8.4(c) nor (d) since the advertising does not "involve dishonesty, fraud, deceit, [nor] misrepresentation and is not conduct that is prejudicial to the administration of justice." Advisory Committee on Professional Ethics, Opinion 735 (Opinion 735). However, the ACPE did advise that other affirmative steps such as inserting or paying the "internet search engine company to insert a hyperlink on the name or website unform resource locator (URL) of a competitor attorney that will divert the user from the searched-for website to the lawyer's own law firm website" is prohibited under RPC 8.4(c). The New Jersey

State Bar Association and the Bergen County Bar Association petitioned the Court for review of the ACPE's opinion.

Opinion 735 resulted from an ACPE inquiry by an attorney who was the unknowing subject of advertising attorney's purchase of the first attorney's name. After granting the Bar Associations' request for review, the Court concluded that "an inadequate factual record exists on which to assess and rule on whether the purchasing of a competitor's names as a keyword search term violates the RPCs." Consequently, it appointed a special adjudicator and remanded this matter for analysis and fact-finding "regarding the technical aspects and practical outcomes of purchasing keyword search terms" and using those in legal advertising.

Format of the Hearing and the Record

As the Court ordered, the State and counsel for both the New Jersey State Bar Association and the Bergen County Bar Association participated in the remand proceedings. Because of the nature of the inquiry, the proceedings were conducted more as an informative seminar than as adversarial litigation.

After a number of status conferences, parties agreed to engage in limited discovery to provide any attorneys who either engaged in this advertising practice or those who might have been negatively impacted by it to answer standard form interrogatories. The parties and the special adjudicator agreed that expert testimony was necessary to address the Court's specific technical inquiries listed in the remand

order. These experts, Steven W. Teppler, Esq., Ross A. Malaga, Ph.D., and John S. Miko, D.Ed., MBA, PMP., were each asked to answer specific, vetted uniform questions. Each expert provided valuable and comprehensive testimony in the areas of e-commerce, search engine optimization (SEO), search engine analytics, digital marketing, and pay-per-click advertising.

This documentary evidence was admitted as evidence, by consent:

C-1: Dr. Miko's expert report,

C-2: Dr. Malaga's expert report,

C-3: Mr. Teppler's expert report,

C-4: Mr. Teppler's curriculum vitae,

C-5: Interrogatory answers of Diana Lynn Helmer, Esq.,

C-6: Interrogatory answers of Misty V. Avallone, Esq.,

C-7: Interrogatory answers of Laura Ruvolo, Esq.,

C-8: Interrogatory answers of Cary B. Cheifetz, Esq.,

C-9: Interrogatory answers of Rosanne S. DeTorres, Ph.D., Esq.,

C-10: Interrogatory answers of Richard H. Weiner, Esq.,

C-11: Interrogatory answers of Robert C. Papa, Jr., Esq.,

C-12: Dr. Miko's curriculum vitae, and

C-13: Dr. Malaga's curriculum vitae.

Factual Framework

To frame the issue factually, attorneys who discovered that their names or firms had been purchased or firms or attorneys who had purchased firm or attorney names were invited to participate in the hearings in this matter.

All were requested to complete standard-form interrogatories and were also asked to testify. In them, the attorneys were asked to detail their version of any incident in connection with an advertising attorney who purchased a keyword search term for an internet search engine. The attorneys were asked to detail their responses to this discovery, to explain any and all damages or injuries that they may have suffered, and to list any remedial efforts that they took to address their concerns either with the advertising attorneys or those attorneys' agents. The attorneys were also asked the current status of the incident or occurrence and the steps that were taken to become aware of the incident.

Similar opportunities were presented to advertising attorneys who might have purchased their colleagues' names as part of their own advertising plan. Questions were drafted to obtain information about the type of service or advertising package purchased, the specific keywords purchased the type of "search match" for each keyword, the search engine results, and whether there was any relationship between the advertising attorney and the attorney whose name was purchased. Six attorneys who had their names or firms purchased participated. No advertising attorneys or firms did.

The responses were generally uniform. In each, the practice was discovered when the attorney whose name was purchased self-searched the attorney's own name in a search engine, or that attorney received that present, future, or potential clients

were having difficulty locating those attorneys on the Internet. None of the responding attorneys detailed any specific damages suffered from this practice. All, however, anticipated that potential harm occurred because attorneys speculated that they lost inquiring and the direction away from the attorney whose name was purchased to the advertising attorneys' website. One responding attorney provided information about collateral injury related to their efforts indicated that the attorney's website consultant that the only foolproof method to ensure that keyword searching was not being used adverse to that attorney, was to spend approximately $10-$15 per day plus a management fee. The same attorney also detailed other remedial efforts including purchasing their own name as a keyword to protect it from other advertising attorneys, at a cost of $100.00 per month. Advertising attorneys may also agree to name the attorneys whose names have been purchased as a "negative keywords" that would preclude the direction of inquirer to the advertising attorneys' website.

All the responding attorneys reported that they contacted the attorneys that had purchased their names to seek to have the advertising attorneys stop this practice. Some sued for injunctive relief and others convinced the purchasing firms to remove their keyword name or insert a "negative keyword" that would preclude the direction to their firms. Some of the advertising attorneys acknowledged that they were aware of the practice. Others, however, did not and indicated that they had relied on their

website developers to develop an advertising plan that involved the redirection of internet inquiries to their clients.

Other States' Approaches

To date, six other jurisdictions addressed the general propriety of the use of keyword advertising in different contexts and have analyzed the issue under different RPCs.

The Ohio Board of Professional Conduct concluded that "a lawyer's purchase of a competitor lawyer's name for use in keyword advertising may constitute conduct involving dishonesty, fraud, deceit, or misrepresentation." The Board concluded that this practice, at bottom, "is designed to deceive an Internet user." This impacts adversely on an attorney's overall fitness to practice law. The Ohio Board of Professional Conduct Opinion 2021-04 (June 11, 2021).

The State Bar of North Carolina found that "the intentional purpose of the recognition associated with one lawyer's name to direct consumers to a competing lawyer's website is neither fair nor straightforward." This, according to that Bar, was actionable misconduct that involved "dishonesty, fraud, deceit, or misrepresentation." The North Carolina State Bar 2010 Formal Ethics Opinion 14 (April 27, 2012).

In 2013, the Florida Standing Committee on Advertising initially concluded that competitive keyword advertising is "deceptive and inherently misleading."

Florida Bar Standing Committee on Advertising Opinion A-12-1 (2013). However, the Florida Bar Board of Governors vacated that opinion and held that

> the purchase of ad words is permissible as long as the resulting sponsored links are clearly advertising based on their placement and wording, and because meta tags and hidden text are outdated forms of web optimization that are penalized by search engines and can be dealt with via existing rules prohibiting misleading forms of advertising.

The Professional Ethics Committee in Texas concluded that a Texas attorney does not violate the RPCs there "by simply using the name of a competing lawyer or law firm as a keyword in the implementation of an advertising service offered by a major search engine company." Texas Opinion 661. Any statements made in that advertising, however, must be truthful and must not be misleading and must comply with all other rules on attorney advertising.

Two jurisdictions have case law about this issue.

In South Carolina, an attorney attempted to attract new business to that attorneys fledgling timeshare cancellation practice. In re Naert, 777 S.E. 2d 823 (2015). In this matter, the lawyer used the name of the attorney's routine adversary and the name of a timeshare company as keywords. Therefore, whenever a consumer or court user searched the internet for the name of that attorney or for the timeshare company itself, the purchasing attorney's advertisement would appear in the results. Id. The Supreme Court concluded that this violated South Carolina's

RPCs that govern attorney advertising and the general precept that an attorney should act fairly and with integrity, with professionalism, and with civility. Id..

In Wisconsin, its Court of Appeals concluded that the use of a lawyer's competitor's name as a keyword was not a "use" that violated a statute in that State that protected the privacy rights of its citizens. Habush v. Cannon, 234 Wisc. 2d 709 (2013). The defendants were personal injury attorneys that used the name of a well-regarded personal injury law firm as a keyword. Habush, 234 Wisc. 2d at 713. The court ultimately concluded that since there was no visible "use" of the acquired attorneys' name or firm, that the privacy statute was not violated. Habush, 234 Wisc. 2 at 729.

Glossary

A glossary of terms defining the more common industry terms in general and those used in keyword advertising specifically is helpful. The three experts defined these words and concepts as predicate to the technical questions for which the Court has requested answers.

"Keyword"/"Keyword search term": These are words or phrases entered into a search engine to find information on a topic. Keywords are used to retrieve relevant results from websites, documents, articles, and videos. Advertisers use keywords to target their ads to specific searches.

"Search engine optimization" (SEO): This process improves a website by increasing that website's visibility in search engines when specific keywords are searched. The primary goal of an SEO is to enhance a website's non-paid search engine traffic by making that content relevant and appealing.

"Internet marketing campaign" (also digital marketing campaign): This is a well-planned and coordinated effort to promote a product, service, or brand to a specific audience through digital channels. Its primary objective is to reach and to engage with an audience and drive those users to the managed website.

"Organic search result": This characterizes a search engine inquiry that is created through the search engine's algorithm and that is not influenced by paid advertising.

"Paid search result": This characterizes a search engine inquiry that is derived from paid advertisers. These advertisements are frequently labeled as "ad" or "sponsored" in the search results.

"Standard search advertising": This is a form of on-line advertising that is displayed when users input specific keywords or inquiries. The advertisements generally consist of a headline, a display URL, and a short description.

"Responsive search advertising": This method of advertising allows advertisers to enter multiple headlines and descriptions for an advertisement and

then uses machine learning to test different combinations to determine which will perform best.

"Dynamic search advertising": This type of advertising uses website content to target advertisements and provide users with current and personalized search results.

"Search engine advertisement auction": This is the competitive bidding process that takes place on advertising platforms to determine which advertisements are displayed to users when users perform a search on a search engine.

"Search engine results page" (SERP): This is the list of websites with a short description of each that appears after a search engine inquiry. The SERP will include organic search results, other SEO factors, and paid search results where advertisers bid to appear for specific keywords.

"Conversion rate": This is a key performance metric that is used in online marketing and e-commerce to measure how effective an action or campaign is in turning potential customers into actual ones. It represents the percentage of users who click on an advertisement and then take a subsequent desired action on the resulting advertiser's website.

"Keyword match types": This is a fundamental concept in online advertising and particularly in "pay-per-click" (PPC) advertising platforms. It refers to how closely a keyword must align with a user's search inquiry for an

advertisement to be displayed as part of a requested search. There are three categories of keyword match types: broad, phrase, and exact. Broad matching has the largest reach, but is much less precise in the results that it returns. Phrase matching searches for the implicit meaning of the keyword. Exact matching is the strictest match type and mirrors the same meaning or intent as the keyword.

"Clickthrough rate": This is a metric that is used in paid search advertising to measure the effectiveness of an advertisement in relation to the number of times that it was displayed and reveals the percentage of users who click on that advertisement.

"Black hat"/"White hat"/ "Grey hat": These are characterizations of search engine optimization practices. Black hat SEOs are nefarious attempts to improve a website ranking by using techniques that violate a search engine's guidelines. White hat SEOs are legitimate ethical attempts to improve a website ranking by using techniques that comply with a search engine's guidelines. Grey hat SEOs are marginal attempts to accomplish the same purposes.

"Landing page": This is the page that is displayed when a user clicks on a search result of an ad.

Factual Findings

After a review of the written discovery, the witness testimony, both lay and expert, and considering the evidence admitted and the comments of counsel, these facts are found:

1. There are three top internet search engines used in the United States.

Based on a number of metrics, including market share, user surveys, traffic analysis, search engine advertising, and search engine features and integration, the experts agree that the top three internet search engines are Google, Bing, and Yahoo.

2. These search engines have a complicated organizational and operational structure.

Each of the major search engines use complex algorithms to deliver results to users that are based on specific search inquiries. The process begins by "crawling", a process why which the engines seek to find content on the web. The collected data is then indexed in each engine's database. The index is used to retrieve relevant pages when the user searches it. The engine's proprietary algorithm then ranks the responses. One of the ranking factors is a keyword presence. The results that are generated are then delivered in response to the users' inquiries. Each search engine incorporates some form of user feedback to improve its search results.

A. Keywords placed into the search bar reveal the requested information through the search engine.

When users enter search terms, users initiate a process to find specific

answers to specific questions. Essentially, when a user enters a search term, the engine's index is searched to find and to rank sites that match the searched term. The information that is returned includes the content that the engine has gathered. It is also considered with semantic relationships between the words searched and how those words are used in a phrase or question, a user's personal history and preference, and geographic locations.

B. The results that are generated appear on a Search Engine Results page (SERP).

When a search is completed, the engine returns a search engine results page or SERP. The SERP displays a link to each discovered website and a brief description of it. The SERP includes both organic search results and paid search results. Additional content including snippets, or concise answers to a users' question, knowledge panels, related questions, and images and videos may also be listed.

C. Search results are characterized either as organic or as paid.

The results generated from organic search results and paid keyword marketing are essentially the same- a user will click on a link from the SERP and will be directed to a website. Paid results are known as pay-per-click (PPC) advertisements. These ads are products of advertisers' bids on specific keywords to have their ads appear when those keywords are searched. Advertisers pay the search engine

whenever a user clicks on these ads. Although there is no firm rule, organic search results often appear later in a search result than the paid ads. Paid ads are usually designated with an "Ad" or "Sponsored" moniker to differentiate them from the organic results. Advertisers often optimize their ads by selecting the right keywords, crafting compelling ad copy, setting an appropriate bid amount, and ensuring that the landing page provides the information requested.

3. There are a number of benefits that are obtained when a paid keyword marketing campaign is used by an attorney services advertiser.

The experts agree that there are a number of potential benefits to organizations that use keyword marketing campaigns. Organic SEO activities are slow. PPC or keyword campaigns reveal results within hours. Additionally, PPC campaigns allow advertisers to target specific keywords, locations, devices, times and day, and many more data metrics that will enable a forensic determination about the target audience. PPC efforts are flexible and can be adjusted very quickly to direct users to a specific landing page almost immediately. These efforts are very cost-effective if they are managed correctly to ensure optimization.

4. There are a number of purchasing options that are available for paid SEO/keyword marketing campaigns.

The top three internet search engines offer a number of purchasing options for SEO/keyword marketing campaigns.

A. Each of the major search engines has a specific payment structure.

Google and Bing/Yahoo use pay-per-click (PPC) models where advertisers pay for specific user interactions with their ads. Each time a user clicks on an ad, the advertiser is charged. Google also offers other payment options including costs-per-thousand viewable structure for display ads, cost-per-acquisition, and return-on-ad-spending models.

B. There are different categories or levels of keyword search term advertising that can be purchased. These include keyword match types, dynamic search, and other methods of broadening or narrowing the search results.

Keywords can be targets using different match types- broad, phrase, or exact. Keyword match types determine how closely a search query must match the targeted keywords for an ad to appear on the SERP. An "exact match" must exactly match the keyword or an extremely close variant of it. A "phrase match" must contain the keyword as a phrase, but it can also offer a balance between an exact match and a word or phrase close to it. A "broad match" may contain the keyword in any order with additional words before or after it.

Dynamic search strategies allow advertisers to generate ads automatically and to display headlines based on the content of their websites. Here, advertisers create a dynamic search ad campaign and select the websites that they wish to target. The engine then scans the advertiser's website to identify relevant keywords and will

automatically generate ad headlines and landing pages. These can be completely controlled by advertisers who can set bid adjustments and other settings to control ad delivery. This method is particularly useful for websites with large or frequently changing inventories since it automates the process of creating and maintaining keyword targeted ads. Advertisers can also broaden or narrow ad targeting based on users' locations, device, timing, and demographics.

Although each can be used individually, advertisers fine-tune ad campaigns to target the most relevant and valuable audiences while balancing the costs and optimizing its search returns.

C. Internet search engine advertisement auctions are conducted in real time and according to a specific protocol.

Google Ads and Microsoft Advertising (the platform that administers Bing and Yahoo advertising) use a real-time auction system. First, advertisers create and establish their campaigns within the advertising platform. This includes selection of keywords, creating ad copy, specifying the target options, setting bid amounts, and defining budgets. Then, a user enters a search query into the engine using specific keywords or generalized search terms. The engine system recognizes that a user has made an inquiry. This triggers an ad auction. The engine will assess the relevance of the keywords to the user's inquiry. Bid amounts are then set for the campaign keywords and the engine will calculate an ad rank for each ad in the auction. The engine will then select the ad with the highest ad ranks to display on the SERP. The

selected ads are then displayed and the advertisers are charged when a user clicks on the ad.

D. There are a number of factors that determine whether a particular advertisement will appear in response to the entry of a paid keyword search term.

The display of an advertisement in response to a specific keyword search is influenced by the bid amount, a quality score, ad extensions providing more information that improves the visibility and relevance of an ad, keyword relevance, targeted settings, and advertisement schedules.

E. There is no guarantee that a paid advertisement will appear for every user search that uses a paid keyword.

Many factors impact whether a paid ad will appear. These include keyword competition, bid amounts, quality scores, the advertiser's budget, the ad rank and scheduling, geographical considerations, campaign settings, match types, and user behaviors.

F. Control mechanisms exists are available when advertisers purchase keyword search terms.

With control mechanisms, advertisers target specific audiences, manage the budgets, and tailor their messaging. All three engines provide keyword (positive and negative) selection, campaign settings, ad scheduling, and targeting for location, devices, demographics, audience, and negative keywords.

G. Search engine platforms are paid when users click on paid keyword advertisements under the pay per click model.

Charges for paid keyword advertisements are generated when users click on the displayed advertisements. Advertisers specify a maximum bid amount, and the actual cost per click is determined by the bid among the advertisers that appear later in the ad ranking. Charges are based on the competition of the ad auction.

5. Search engines create their own guidelines that govern what keyword or words can be purchased.

Each search engine maintains its own policies about what keyword or words are available for purchase. Additionally, guidelines and restrictions exist to prevent the misuse of sensitive terms, the dissemination of misleading information, and any content that violates the search engines' advertising policies. Substantial emphasis is placed on the restrictions of enumerated "prohibited practices."

6. Advertisers may not be the exclusive purchaser of a particular keyword.

None of the top 3 engines permit exclusive purchase of a keyword. All of the platforms operate on an auction system so many advertisers can bid on the same keyword.

7. Each search engine has specific limits and restrictions on what word or words can be purchased as keyword search terms.

Search engines have strict policies that restrict or prohibit the use of certain keywords, especially those that are related to adult content, recreational drugs, and

products or services that are designed to enable dishonest behavior. Advertisers who fail to comply with these restrictions risk ad disapproval, account suspension, or other adverse consequences.

8. Similarly, each search engine has specific limits and restrictions on what can appear in an advertisement in response to the purchase of a keyword search term.

Advertisements cannot be misleading and must also comply with all other content-based guidelines set forth by the platforms. These restrictions ensure that advertisements are compliant with both legal and ethical standards and also provide a positive and safe user experience.

9. Even if a purchased attorney's name is not connected to a website, an advertiser attorney search results will still return that purchased attorney's name.

If an attorney does not participate in any paid search advertising, their information would not be included in the paid search areas of the SERP regardless of whether they had a website. Although an attorney with a website would rank very high in organic search results, even without a website, an attorney could still be shown in the organic search area.

10. Opportunities to prohibit third parties from using or benefitting from use of their name in a keyword search are scarce.

Only trademark owners may file complaints about the unauthorized use of their trademarked ad text. However, this does not prevent advertisers from bidding on trademarked terms as keywords. There are other methods of preventing third

parties from using or benefitting from keyword name advertising including cease and desist letters, threatened or actual legal action, complaints to the platform (if trademark infringement occurs), and employing keyword exclusion lists.

11. The advertising platforms use the auction system to determine placement of the ads.

A. There are a number of factors that determine where and when a paid advertisement will appear.

Factors that influence where and when a paid advertisement will appear include the order of placement, the bid amount, the quality score, and ad extensions. Generally, the combination of the bid amount with the quality score determines the ad rank.

B. When an advertiser employs a paid keyword marketing campaign, the keyword or words generally appear in the resulting advertisements on the SERP.

Advertisers who bid on a particular keyword can generally use any text in their ads and the keywords they use will typically appear in the resulting advertisements on the SERP.

C. Advertisements appear on a SERP in a variety of formats.

The specific formats and ad placement on a SERP will very among the engines and will also depend on the search inquiry and user behavior, There are a variety of advertisements that can appear on a SERP including text ads, shopping ads with

product images, video ads, image ads, app install ads, banner ads, sponsored listings, knowledge panels, carousel ads, featured snippets, call-only ads, and dynamic ads.

D. Paid keyword search results generally appear earlier and higher in relation to organic search results.

Generally, paid advertisements appear at the top of the SERP. They can also appear lower on the SERP as the user scrolls down the page. However, this is not a hard and fast rule because the specific layout and placement of paid search results evolves over time as the engines update their algorithms and designs.

E. Paid search advertising is given priority placement in the SERP.

Paid search ads are prioritized over organic search results. Priority placement is a key feature of paid advertising and is designed to ensure that paid ads have prominence.

F. Visual cues are used to differentiate between paid and organic searches.

The platforms use visual cues and labeling techniques to distinguish paid ads from organic ones. Generally, paid ads are noted as “ad”, “sponsored”, and “promoted.”

G. Paid search results are generally always listed above organic results.

Paid ads appear above the organic results and lower in the SERP on Google. Microsoft’s platform produces them on the right sidebar.

H. Paid search results are not always located in the same place in the SERP each time a search of the keyword is conducted.

Placement of paid search results can vary on the SERP depending on the competition, the bid amount, and the quality score. Other factors such as user behavior, ad rotation, and query relevance can also result in different placement on the SERP.

I. Search results are affected by the type of device used to generate the SERP.

SERPs are streamlined to fit on mobile devices, but the core content of the SERP remains consistent across the devices. Currently, advertisers are implementing mobile-specific strategies to optimize their campaigns to reflect market research that reveals that 60% of all web traffic is accessed by mobile devices.

J. Paid search results do not appear in response to a search if the keyword was not purchased.

A paid search result will not typically appear in response to a search inquiry if the keyword was not purchased and does not appear in the website copy nor in the ad that is associated with the advertiser's campaign.

12. Paid keyword results are set apart from the organic results and are designated with the words such as "ad", "advertisement", or "sponsored."

All three engines designate the paid keyword placement with terms to differentiate them from other results in the SERP. These include "ad", "sponsored",

or "advertisement." Google, in particular, uses icons known as "flavicons" that provides an additional layer of identification.

13. Physical placement of a keyword in the top position on a SERP is preferable, but it might be cost prohibitive.

Top positions achieve higher click through rates and that position often drives traffic to the site. The position also boosts brand visibility and fosters the perception of authority and relevance among users. It must be noted, however, that the costs that are often associated with the top placement might make it, in the long term, less profitable. Proper decision making as to this point requires regular monitoring, testimony and optimization.

14. There is no ideal appearance of an ad on a SERP.

At bottom, the ideal placement for an ad on a SERP depends on the goals of the advertiser and the specific needs of the author of the search request. The 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.

15. SEOs cannot manipulate search results, however, white, gray, and black hat techniques influence search rankings.

As premise, search engines use sophisticated algorithms combined with strict guidelines to maintain the quality and relevance of search results. This gives the

platforms credibility. White hat efforts will use authorized methods to optimize site factors. Less scrupulous SEOs employ both grey and black techniques to attempt to manipulate search results with deceptive automated practices.

16. Many users cannot differentiate between organic search results and those that are generated from paying advertisers.

The differences between organic and paid advertising searches are nuanced and most users have a difficult time telling the difference between them. Recent scholarship reveals that 68.2% of respondents were unable to recognize a Google ad in the SERP. Consequently, existing or potential court users are left on their own to ascertain the validity of any search result.

17. The top three internet search engines use private names in their internet searches even if the name is not a purchased keyword.

The algorithms and protocols that the engines use are proprietary and they are not fully disclosed to the public. It is possible, therefore, that search engines use private names even if the name is not a purchased keyword.

18. AI is an important tool that is used to refine SEO.

AI is becoming increasingly used in SEO to enhance digital marketing and search engine strategies. AI generates high-quality content that is relevant and is optimized for websites and blogs. AI tools analyze trends and also record user behavior that generates suggestions about content topics and keyword strategies. AI also allows for sophisticated keyword research that pinpoints relevant keywords and

customary phrases for which users search. The algorithms that support a form of AI known as Natural Language Processing (NLP) enable search engines to understand and to interpret inquiries more accurately. This translates to more accurate and sophisticated results that are more quickly returned.

AI continually learns from itself and recognizes synonyms and variations of words. Search engines use AI to refine their ranking algorithms. These algorithms consider a number of factors including user behavior, content quality, and relevance to determine search rankings. Voice searching is also becoming increasingly prevalent too and permits search engines to optimize content to natural language and adapt to conversational search patterns.

Search engines benefit from AIs ability to analyze data, to predict future trends, and to anticipate user behavior. Harnessing this burgeoning sophistication will permit SEO professionals to plan and to develop other strategies. The engine's maintenance tasks may also replace human involvement in repairing broken links, slow-loading items, and mobile device problems. Security is also improved because of the enhanced supervision and monitoring abilities. To that extent, better vigilance can be provided to alert businesses or legal teams when unauthorized or improper brand name use or trademarks infractions are detected either in ads or in search results.

As it is pertinent to the question current before the Court, AI algorithms can assist search engines to enforce advertising policies including restrictions on bidding on certain keywords or brand names. This specifically can assist to prevent the unauthorized use of another attorney's name as a search terms in paid advertising. Specifically, AI can create automated processes that can detect violations and trigger actions such as ad removal or account suspension.

Proposed Modifications to the Rules of Professional Conduct

On remand, the Court invited the parties, other participants, and the special adjudicator to "address and propose changes to the RPCs that relate to the keyword search term issue." It is suggested that no changes to the current rules are necessary.

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). Misleading communications include actual misrepresentations or factual omissions, those have a likelihood of creating unjustified expectations, or those that create improper comparisons with other lawyers' services. RPC 7.1(a)(1-3).

Confidence is created and perpetuated in the judicial system based on the candor, credibility, and honesty of those who work within it. It is fundamental, therefore, that attorneys act with complete integrity and in scrupulous adherence to the Rules of the Professional Responsibility, Since 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.

Respectfully submitted,

Jeffrey R. Jablonski, A.J.S.C.
Special Adjudicator

Dated: June 3, 2024

NEW JERSEY STATE BAR ASSOCIATION

August 7, 2024

VIA LAWYERS' SERVICE
Honorable Heather Joy Baker, Esq.
Clerk, Supreme Court of New Jersey
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RE: IN RE SUPREME COURT ADVISORY COMMITTEE ON PROFESSIONAL ETHICS OPINION NO. 735
Docket No. 083396

Dear Ms. Baker:

On behalf of the New Jersey State Bar Association, enclosed for filing please find an original and nine (9) copies of a Supplemental Brief in connection with the above-referenced matter.

Once filed, please return a "FILED" copy to me in the self-addressed stamped envelope.

Thank you again for your courtesies.

Respectfully submitted,

Sharon A. Balsamo

SHARON A. BALSAMO
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SUPREME COURT OF NEW JERSEY
DOCKET NO. 083396

IN RE SUPREME COURT ADVISORY COMMITTEE ON PROFESSIONAL ETHICS OPINION NO. 735	:	On Appeal to the New Jersey Supreme Court from the Advisory Committee on Professional Ethics

SUPPLEMENTAL BRIEF OF NEW JERSEY STATE BAR ASSOCIATION

OF COUNSEL:
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ON THE BRIEF:
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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

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Dated: August 7, 2024

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SUPREME COURT OF NEW JERSEY
DOCKET NO. 083396

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

Sharon A. Balsamo, an attorney at law of the State of New Jersey, certifies the following to be true:

1. On August 7, 2024, on behalf of the New Jersey State Bar Association, the Supplemental Brief of the New Jersey State Bar Association was email to SupremeCTBrief.mbx@njcourts.gov and an original and nine (9) paper copies were sent by overnight delivery via Lawyers' Service to:

Honorable Heather Joy Baker
Clerk of the Supreme Court
Hughes Justice Complex
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2. On August 7, 2024, on behalf of the New Jersey State Bar Association, the Supplemental Brief of the New Jersey State Bar Association was emailed to the below parties and two paper copies were sent by overnight delivery:

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I hereby certify the foregoing statements made by me are true to the best of my knowledge.

Respectfully Submitted,

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Dated: August 7, 2024

Recent Arguments Before the Supreme Court NJ Courts Link

https://www.njcourts.gov/courts/supreme/supreme-court-webcast/recent-arguments

Issued by the Advisory Committee on Professional Conduct
March 7, 2024

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

Appointed by the Supreme Court of New Jersey

OPINION 745

Referral Fees

The Advisory Committee on Professional Ethics and the attorney ethics research assistance hotline have received inquiries about out-of-state lawyers seeking payment of referral fees from New Jersey certified attorneys. Some states, such as Florida, host seasonal New Jersey residents who present local lawyers with legal issues that involve New Jersey law; out-of-state lawyers in our neighboring states may also have local clients with New Jersey matters. For the reasons set forth in this Opinion, certified lawyers generally may not pay referral fees to out-of-state lawyers. Certified lawyers also may not pay referral fees to New Jersey lawyers who cannot accept a case, or must withdraw from a case, due to a conflict of interest. Certified lawyers may, however, pay referral fees to New Jersey

lawyers who referred a case when they were eligible to practice but were thereafter suspended or disbarred when the case resolved and the referral fee was payable.

Only New Jersey lawyers who are certified trial lawyers under Court Rule 1:39-1 through 1:39-9 may pay a referral fee. The Rules of Professional Conduct prohibit other New Jersey lawyers from paying referral fees. RPC 7.2(c) (lawyers shall not "give anything of value to a person for recommending the lawyer's services") and RPC 7.3(d) (lawyers "shall not compensate or give anything of value" to a person for recommending the lawyer's employment by a client or "as a reward for having made a recommendation resulting in the lawyer's employment by a client").

Referral fees are a division of the legal fee, paid for legal services rendered. Rule of Professional Conduct 1.5(e) provides:

> Except as otherwise provided by the Court Rules, a division of fee between lawyers who are not in the same firm may be made only if:
>
> (1) the division is in proportion to the services performed by each lawyer, or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; and
>
> (2) the client is notified of the fee division; and
>
> (3) the client consents to the participation of all the lawyers involved; and
>
> (4) the total fee is reasonable.

Thus, lawyers may receive a legal fee only in proportion to legal services rendered or when the lawyer has assumed joint responsibility for the representation. RPC 1.5(e). The Court Rule governing certified lawyers, however, expressly permit them to pay a referral fee: "fee division may be made without regard to services performed or responsibility assumed by the referring attorney." R. 1:39-6(d).

As a referral fee is considered payment for legal services rendered in the case (not in proportion to actual services rendered), the lawyer to whom the fee is payable must be eligible to practice New Jersey law. People who are not permitted to practice law in New Jersey may not receive fees for legal services rendered. Stack v. P.G. Garage, Inc., 7 N.J. 118, 120, 123 (1951) (nonlawyer suit to obtain fee for legal services dismissed because unauthorized practice of law is illegal); Appell v. Reiner, 81 N.J. Super. 229, 241 (Ch. Div. 1963), rev'd on other grounds 43 N.J. 313 (1964) (out-of-state lawyer not entitled to recover legal fee for unauthorized practice of law); In re Armorer, 153 N.J. 358 (1998) (New Jersey lawyer cannot recover fee for services rendered while ineligible to practice law). An out-of-state lawyer is not permitted to receive a referral fee for a New Jersey case unless the out-of-state lawyer is licensed and eligible to practice law in New Jersey. Among other requirements, lawyers must have New Jersey bank accounts to be eligible to practice law in New Jersey. Rule 1:21-6(a).

New Jersey lawyers who cannot undertake a New Jersey case, or who must withdraw from a case, due to a conflict of interest often refer the matter to a certified lawyer. Certified lawyers may not pay referral fees in these circumstances since the referring lawyers are not able to, or are no longer able to, provide legal services in that case. Of course, if an unforeseen conflict arises in the midst of litigation and was not foreseeable, the lawyer is entitled to payment for legal services rendered prior to withdrawing from the matter, though no further payment may be made. DeBolt v. Parker, 234 N.J. Super. 471 (Law Div. 1988) (lawyer who had to withdraw from a case when an unforeseen conflict developed was entitled to be paid only for services rendered prior to the development of the conflict and withdrawal); ACPE Opinion 613 (May 1988) (lawyer could be paid for services rendered prior to withdrawal due to an unforeseen conflict but could not receive a referral fee because the lawyer should not "profit from" the conflict); Opinion 629 (July 1989) and Opinion 304 (May 1975) (lawyers were permitted fees for legal services rendered prior to withdrawal due to an unforeseen conflict). Hence, if a lawyer is unable to represent a party due to a conflict, the lawyer cannot receive a legal fees, in the form of a referral fee, for that representation.

Certified lawyers may pay referral fees to lawyers who were in good standing and eligible to practice law at the time of the referral but who later were suspended or disbarred at the time the case was concluded and the referral fee was

payable. Eichen, Levinson & Crutchlow, LLP v. Weiner, 397 N.J. Super. 588, 594-95 (App. Div.), certif. den. 195 N.J. 418 (2008). The court reasoned that the referring lawyer was not required to have performed any legal work on the referred cases to obtain the referral fee and, at the time of the referral, the lawyer was eligible to practice.

At times, New Jersey lawyers refer cases to out-of-state lawyers. New Jersey lawyers may not "practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction." RPC 5.5(a)(1). If the law of the other state allows payment for legal services in the form of a referral fee to an out-of-state lawyer, then the New Jersey lawyer may accept the referral fee. The New Jersey lawyer should, however, ensure that the other state's law permits such payment for legal services or risk violating Rule of Professional Conduct 5.5(a)(1). Further, all referrals should depend upon the specific needs of the client. "[T]he lawyer owes a duty to make an independent judgment concerning what kind of referral will be in the client's best interests, completely free from any economic or other incentive that might weigh on the lawyer's judgment." Opinion 681 (July 1995); see also Opinion 696 (May 2005).

In sum, certified lawyers may not pay referral fees to out-of-state lawyers unless those out-of-state lawyers are licensed and eligible to practice law in New Jersey. In addition, certified lawyers may not pay referral fees to a lawyer who

cannot handle a matter due to a conflict of interest, though they may pay referral fees to lawyers who referred a case when they were eligible to practice but were suspended or disbarred at the time the case resolved and the referral fee was payable.

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SUPREME COURT OF NEW JERSEY
DOCKET NO. 089278

IN RE SUPREME COURT ADVISORY COMMITTEE ON PROFESSIONAL ETHICS OPINION NO. 745	NOTICE OF PETITION FOR REVIEW OF ADVISORY COMMITTEE ON PROFESSIONAL ETHICS OPINION NO. 745

BRIEF OF NEW JERSEY STATE BAR ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

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PRELIMINARY STATEMENT

The Advisory Committee on Professional Ethics ("ACPE" or "the Committee") issued Opinion 745 in response to inquiries received by the attorney ethics research hotline "about out-of-state lawyers seeking payment of referral fees from New Jersey certified attorneys." The Committee determined certified attorneys are not permitted to pay referral fees to out-of-state referring attorneys under Rule 1:39-6(d) unless the latter "is licensed and eligible to practice law in New Jersey." The New Jersey State Bar Association ("NJSBA") respectfully submits the Committee's analysis and conclusion are incorrect, and requests this Court grant its Petition and summarily reverse Opinion 745.

First, the Committee's interpretation of R. 1:39-6 is at odds with well-established canons of statutory construction. Concluding that "attorney" as it appears in Rule 1:39-6 means only a "New Jersey attorney" ignores the fact that the plain language of the Rule contains the word "attorney" *without* any qualification; it does not employ the term "New Jersey attorney" or except out-of-state attorneys. Without such qualification, for purposes of permissible recipients of referral fees in the context of Rule 1:39-6, the word "attorney" necessarily includes out-of-state attorneys as well as New Jersey attorneys.

Second, Opinion 745 conflates the nature of a referral fee paid to a New Jersey certified attorney, on the one hand, with a division of a legal fee under

R.P.C. 1.5(e), on the other. Rule 1:39–6(d) provides that a lawyer who refers a matter to a certified attorney is entitled to the payment of a referral fee "without regard to services performed or responsibility assumed by the referring attorney." This distinction is important, because an attorney who receives a referral fee under Rule 1:39-6(d) is not *sharing* fees with another lawyer as the "fee" is earned without performing legal services. Put simply, it is the Rule 1:39-6(d) referral itself, *not* any service rendered by the referring lawyer, which is the distinguishing factor.

Third, Opinion 745 ignores the potential harm to New Jersey clients, the public at-large, and the administration of justice. Opinion 745 eliminates the incentive for out-of-state lawyers to refer cases to certified attorneys deemed by this Supreme Court to possess the requisite skill, knowledge, experience, and competence to handle complex cases for the betterment of New Jersey clients. By excluding out-of-state attorneys from the ability to receive a referral fee, Opinion 745 increases the risk of harm from representation by out-of-state attorneys not familiar with New Jersey practice with potentially significant adverse consequences to the client, resulting in a loss of confidence in the justice system.

Finally, Opinion 745 creates immediate harm to certified attorneys with pre-existing referral fee arrangements with out-of-state attorneys made in

reliance on the unambiguous language of R. 1:39-6(d). According to the Committee, an out-of-state attorney who refers a case to a certified New Jersey lawyer is engaging in the practice of law in New Jersey by having referred the underlying case and receiving a referral fee under Rule 1:39-6(d). The effect of Opinion 745 is to place two competing obligations of a certified attorney in conflict with each other: the ethical obligation to not divide fees except as permitted by law, see R.P.C. 1.5(e), and the contractual obligation to pay referral fees that arose at the time a matter was referred to a certified attorney.

The NJSBA submits this Court's timely intervention is necessary to summarily reverse Opinion 745 and permit Court-certified attorneys to pay referral fees to out-of-state attorneys in accordance with the Rules of Court.

STATEMENT OF THE MATTER INVOLVED

The ACPE issued Opinion 745 on March 7, 2024, interpreting Rule 1:39-6 to preclude the payment of referral fees to out-of-state attorneys. The NJSBA, the largest professional association of attorneys within this state, filed a notice of petition on April 1, 2024, seeking reversal of Opinion 745.

Pursuant to R. 1:39-6(d), New Jersey certified are permitted to provide referral fees to referring attorneys "without regard to services performed or responsibility assumed by the referring attorney[.]" Since its adoption, certified trial attorneys have relied on the plain language of R. 1:39-6(d) in the payment

of referral fees and in furtherance of their representation of New Jersey clients. This referral fee mechanism is *an exception to* the general rule prohibiting the division of a fee by and between lawyers who are not in the same firm, unless the fee is in proportion to the services performed by each lawyer or each lawyer assumed joint responsibility for the representation. See R.P.C. 1.5(e). Such a referral fee is one of the privileges granted to certified attorneys by the Supreme Court and the New Jersey Board on Attorney Certification in recognition of their "education, experience, knowledge, and skill for each designated area of practice[.]" R. 1:39.

The ACPE interpreted Rule 1:39-6 to preclude the payment of referral fees to out-of-state attorneys. This interpretation hinges on the premise that a Rule 1:39-6(d) "referral fee is considered payment for legal services rendered[.]" The ACPE's description of a Rule 1:39-6(d) referral fee as "a division of the legal fee, paid for legal services rendered" is a legal fiction, wholly unsupported by case law, and in direct conflict with the spirit and intent of the Rule. The NJSBA respectfully submits this Court should grant its petition and reverse Opinion 745.

QUESTION PRESENTED

Can New Jersey lawyers who are certified trial lawyers under Rule 1:39-1 through 1:39-9 pay a referral fee to out-of-state referring attorneys who are not licensed to practice law in New Jersey?

ERRORS COMPLAINED OF

The Committee misinterpreted the plain language of R. 1:39-6. The Rule does not contain the term "New Jersey attorney," nor does it except "out-of-state attorneys" from its purview. The absence of limiting language, appearing elsewhere in the Court Rules, demonstrates that in R. 1:39-6(d) there was no intent to limit the application to an "attorney-at-law of this State." Rather, the lack of such qualification in the language of R. 1:39-6(d) means the intent was to apply to "all attorneys" generally.

Opinion 745 also erroneously conflates the payment of a referral fee in the context of Rule 1:39-6(d) with the division of a legal fee under R.P.C. 1.5(e). This led to the mistaken conclusion that an out-of-state attorney's act of referring a case to a New Jersey attorney constitutes the practice of law in New Jersey, notwithstanding that no case law is cited in support of this proposition.

Because the Committee's opinion is not supported by the plain language of the Rule or other case law and poses the risk of significant harm to the public, this Court should grant this petition and summarily reverse the matter.

THE MEMBERSHIP OF THE NJSBA HAS A COMPELLING INTEREST IN OPINION 745.

"Petitions for Supreme Court review can be filed by 'any aggrieved member of the bar, bar association or ethics committee.'" On Petition for Rev. of Opinion 475 of Advisory Comm. on Pro. Ethics, 89 N.J. 74, 80 (1982)

(quoting R. 1:19–8). The NJSBA is the largest bar association in the state, and many of its members are certified attorneys who earnestly adhere to the Court Rules and Rules of Professional Conduct, including relying on a plain reading of R. 1:39-6(d) regarding the payment of referral fees. The interpretation of that Rule contained in Opinion 745 has caused widespread confusion and uncertainty, resulting in those NJSBA members being aggrieved by this decision. It is therefore respectfully requested that this Court grant this Petition.

LEGAL ARGUMENT

POINT I
THE ACPE MISINTERPRETED THE PLAIN LANGUAGE OF RULE 1:39-1 THROUGH 1:39-9.

A. The ACPE's Interpretation of R. 1:39-6(d) Ignores the Plain Language of the Court Rule and Defies the Canons of Statutory Construction.

Generally, "[i]f a single fee is to be divided between in-state and out-of-state lawyers who are not in the same firm . . ., the propriety of the fee division is governed by R.P.C. 1.5(e): the division must be in proportion to the involvement of the out-of-state and in-state attorneys in the rendering of services or the assumption of responsibility for representation." Michels & Hockenjos, New Jersey Attorney Ethics, §36:6-4. "Out-of-State Attorneys" (GANN, 2024). R.P.C. 1.5(e) provides:

> (e) Except as otherwise provided by the Court Rules, a division of fee between lawyers who are not in the same firm may be made only if:

> (1) the division is in proportion to the services performed by each lawyer, or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; and
> (2) the client consents to the participation of all the lawyers involved; and
> (3) the total fee is reasonable.

New Jersey also permits a lawyer's payment of a referral fee to another lawyer when the recommended attorney is a certified attorney under R. 1:39-6(d). Rule 1:39-6(d) provides that "[a] certified attorney who receives a case referral from a lawyer who is not a partner in or associate of that attorney's law firm or law office may divide a fee for legal services with the referring attorney or the referring attorney's estate." The Rule does not contain the term "New Jersey attorney," or any other reference to a requirement of being licensed to practice law in this state, nor does it except out-of-state attorneys from its purview. Nevertheless, Opinion 745 concludes that only a referring attorney who is licensed and eligible to practice law in New Jersey may receive a referral fee from a certified lawyer under R. 1:39-6(d). The absence of limiting language, appearing elsewhere in the Court Rules, demonstrates that in R. 1:39-6(d) there was no intent to limit the application to only an "attorney-at-law of this State" from receiving a referral fee.

First, the Committee's interpretation of R. 1:39-6(d) is not in accordance with the plain language of the Rule. See First Resolution Inv. Corp. v. Seker,

171 N.J. 502, 511 (2002) (applying canons of statutory construction in interpreting court rules, including principle that enactments are to be construed consistent with their plain meaning). Specifically, the Committee's interpretation of "attorney" to only mean "New Jersey attorney" is comparable to interpreting a statute to mean "any citizen" when the statute used the term "any person." In re Zhan, 424 N.J. Super. 231, 237 (App. Div. 2012). In Zhan, the Appellate Division corrected the improper interpretation because "any citizen" is more restrictive than "any person." Here, Rule 1:39-6 includes the word "attorney" without any qualification and therefore must be interpreted to include both out-of-state attorneys, as well as New Jersey attorneys.

Second, under the doctrine of "*expressio unius est exclusio alterius,*" because the term "out-of-state attorney" and "New Jersey attorney" are used elsewhere in the Court Rules, the fact that R. 1:39-6(d) does not have these qualifications indicates that the intent was to apply to "all attorneys" without qualification. See Squires v. Atlantic County Bd. Of Chosen Freeholders, 200 N.J. Super. 496, 503 (App. Div. 1985)("the mention of one thing usually implies the exclusion of another"). See, e.g., R. 1:21-9(b)("The foreign legal consultant shall associate and consult with a **New Jersey attorney** and the associating **New Jersey attorney** shall assume full responsibility for the conduct of the foreign legal consultant.)(emphasis added); R. 1:21-3(c)(1)(" Permission for an **out-of-**

state attorney to practice under this rule...")(emphasis added); R. 4:11-4(b)(1)("[A]n **out-of-state attorney** or party may submit a foreign subpoena along with a New Jersey subpoena, in the name of the clerk of the Superior Court, which complies with subparagraph (3) to **an attorney authorized to practice in this State**...")(emphasis added).

In fact, R. 1:39-6(a)specifically addresses that "[t]he standards and systems adopted herein shall in no way limit the right of a certified attorney to practice law in any respect nor shall any attorney-at-law of this State be barred from engaging in a designated area of practice by reason of lack of eligibility or certification." The same limiting language does not appear in R. 1:39-6(d), thereby demonstrating that there was no intent to limit the application to only an "attorney-at-law of this State" from receiving a referral fee.

The Court Rules similarly limit application to New Jersey attorneys in certain instances. For instance, the Rules explain the scope of those who must pay fees as "every attorney admitted to practice law in this state, including all persons holding a plenary license, those admitted *pro hac vice*, those holding a limited license as in-house counsel, those registered as multijurisdictional practitioners, those certified as Foreign Legal Consultants, and those permitted to practice under Rule 1:21-3(c)." Further, as an example, the Rules specify in

R. 5:8A that "[c]ounsel shall be an attorney licensed to practice in the courts of the State of New Jersey and shall serve as the child's lawyer."

Here, the Committee's reading of "attorney," as it appears in Rule 1:39-6, to only mean "New Jersey attorney" ignores the fact that the plain language of the Rule contains the word "attorney" without any qualification. It does not employ the term "New Jersey attorney" or except out-of-state attorneys. As a result, for purposes of permissible recipients of referral fees in the context of Rule 1:39-6, the word "attorney" necessarily includes out-of-state attorneys, as well as New Jersey attorneys, and Opinion 745 must be reversed.

B. Opinion 745 Erroneously Conflates the Payment of a Referral Fee in the Context of Rule 1:39–6(d) With the Division of a Legal Fee Under R.P.C. 1.5(e).

Opinion 745 is based on the flawed premise that a referral fee is the equivalent of an earned fee paid as compensation for the performance of legal services. The text of Opinion 745 provides that:

> As a referral fee is considered payment for legal services rendered in the case (not in proportion to actual services rendered), the lawyer to whom the fee is payable must be eligible to practice New Jersey law.

The Committee determined certified attorneys are not permitted to pay referral fees to out-of-state referring attorneys under Rule 1:39-6(d) unless the latter "is licensed and eligible to practice law in New Jersey." In so doing, the Committee reasoned that payment of a referral fee in the context of Rule 1:39-

6(d) constituted the division of a legal fee for legal services rendered. According to the Committee, in Opinion 745, an out-of-state attorney who refers a case to a certified New Jersey lawyer is engaging in the practice of law in New Jersey by virtue of having referred the underlying case and receiving a referral fee under Rule 1:39-6(d).

A referral fee paid by a New Jersey certified attorney, however, is not a division of fees under R.P.C. 1.5(e). Rule 1:39–6(d) provides that a lawyer who refers a matter to a certified attorney is entitled to the payment of a referral fee "without regard to services performed or responsibility assumed by the referring attorney." The Appellate Division has explained that this distinction means an attorney taking the referral fee is not sharing fees with another lawyer because the fee is earned without performing legal services. Eichen, Levinson & Crutchlow, LLP v. Weiner, 397 N.J. Super. 588, 595-97 (App. Div. 2008)(explaining "[c]ompensation for work on a file is thus very different from receiving a referral fee").

The case law relied upon in Opinion 745 does not actually apply to out-of-state attorneys receiving a referral fee from a certified attorney. See Stack v. P. G. Garage Inc., 7 N.J. 118, 121 (1951) (voiding contract for handling of tax appeal because "it constitutes the practice of law"); see also Eichen, 397 N.J. Super. 588 (holding certified attorney should pay disbarred New Jersey

attorney's referral fee to trustee for the law practice); see also Appell v. Reiner, 81 N.J. Super. 229, 239 (Ch. Div. 1963)(New York attorney was not entitled to fee because the legal advice constituted the practice of New Jersey law), rev'd, 43 N.J. 313, 316 (1964)(reversing on the basis that it would be impractical to involve a New Jersey attorney in the negotiations that involved both New Jersey and New York members).

In fact, what flows from Opinion 745 is equivalent to a determination that an out-of-state attorney's referral of a case to a New Jersey attorney constitutes the unauthorized practice of law. Because there is no statute or Rule that defines the unauthorized practice of law, such a decision is reserved for this Court under the Constitution. See N.J. Const. Art. VI, s II, ¶ 3; see also In re Op. No. 24 of Comm. on Unauthorized Prac. of Law, 128 N.J. 114, 122 (1992) ("Essentially, the Court decides what constitutes the practice of law on a case-by-case basis.").

The Appellate Division recently reviewed the unauthorized practice of law by an attorney admitted to practice *pro hac vice* in this state through an associate at his firm in a medical malpractice case. Johnson v. McClellan, 468 N.J. Super. 562, 570 (App. Div. 2021). After settling, the attorney paid the referring Pennsylvania attorney a referral fee. Id. at 571. The Appellate Division explained the attorney receiving the referral fee did not violate the unauthorized practice of law due to New Jersey's R.P.C. 5.5, which states:

> (b) A lawyer not admitted to the Bar of this State who is admitted to practice law before the highest court of any other state, territory of the United States, Puerto Rico, or the District of Columbia (hereinafter a United States jurisdiction) may engage in the lawful practice of law in New Jersey only if:
>
> ....
>
> (3) Under any of the following circumstances:
>
> ....
>
> (iv) the out-of-state lawyer's practice in this jurisdiction is occasional and the lawyer associates in the matter with, and designates and discloses to all parties in interest, a lawyer admitted to the Bar of this State who shall be held responsible for the conduct of the out-of-State lawyer in the matter.

Johnson, 468 N.J. Super. at 582–83 (App. Div. 2021)(quoting R.P.C. 5.5). The court further found the referring attorney's involvement in Johnson that was not the unauthorized practice of law was far more extensive than an out-of-state attorney who simply refers a matter: "Defendant's involvement in the underlying lawsuit was limited to providing recommendations to plaintiff to assist her in retaining a properly licensed or admitted attorney to represent her in her case and then assisting her attorneys of record, conduct which is permitted by R.P.C. 5.5(b)(3)(iv)." Id. at 583.

After the Johnson decision, the Committee on the Unauthorized Practice of Law ("UPL Committee") issued a decision providing guidance to out-of-state practitioners seeking to practice under R.P.C. 5.5. See Comm. Unauth. Prac. Op. 60 (Dec. 19, 2022). The Committee explained an out-of-state lawyer does not need to register as a multijurisdictional practitioner under R.P.C. 5.5(b)(3) for

"lower-level assistance, such as researching legal issues and drafting documents under the direct supervision of an admitted lawyer." Moreover, "out-of-state lawyers who merely consult with an admitted lawyer on specialized legal issues need not register as a multijurisdictional practitioner." Id. The UPL Committee further explained, "If the consultation is lawyer-to-lawyer and does not involve direct interaction with the client, this activity is not considered the unauthorized practice of law and generally does not require registration as a multijurisdictional practitioner." Comm. Unauth. Prac. Op. 60. A referral falls precisely within this definition of lawyer-to-lawyer interaction.

But this guidance is directly contradicted by the view expressed in Opinion 745 that now considers out-of-state lawyers who refer matters to certified attorneys as being engaged in the unauthorized practice of law. The Committee on the Unauthorized Practice of Law's decision explains there are three ways an out-of-state lawyer may practice within New Jersey without constituting the unauthorized practice of law: 1) consulting with a New Jersey lawyer regarding a client's needs; 2) registering as a multijurisdictional lawyer for occasional practice in New Jersey; and 3) seeking *pro hac vice* admission. Id. Here, as explained by the Committee that this Court empowered to review unauthorized practice of law, the act of referring a case does not constitute the practice of law in New Jersey. This conclusion is now contradicted by a different

Committee – a compelling reason this Court should hear this matter on an expedited basis.

Notably, the ACPE did not reference either this Court's decision in Appell v. Reiner, 81 N.J. Super. 229 (Ch. Div. 1963), rev'd, 43 N.J. 313 (1964), or UPL Opinion 60 in its decision. In Appell, the Chancery Division denied a New York attorney payment for his time serving New Jersey clients on New Jersey mortgage issues. On appeal, this Court held "plaintiff's agreement to furnish services in New Jersey was not illegal and contrary to public policy" because of "the inseparability of the New York and New Jersey transactions." Appell, 43 N.J. at 316. Payment of a referral fee is also inseparable and should not constitute the unauthorized practice of law nor preclude payment of a referral fee to an out-of-state lawyer by a certified attorney.

POINT II
THE COURT SHOULD GRANT THIS PETITION BECAUSE OPINION 745 PRESENTS A REAL HARM TO THE GENERAL PUBLIC.

The purpose behind R. 1:39-6 is to allow others to identify those attorneys who have been designated by the Supreme Court as "specialists" who demonstrate an objectively adjudicated level of competence. One way of encouraging attorneys to refer matters that fall outside of their experience and knowledge to these Supreme Court-designated specialists is by allowing certified attorneys to pay a referral fee. By excluding out-of-state attorneys from

the ability to receive a referral fee, ACPE Opinion 745 poses an increased risk of harm from representation by out-of-state attorneys not familiar with New Jersey practice with potentially significant adverse consequences to the client, resulting in a loss of confidence in the justice system.

New Jersey's explicit fee division and referral fee rules are rooted in long-standing public policy that places the protection of clients at the forefront. "The primary motivation for the prohibition against giving compensation for recommending a lawyer historically has been the desire to protect the public from unscrupulous and undignified solicitation practices." N.J. Comm. on Attorney Advertising Op. 13 (Oct. 5, 1992). One purpose behind allowing payment of a referral fee involving a certified attorney is to encourage the referral of matters to experienced attorneys.

By precluding payment of a referral fee to an out-of-state attorney, Opinion 745 incentivizes the out-of-state attorney not best suited to handle a particular claim on behalf of a New Jersey client to nevertheless seek *pro hac vice* admission to handle the matter or to perform a portion of the "services performed" in order to derive a fee under R.P.C. 1.5(e). However, among the central goals of Rule 1:39-6(d) is to facilitate the pairing of competent New Jersey counsel with litigants involved in matters before our courts. The certified attorney specialization, coupled with the ability to pay referral fees, creates an

incentive for the out-of-state lawyer to refer the case to a specialist who has the skill, requisite knowledge, and experience to handle complex cases for the betterment of New Jersey clients.

This Court has long-ago recognized the harm that could occur when an out-of-state lawyer attempts to enter the New Jersey market. "To the extent that an out-of-state law firm seeks to capitalize on a reputation not based on the successful practice of New Jersey law, the potential for consumer deception will always be present." On Petition for Rev. of Opinion 475 of Advisory Comm. on Pro. Ethics, 89 N.J. 74, 96 (1982). The Court recognized that law firms differ from other businesses, due to "the trust [lawyers] have earned from their clients and the reputation they have developed with fellow practitioners, the courts and the community. It is the experience they have slowly accumulated by the repeated, successful exercise of judgment." Id.

Opinion 745 eliminates the incentive for out-of-state lawyers to refer cases to certified attorneys deemed by this Supreme Court to possess the requisite skill, knowledge, experience, and competence to handle complex cases for the betterment of New Jersey clients. Accordingly, the NJSBA respectfully requests that the Court grant this Petition and reverse Opinion 745.

POINT III

THE COURT SHOULD GRANT THIS PETITION DUE TO THE NEGATIVE AND DELETERIOUS IMPACT THAT OPINION 745 HAS ON THE PRACTICE OF LAW.

The NJSBA urges this Court to reverse Opinion 745 and expedite its review of the Opinion because any delay would further exacerbate the ethical and contractual dilemmas facing certified attorneys with agreements in place to pay referral fees to out-of-state attorneys. Opinion 745 creates immediate harm to certified attorneys with pre-existing referral fee arrangements with out-of-state attorneys that were made in reliance on the plain language of R. 1:39-6(d).

On the one hand, attorneys have an ethical obligation not to divide fees except as permitted by law. See R.P.C. 1.5(e). On the other hand, attorneys have contractual obligations to pay referral fees that arose when a matter was referred to a certified attorney. See Eichen, Levinson & Crutchlow, LLP v. Weiner, 397 N.J. Super. 588, 595 (App. Div. 2008)(holding attorney had obligation to pay referring disbarred attorney's trustee because referral was made prior to disbarment); see also Ravich, Koster, Tobin, Oleckna, Reitman & Greenstein, P.C. v. Gourvitz, 287 N.J. Super. 533, 539 (App. Div.)(holding referral fee is a legal obligation owed to referring lawyer), aff'd, 147 N.J. 170 (1996).

In Eichen, 397 N.J. Super. at 591-92, the Appellate Division addressed whether a referral fee must be paid to the trustee for a disbarred attorney's legal practice. The law firm which had successfully settled many cases that had been

referred by the disbarred attorney refused to pay the trustee the referral fees because the attorney was disbarred at the time the cases settled. Id. The Appellate Division explained the legal obligation became due at the time the referral was made, calling it a "financial obligation." Id. at 598.

Moreover, under the holding in Eichen, a referring lawyer with an active license at the time of a referral to a certified civil trial attorney is entitled to receive a referral fee even if the lawyer is subsequently disbarred at the time the fee becomes payable. Opinion 745, however, concludes that a duly licensed out-of-state attorney who makes a referral under R. 1:39-6(d) is *precluded* from receiving a referral fee if said attorney is not barred in the state of New Jersey. It stands to reason that the common denominator for a referring attorney to be eligible to receive a referral fee under R. 1:39-6(d) is a license to practice law irrespective of the jurisdiction. Opinion 745 arbitrarily excludes duly licensed out-of-state attorneys from receiving a referral fee and stands in direct conflict with the spirit and intent of the Rule and existing case law.

Accordingly, Opinion 745 places certified attorneys in the untenable position of potentially being exposed to civil liability for breach of contract if they do not pay a previously agreed upon referral fee to an out-of-state lawyer not licensed in New Jersey. Certified attorneys should not be placed in such a predicament given (1) their good-faith reliance on the plain language of R. 1:39-

6 that does not limit the payment of referral fees to only licensed New Jersey attorneys; (2) current law recognizes the payment of a referral fee is a legal obligation enforceable in court; and (3) the referral of a matter by an out-of-state attorney to a New Jersey attorney is not considered the unauthorized practice of law by the UPL Committee. To prevent this harm, the NJSBA respectfully requests the Court grant this Petition and summarily reverse Opinion 745.

CONCLUSION

The NJSBA's membership is deeply troubled by the impact of Opinion 745. The NJSBA respectfully requests this Court grant the within Petition and hold that certified attorneys may pay, and out-of-state attorneys may accept, referral fees as contemplated by the plain language of R. 1:39-6 to avoid harm to both the lawyers of this state and their clients.

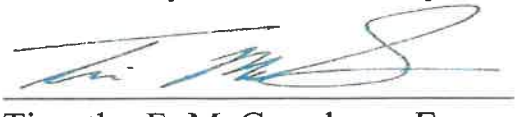
Respectfully submitted,
NEW JERSEY STATE BAR ASSOCIATION

By: 
Timothy F. McGoughran, Esq., President

Dated: April 10, 2024

CERTIFICATION OF GOOD FAITH

The undersigned counsel certifies this Petition presents a substantial question and is filed in good faith and not for the purposes of delay. I certify that the foregoing statements made by me are true. I am aware if any of the foregoing statements made by me are willfully false, I am subject to punishment.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SUPREME COURT OF NEW JERSEY
DOCKET NO. 089278

IN RE SUPREME COURT ADVISORY COMMITTEE ON PROFESSIONAL ETHICS OPINION NO. 745	:	ON PETITION FOR REVIEW UNDER RULE 1:19-8

BRIEF OF NEW JERSEY STATE BAR ASSOCIATION IN SUPPORT OF MOTION FOR STAY OF ENFORCEMENT OF ACPE OPINION 745

Of Counsel:
William H. Mergner Jr., Esq.
President, New Jersey State Bar Association
New Jersey Law Center / One Constitution Square
New Brunswick, New Jersey 08901
Attorney ID No.: 036401985

Date Submitted: June 28, 2024

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PRELIMINARY STATEMENT

The conflict between the decades-long practice of certified attorneys paying referral fees to out-of-state attorneys, in good faith reliance on Rule 1:39-6(d), and the new interpretation of the Rule given by the Advisory Committee on Professional Ethics ("ACPE") in its Opinion 745 ("Opinion"), gives rise to the critical need for a stay of enforcement of the Opinion until the Supreme Court issues a final determination on the various Petitions for Review that have been filed. In balancing the equities, more harm will occur if the Opinion is left to stand pending review than if a stay is imposed. The ACPE believes it does not have authority to issue a stay, despite having done so previously. See In re ACPE Op. 621, 128 N.J. 577, 584 (1992) ("The ACPE stayed the effect of its opinion pending disposition of the issue by the Court") and see Exhibit A at A1, NJSBA May 10, 2024 letter to ACPE, and Exhibit B at A4, ACPE response. The New Jersey State Bar Association ("NJSBA") therefore respectfully requests the Supreme Court to issue a stay of enforcement of the Opinion pending its review.

Rule 1:39 has permitted referral fees to be paid without responsibility or any participation in the matter for nearly four decades. See R. 1:39-6(d). New Jersey's Certified Trial Attorneys ("CTAs") have always understood that this Rule permitted referral fees to be paid to out-of-state attorneys. This has been bolstered by references in case law and disciplinary opinions to a prohibition on

the payment of referral fees by attorneys who are not certified, and the lack of any reference to a prohibition on the payment of such fees to out-of-state attorneys. See Johnson v. McLellan, 468 N.J. Super. 562, 572, fn 4, and 579, fn 7.; In the Matter of David A. Bolson, DRB 12-148 (November 7, 2012). The conflict between the pronouncements in the Opinion and the widely understood interpretation of the rules governing referral fees by CTAs gives rise to imminent and serious issues for CTAs who have, in good faith, accepted out-of-state referrals and have committed in writing to the payment of referral fees.

A CTA has three choices upon the resolution of a pending matter that has been referred by an out-of-state attorney, in the aftermath of Opinion 745. One, an attorney may refuse to pay the referral fee "earned" at the time of referral and risk a claim for breach of contract. Two, the attorney may pay the referral fee in the face of a clear pronouncement by the ACPE that the payment of such a fee is not ethical and risk prosecution for an ethical violation. Three, the attorney may retain the referral fee funds until the requested review of Opinion 745 is resolved. Each option presents legal, ethical, or practical problems. The ACPE, in its briefing in this matter, has suggested that the Court may allow those attorneys who have a pre-existing contractual obligation to pay a referral fee to do so without any ethical implications. See ACPE brief at 19-20. That does not

completely address the issues presented, however, particularly with regard to litigants whose cases arise while the Court's review is pending.

New Jersey's CTA program identifies competent and experienced New Jersey trial attorneys and encourages, through the payment of a referral fee pursuant to Rule 1:39-6, attorneys to refer matters to CTAs. Opinion 745 eliminates the availability of referral fees to out-of-state attorneys and may disincentivize those out-of-state attorneys from making an immediate referral, resulting in harm to the public. Time is critical when issues such as tort claims notices or other procedural hurdles are potentially present. A litigant's rights may be lost while an out-of-state attorney waits to determine the outcome of the pending Petitions for Review. CTAs may decline to accept a proposed referral from an out-of-state attorney because of the potential exposure and legal peril, depriving competent counsel to the out-of-state litigant.

The NJSBA respectfully requests that the Court stay the imposition of Opinion 745 until the Court addresses the filed Petitions for Review.

LEGAL ARGUMENT

I. THE COURT SHOULD STAY THE ENFORCEMENT OF ADVISORY COMMITTEE ON PROFESSIONAL ETHICS OPINION 745.

The Court may stay the enforcement of an ACPE Opinion. See In Re Advisory Committee on Professional Ethics Opinion 635, 125 N.J. 181, 184 (1991). The standard for the granting of a stay is discretionary and dependent on the equities of a given case. A party seeking a stay must demonstrate that (1) irreparable harm will result from enforcement; (2) the appeal presents a meritorious issue, and movant has a likelihood of success on the merits; and (3) balancing the "relative hardships to the parties reveals that greater harm would occur if a stay is not granted than if it were." McNeil v. Legislative Apportionment Commission of NJ, 176 N.J. 484, 486 (2003) (LaVecchia, J., dissenting) (citing Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982)).

A. The Enforcement of Opinion 745 Will Result in Irreparable Harm.

Irreparable harm will result if Opinion 745 is not stayed. Numerous matters have been referred to New Jersey CTAs by out-of-state attorneys with the expectation of a referral fee to be paid pursuant to Rule 1:39-6. This obligation to pay a referral fee is universally reduced to writing to prevent ambiguity and constitutes a valid and enforceable contract. Referring attorneys

are not jointly responsible for the matters referred, nor have they participated in handling the matter. The vast majority have not sought *pro hac vice* status. Opinion 745 now calls into question the ethical propriety of paying these attorneys the referral fee they earned upon the referral of the matter, and which has been acknowledged in writing by the CTA.

CTAs have legal obligations that arise at the time a matter is referred. See Eichen, Levinson & Crutchlow, LLP v. Weiner, 397 N.J. Super. 588, 595 (App. Div. 2008) (holding a CTA had obligation to pay referring disbarred attorney's trustee because referral was made prior to referring attorney's disbarment); see also Ravich, Koster, Tobin, Oleckna, Reitman & Greenstein, P.C. v. Gourvitz, 287 N.J. Super. 533, 539 (App. Div. 1996) (holding referral fee is a legal obligation owed to referring lawyer), aff'd, 147 N.J. 170 (1996). The Eichen opinion draws a critical distinction between "fees for legal services" and the referral fee at question in the case.

In Eichen, 397 N.J. Super. at 591-92, the Appellate Division addressed whether a referral fee must be paid to the trustee for a disbarred attorney's legal practice. The law firm, which had successfully settled many cases that the disbarred attorney had referred, refused to pay the referral fees to the trustee because the referring attorney was disbarred at the time the cases settled. Ibid. The Appellate Division explained the legal obligation became due at the time

the referral was made, calling it a "financial obligation." Id. at 598. More importantly, the appellate court did not consider the referral fees in question to constitute "legal fees," but considered them to be "other compensation." The relevant portion of Rule 1:20-20(b)(13) refers to: "all legal fees for legal services and other compensation due the [disbarred] attorney." The Eichen firm argued that it could not pay the requested fees to the trustee because they constituted "legal fees." The Court disagreed:

> We interpret a referral fee, once paid, to constitute a form of "other compensation" under Rule 1:20-20(b)(13). When an attorney refers client files to another attorney, the referring attorney has "assign[ed] or transfer[ed] an[ ] aspect of [that] attorney's share of a law firm." Ibid. Weiner, as the referring attorney, relinquished all further professional responsibility for the handling of those files once the Eichen firm filed a substitution of attorney. Under such circumstances, we conclude that the referral of those files constituted an "assignment or transfer," ibid., of a portion of Weiner's law practice, thereby entitling him to eventual compensation in the form of a referral fee for the files that he relinquished. **We thus conclude that Weiner's right to receive the referral fee is a form of "other compensation due the [disbarred] attorney."** (emphasis added). Id. at 594.

The Ravich opinion, 287 N.J. Super. 533, addressed the obligation of a CTA to pay a referral fee to a forwarding attorney, under circumstances where the CTA was no longer associated with the legal entity which had accepted the initial referral.[1] The appellate court held that the obligation to pay a referral fee was personal to the CTA, and survived defendant's moving between law firms:

[1] This case, involving a referred matrimonial matter, pre-dated the certification of matrimonial lawyers and the prohibition on the payment of referral fees in matrimonial matters.

> Because the case was referred to defendant, he remains liable on his agreement to pay a referral fee. When he brought his matters into the newly-formed firm it should have been with the understanding that there was an outstanding referral obligation. One can assign assets but cannot assign liabilities. The responsibility to pay plaintiff's referral fee was and is defendant's personal liability. Id. at 539.

This case clearly identifies the legal jeopardy a CTA faces in declining to pay a promised referral fee.

Parenthetically, in his dissent, Judge Michels – who vehemently opposed the concept of referral fees – noted:

> Merely recommending another lawyer to a client or referring a client to another lawyer is not the performance of a legal service or the discharge of responsibility. Id.

These cases illustrate how the failure to pay a promised referral fee can quickly become the subject of costly litigation and place a CTA who declines to pay a promised referral fee in legal jeopardy. It is possible for an out-of-state referring attorney to sue a New Jersey CTA for a referral fee, obligating the attorney to defend an action for abiding by the ACPE's advisory opinion. ACPE opinions are not binding on New Jersey courts, although they are arguably persuasive. Under these circumstances, however, Opinion 745 may not serve as an adequate defense to a claim by a referring attorney that a "financial obligation" created at the time of the referral must be honored.

On the other hand, paying a promised referral fee to an out-of-state attorney may cause a CTA, who acted in good faith reliance on the decades-long

interpretation of Rule 1:39-6(d) before the Opinion, to face an ethics issue. The ACPE's published opinions are binding on a county ethics committee in the disposition of all matters. R. 1:19-6. "An attorney who fails to follow an Advisory Committee opinion does so at his [or her] peril." Higgins v. Advisory Committee on Professional Ethics of Supreme Court, 73 N.J. 123, 127 (1977).

This illustrates the particularly difficult position CTAs face. Both forwarding and referring attorneys reasonably expected that a referral fee would be paid. Opinion 745 casts doubt on that obligation without having the force of law, creating a quandary between ethics and law. Many CTAs will most likely hold funds for the "financial obligation" created by the referral fee until the Petitions for Review are addressed, but this is not a viable temporary solution. A tax issue is certain to arise because the funds in question are revenue for either the law firm who received the referral or the law firm who initiated the referral, yet neither has received the benefit of the actual funds at the time the tax obligation is due.

These tax ramifications are a crisis for law firms operating on a June 30 to July 1 fiscal year. Attorneys and their accountants will, of course, diligently attempt to determine how to account for these funds in a manner that complies with the attorney's ethical obligations and does not violate any tax obligations.

It is conceivable that attorneys will have to hold funds for many months, or longer, under these uncertain conditions.

Finally, irreparable harm is likely to occur to potential clients nationwide with New Jersey-based claims, who have not yet been advised by a CTA versed in New Jersey procedural and substantive law. Out-of-state attorneys may delay referring cases to a New Jersey attorney to await the outcome of the Court's potential review in this matter. Such a delay may, unbeknownst to the out-of-state attorney, cause peril for litigants, because there are strict time and substantive requirements for various types of litigation, such as the need to file a Tort Claims Notice or an Affidavit of Merit. An additional element of irreparable harm is visited upon these same potential clients, when the CTA selected by the forwarding attorney declines to undertake the representation of the referred client, because of the potential for negative consequences as a result of the representation. Will a CTA accept a referral and issue a written promise to pay a referral fee under the current circumstances? The chilling effect of Opinion 745 will pose a significant contraindication to the acceptance of an otherwise worthy case proffered to the CTA. Many would argue that the wisest course of action for the CTA is to decline the referral, and avoid the potential for litigation or an ethics violation. This choice, while arguably in the best

interests of the CTA, poses a very real pitfall for the innocent party seeking competent New Jersey legal representation.

By contrast, the ACPE, in its briefing in this matter, fails to point to any real harm that has been suffered as a result of the payment of referral fees to out-of-state attorneys by CTAs. On the contrary, the ACPE recommends that attorneys be permitted to honor any existing referral fee contracts, and implies that a Rule change may be worth considering. See ACPE brief at 19-20. This illustrates the lack of harm in implementing a stay of the Opinion and allowing the practice of paying referral fees by CTAs to out-of-state attorneys to continue while the Court reviews the merits of the Petitions.

In summary, irreparable harm will result if Opinion 745 is enforced; no harm will result if the Opinion is stayed pending this Court's review. The Court should stay enforcement of Opinion 745 and allow the Court to address the Petitions for Review filed by the NJSBA and others.

B. The NJSBA and Other Entities Have Raised Meritorious Issues in Support of the Petitions For Review That are Likely to Succeed.

The NJSBA, along with other bar associations and a law firm, have filed Petitions for Review of Opinion 745. Each of these Petitions raises meritorious arguments with respect to why Opinion 745 should be reversed. These

arguments are based on a plain reading of the Rule, settled law, existing case law, and over 40 years of practice with no indication to the contrary. New Jersey courts and the Disciplinary Review Board have not limited the payment of referral fees to New Jersey attorneys. Opinion 745 is the first occasion any reference has been made to such a limitation.

The Supreme Court may affirm, reverse, or modify the ACPE's opinion. R.1:19-8(g). Since an appellate court's review of issues regarding the interpretation of laws, statutes, or rules is *de novo*, the Opinion is not accorded any specific deference and the standard of review for a Petition for Review of an ACPE Opinion that involves a Rule interpretation is *de novo*. See In re Ridgefield Park Bd. of Educ., 244 N.J. 1, 17 (2020) (agency's interpretation of a statute subject to *de novo* review).

The NJSBA filed a Petition for Review, joined by several county bar associations. They argue that the ACPE misinterpreted the plain language of Rule 1:39-1 through 1:39-9 and ignores long established rules of statutory construction by concluding that "attorney," as it appears in Rule 1:39-6, means only "New Jersey attorney." Further, the Opinion confuses a referral fee paid by a certified attorney pursuant to Rule 1:39-6 with a fee for legal services that must be divided pursuant to RPC 1.5(e). These payments are each unique, and they are separate and distinct from each other. The Opinion also potentially

harms clients with claims that must be brought in New Jersey courts because it eliminates the incentive for out-of-state lawyers to refer cases to certified attorneys deemed by this Supreme Court to possess the requisite skill, knowledge, experience, and competence to handle complex cases, for the betterment of New Jersey clients.

The New Jersey Association for Justice ("NJAJ") filed a Petition for Review. The NJAJ asserts that Opinion 745 incorrectly labels the referral of a client a "legal service," without explanation or legal support, resulting in an interpretation of Rule 1:39-6(d) that contradicts our courts and the ACPE's previous guidance. Further, the Opinion contradicts the fundamental underpinning of the certification program in New Jersey, which is designed to identify qualified and experienced practitioners and promote referrals to those practitioners.

The Trial Attorneys of New Jersey ("TANJ") and the American Board of Trial Advocates ("ABOTA") filed a Petition for Review. TANJ and ABOTA contend that Opinion 745 relies upon an incorrect definition of a referral fee. The Opinion will also impede the ability of clients to obtain representation from certified attorneys.

The law firm, Blume, Forte, Fried, Zerres & Molinari, P.C., also filed a Petition for Review. The firm submits that Opinion 745 contradicts and confuses

the basic distinctions between referral fees under Rule 1:39-6(d) and the division of participation fees for legal services rendered under RPC 1.5. It also argues that the Opinion misconstrues the purpose of the Supreme Court's recognition of certified attorneys under Rule 1:39, et seq., that will adversely affect the citizens of New Jersey, the New Jersey bar and professional interests of New Jersey practitioners.

The Petitions for Review filed on behalf of the NJSBA and other entities are likely to be successful. They present persuasive arguments to establish that Opinion 745 sets forth an interpretation of Rule 1:39-6 that is legally unsupported and in conflict with the plain reading of the Rule. Further, in its briefing in this matter, the ACPE is unable to point to any support for its interpretation of the language in Rule 1:39-6 in the Rule itself. It admits that it must draw upon inferences based on language elsewhere in the Rules. The NJSBA submits that the ACPE's analysis is misplaced, while the plain reading of the Rule by the NJSBA and others is wholly supported by statutory construction caselaw.

The widespread opposition to Opinion 745 by the New Jersey legal community and certified practitioners is rooted in the longstanding understanding of the rule, the agreement by previous courts and court committees that have touched on the issue, the lack of any indication to the

contrary over 40 years of practice, the numerous meritorious issues raised in the Petitions for Review, and the ACPE's inability to point to any harm raised by the practice and its misguided analysis of the language of the Rule. All of these establish a likelihood that Petitioners will prevail and support granting the request for a stay of the Opinion's enforcement.

C. Great Hardship Will Be Suffered by the Public and Certified Trial Attorneys if Opinion 745 is Not Stayed.

Both the public and certified trial attorneys will be significantly harmed by the failure to grant a stay. In contrast, Opinion 745 does not protect any party currently suffering harm nor does it advance an important public interest.

The public has benefitted from being referred to those attorneys deemed "certified" by the Supreme Court to represent them in resolving their grievances. For over 40 years, there have been no reported disciplinary opinions resulting from the payment of referral fees to out-of-state attorneys. In its briefing in this matter, the ACPE did not point to any harm caused by the practice and even consented to allowing the practice to continue in a limited way in those pending matters where referral fees have been promised to referring out-of-state attorneys. See ACPE brief at 19-20. On the other hand, if Opinion 745 stands, the public may not be represented by attorneys deemed certified by the Supreme Court and their rights may be adversely and permanently affected when out-of-

state law firms delay making case referrals pending the outcome of the Supreme Court's review.

In addition, lawyers who acted in good faith reliance on the longstanding interpretation of the Rule may face ethical charges and contractual breaches. Opinion 745 will expose lawyers who have received referrals from out-of-state attorneys, but now resist paying referral fees, to potential lawsuits for recovery of those fees. There are also potential tax issues associated with the holding of monies in a law firm's accounts that previously would have been paid as a referral fee.

As illustrated above, unless a stay of enforcement of Opinion 745 is imposed while the Petitions for Review are pending, both the public and certified trial attorneys will suffer great harm. On the contrary, even the ACPE appears to concede there would be no harm in allowing certified trial attorneys to continue to pay referral fees to out-of-state attorneys when it suggests the Court may allow existing referral arrangements to continue and may consider adding affirmative language to the Court Rules addressing the practice.

CONCLUSION

Opinion 745's guidance sharply contrasts with the current understanding of Rule 1:39. It represents a dramatic deviation from the established practice and understanding that CTAs are permitted to pay a referral fee to out-of-state attorneys who refer a matter without performing legal services or retaining joint responsibility. This practice has not been previously questioned or challenged because it is consistent with the plain wording of Rule 1:39-6.

It is respectfully submitted that Opinion 745 is a solution seeking a problem. The problem is non-existent, and the solution creates a labyrinth of legal issues fraught with exposure for a CTA, while creating a host of issues for potential clients, and irreparably damaging existing legal relationships. There will be no harm to suspend the imposition of Opinion 745, but great harm will occur if it is allowed to persevere during a review process which is likely to result in its reversal. The New Jersey Supreme Court should stay the imposition of Opinion 745 until the review process is complete.

Respectfully submitted,
New Jersey State Bar Association

By: William H. Mergner, Jr. /sab
William H. Mergner Jr., Esq.
President, New Jersey State Bar Association
Attorney ID No. 036401985

Dated: June 28, 2024

APPENDIX / EXHIBITS

EXHIBIT A

NEW JERSEY STATE BAR ASSOCIATION

May 10, 2024

Renee Greenberg
Deputy Attorney General
Dept. of Law & Public Safety, Division of Law
DCF-Appellate
153 Halsey Street, 8th Floor
Newark, New Jersey 07101

Re: *In Re: Advisory Committee on Professional Ethics Opinion 745*
Docket No. 089278

Dear Renee:

Thank you for speaking with NJSBA General Counsel Sharon A. Balsamo on behalf of the members of the New Jersey State Bar Association (NJSBA). Following up on that conversation, this will confirm that the NJSBA consents to a 30-day extension of time for you to file your brief.

This will also follow-up on our conversation about the NJSBA's request for the Advisory Committee on Professional Ethics (ACPE) to stay the enforceability of Opinion 745 pending the outcome of Supreme Court review. This action is not novel, as the enforcement of previous ACPE opinions have been stayed when the situation warranted it, either by the ACPE or the Court.

In *In re ACPE Op. 621*, 128 N.J. 577 (1992), a part-time legislative aide and other parties challenged an ACPE opinion placing certain restrictions on the aide when representing private parties. The decision says, "The ACPE stayed the effect of its opinion pending disposition of the issue by the Court." *Id.* at 584. In a later matter, the Court issued a stay in *In re ACPE Op. 635*, 125 N.J. 181 (1991), where the Clients' Security Fund and the Office of Attorney Ethics sought review of an ACPE opinion approving an "Authorization to Endorse" form. Similarly, the chair of the Unauthorized Practice of Law Committee granted a stay in *In re UPL Op. 24*, 128 N.J. 114 (1992), when independent paralegals challenged a UPL opinion concluding their unsupervised practice was the unauthorized practice of law. For the reasons expressed below, the NJSBA now respectfully requests that the ACPE take similar action in this matter and stay enforcement of Opinion 745 until final guidance is provided by the Supreme Court.

In this case, Opinion 745 is contrary to what many, if not most, certified attorneys believed R. 1:39-6(d) allows, particularly with regard to accepting referrals from out of state attorneys and paying referral fees. These attorneys, deemed by the Supreme Court to meet heightened requirements regarding education, experience, knowledge and skill, do not take their professional obligations lightly. They are diligent in ensuring they practice within the guidelines provided by the Court Rules and Rules of Professional Conduct. Opinion 745 has wrought quite a bit of grief and chaos for these attorneys who, in good faith, believed they were ethically able to pay referral fees to out of state attorneys.

The NJSBA Petition for Review sets forth the arguments why the Association and its members believe the ACPE's analysis in this matter was flawed. We understand the review process is available to seek additional Supreme Court guidance and we have availed ourselves of that process on behalf of our members.

However, while that review is ongoing, many attorneys, and their law firms, face a number of quandaries in attempting to comply with the Opinion as written. They have voiced several concerns: (1) the effect of the Opinion on matters that were accepted in good faith from out of state attorneys with a promise to pay a referral fee; (2) the potential tax ramifications of holding case proceeds in an attorney's/law firm's accounts that previously would have been paid as a referral fee, but are now in question; and (3) the effect on litigants and the potential jeopardizing of their rights if out of state law firms delay making any case referrals pending the outcome of the Supreme Court's review.

With regard to matters that were previously accepted from out of state attorneys, a certified trial attorney now has three choices upon the matter's resolution. One, they can refuse to pay the referral fee "earned" at the time of referral and risk a claim for breach of contract. Two, they can pay the referral fee in the face of a clear pronouncement by the ACPE that the payment of such a fee is not ethical and risk prosecution for an ethical violation. Three, they can retain the referral fee funds until the potential review of Opinion 745 is resolved. Each option presents legal, ethical, or practical problems.

The tax ramifications of case proceeds being held in an attorney's account are even more pressing for attorneys/law firms who operate on a June 30 to July 1 fiscal year. Attorneys and their accountants are diligently trying to determine how best to account for those funds in a manner that complies with the attorney's ethical obligations and does not run afoul of any tax requirements. Attorneys could conceivably have to hold funds for many months and potentially even more than a year.

Finally, attorneys are concerned about their potential clients. Out of state attorneys may delay referring cases to a New Jersey attorney to await the outcome of the Suprem Court review in this matter. That delay may, unknown to the out of state attorney, pose timing issues for litigants in being able to properly exercise their rights, as there are strict time requirements for certain steps in the early stages of certain litigation, such as the need to file a tort claims notice.

In light of these emergent, time sensitive and very real concerns faced by many of its members, and the precedent of previous stays issued in appropriate ACPE matters, the NJSBA respectfully requests that the ACPE stay the effect of Opinion 745 until such time that the Court addresses the filed Petitions for Review.

We understand there may be some procedural requirements that need to be met for the ACPE to consider a request such as this. Please advise if that is the case, and the NJSBA will quickly and diligently work to meet those requirements. Because of the urgent need for definitive guidance on these matters, if the ACPE cannot provide a voluntary stay, or cannot do so in a reasonable timeframe, the NJSBA is prepared to seek a stay from the Supreme Court.

The NJSBA thanks you for your consideration and looks forward to your response and any guidance you may be able to provide. Please contact NJSBA General Counsel Sharon Balsamo with any questions or if you need further information at sbalsamo@njsba.com or 732-937-7505.

Sincerely,

Timothy F. McGoughran, Esq.
President, New Jersey State Bar Association

cc: All counsel by email:

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EXHIBIT B

From: Renee Greenberg <Renee.Greenberg@law.njoag.gov>
Sent: Tuesday, May 14, 2024 3:41 PM
To: Sharon A. Balsamo, Esq. <sbalsamo@njsba.com>
Cc: mdonahue@stark-stark.com; ekahn@lawjw.com; dcardoso@brclegal.com; mthakkar@hillwallack.com; gtroublefield@carellabyrne.com; scott@tashjylaw.com; tjhull@njatty.com; mjepstein@theepsteinlawfirm.com
Subject: RE: In re: Advisory Committee on Professional Ethics Opinion 745, Docket No. 089278

Hi Sharon:

As we discussed last Friday, I met with ACPE to share and discuss NJSBA's request for a stay. The ACPE advised that it cannot grant a stay as the Supreme Court is the proper entity to consider such action.

Please don't hesitate to reach out if you wish to discuss.

Best,
Renee

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SUPREME COURT OF NEW JERSEY
M-1040 September Term 2023
089278

In re Opinion No. 745
of the Supreme Court
Advisory Committee on
Professional Ethics.

ORDER

It is ORDERED that the motion for stay of enforcement of Opinion No. 745 of the Advisory Committee on Professional Ethics is granted.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 23rd day of July, 2024.

Heather J. Baker
CLERK OF THE SUPREME COURT

NEW JERSEY STATE BAR ASSOCIATION
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J.H. Plaintiff-Respondent vs. WARREN HILLS BOARD OF EDUCATION; WARREN HILLS JUNIOR HIGH SCHOOL; THE ESTATE OF F.M.; DEFENDANT DOE 1-10; DEFENDANT DOE ENTITY 1-10; DEFENDANT DOE INSTITUTION 1-10 Defendants-Appellants	SUPREME COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-2896-23 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION, WARREN COUNTY DOCKET NO.: WRN-L-423-21 SAT BELOW: HON. KEVIN SHANAHAN, P.J.CV.

BRIEF OF *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION

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PRELIMINARY STATEMENT

The passing of L. 2019, c. 120 (Chapter 120), and L. 2019, c. 239 (Chapter 239) reflected the Legislature's intent to statutorily acknowledge and address the trauma and emotional hardship victims of sexual assault and abuse suffered. The two laws furthered the Legislature's objective of providing a path for civil legal recourse for those victims who were prevented from pursuing civil remedies under prior statutory restrictions. To accomplish this, the bills extensively broadened the statute of limitations for sexual assault and abuse claims, and carved out a two-year window for victims who were denied (or would have been denied) the right to prosecute their claims based on prior procedural restrictions.

To further ensure universal access to civil justice for victims of sexual assault and abuse, the bills also expanded institutional liability under the Charitable Immunity Act (CIA). That made subject organizations liable for negligence in hiring, retaining or supervising employees, agents or servants who perpetrate sexual assault on a minor. To further level the playing field, the two-year statute of limitations for bringing a claim against public entity defendants, pursuant to N.J.S.A. 59:8-8, was eliminated for sexual assault and abuse victims, as was the requirement of such claimants to file a notice of tort

claim under N.J.S.A. 59:8-3(a) and (b). This change, the Senate Judiciary Committee explained, created a "process of filing a lawsuit with service upon the liable public entity or entities . . . [which was] the same as when suing a private organization." S. Judiciary Comm. Statement to S. Comm. Substitute for S. No. 477 (March 7, 2019) at 7. Accordingly, "[p]ublic entities would also be subject, just like a private organization, to the new, extended statute of limitations periods for child and adult victims of abuse . . ." Ibid.

After passing Chapter 120, follow-up legislation in the form of Chapter 239 cemented the legislative objective, which Gov. Phil Murphy reiterated in his May 13, 2019 statement:

> [Chapter 120] inadvertently fails to establish a standard of proof for cases involving claims filed against public entities. . . . I have received assurances that the Legislature will correct this omission by clarifying that public entities should be held to the same standard of liability that is applied to religious and nonprofit organizations. Applying a different standard would be unjustified.
>
> [Governor's Statement to S. Comm. Substitute for S. 477 (May 13, 2019)].

The issue presented in this matter lies at the heart of one of the principal missions of the New Jersey State Bar Association (NJSBA): To promote equal access to the justice system for the public and fairness in its administration. While the underlying issue before this Court is one which, in the words of Gov. Murphy, "has evoked strong passions on both sides," Governor's

Statement to S. Comm. Substitute for S. 477 (May 13, 2019), the actual legal question is not so polarizing. In the face of the obvious and unambiguous intent to pass a statute that opens the door for all survivors of sexual assault and abuse to bring claims for civil redress against both private and public entities, the matter before the Court asks: Was there any legislative intent to deny a class of victims, such as plaintiff, the right to proceed in their claim based upon prior tort claim notice requirements or based upon the pre-amendment language of the Child Sexual Abuse Act (CSAA)? The Supreme Court addressed a similar question in W.S. v. Hildreth, 252 N.J. 506 (2023). The NJSBA participated as *amicus curiae* in that matter, and the NJSBA urges the same conclusion be reached result here: Because such a denial would be irreconcilable with the language of the relevant statutes and their legislative history, and would result in unsubstantiated denials of access to civil justice for sexual assault victims, the answer must be no.

PROCEDURAL HISTORY AND STATEMENTS OF FACTS

The NJSBA relies upon the submitted facts and procedural histories provided by the parties.

Backdrop of W.S. v. Hildreth

Appellate analysis of the within matter has the benefit of the Supreme Court's interpretation of the subject statutory amendments in W.S. v. Hildreth,

252 N.J. 506 (2023). W.S. involved an adult plaintiff who sought to file a late notice of tort claim against defendant school entities in 2017 regarding alleged sexual abuse that occurred in the mid-1990s. The trial court denied the plaintiff's motion to permit the filing of a late notice of claim without prejudice, citing various deficiencies. W.S. never sought to correct said deficiencies, nor did W.S. appeal.

In January 2020, with the new legislation in effect, W.S. filed a complaint alleging violations of the CSAA and the New Jersey Law Against Discrimination (NJLAD), and made other common law claims. After the trial court denied defendants' motion to dismiss the claim for failure to file a timely notice of tort claim, and the Appellate Division affirmed the denial, the Supreme Court intervened.

W.S. revealed the Supreme Court's first interpretation of the broad-sweeping amendments contained in Chapter 120 and Chapter 239, confirming the legislative intent to overhaul and eliminate prior restrictions on sexual abuse claims. Id. In addition to broadening the statute of limitations and even reopening same for survivors who had previously been time-barred, the legislation also amended and broadened remedies for victims under the CSAA, the CIA and the Tort Claims Act (TCA).

Relative to the TCA, the Supreme Court expressly found that the trial court had "correctly applied the law in effect at the time W.S. filed his complaint," affirming W.S. could proceed with the CSAA claims despite the lack of a timely-filed tort claim notice. Id. at 521. The Court examined the plain language of the amendment to N.J.S.A. 59:8-3(b), which provided that "[t]he procedural requirements of this chapter shall not apply to an action at law for an injury resulting from the commission of sexual assault, any other crime of a sexual nature, a prohibited sexual act as defined in [N.J.S.A. 2A:30B-2], or sexual abuse as defined in [N.J.S.A. 2A:61B-1]." Id. at 522 (citing N.J.S.A. 59:8-3(b)). The Court determined:

> Applying the law in effect at the time a complaint is filed – even when that law changed the requirements for filing a complaint – is not applying a statute retroactively; it is applying a statute prospectively to cases filed after its effective date.
> [Id. at 522].

Thus, the Court found the defendants' argument that a timely notice of tort claim needed to be filed for claims accruing prior to the passage of the new legislation was not supported by anything in the language of the statute. Importantly, the Court also commented on the "absurd results" which would have yielded had defendants' interpretation of the amended legislation prevailed. Id. at 524-25.

The Court in its final footnote in the W.S. opinion commented on a request from the Attorney General, participating as *amicus curiae,* for clarification on the application of the amended language of N.J.S.A. 59:8-3(b) to common law claims that W.S. had made, attempting to distinguish such claims from plaintiff's CSAA claim. Citing State v. Mosley, 232 N.J. 169, 180 n.2. (2018), the Court refused to consider arguments raised as a first impression by an *amicus curiae*. W.S., 252 N.J. at 525 n.3.

LEGAL ARGUMENT

The Appellate Division is asked to rely on language in footnote 3 in W.S. v. Hildreth, 252 N.J. 606 (2023), to reinstate a requirement for victims of sexual assault and abuse to file notices of tort claim for any and all common law claims they may intend to bring. While, as noted above, the Supreme Court declined to affirmatively address what is required for common law claims in its W.S. opinion because the issue was raised as a matter of first impression by an *amicus curiae* party, id. at 525 n.3, the Supreme Court provided clear direction in the body of the opinion that the amended statutory language should apply to all timely filed civil actions seeking damages for sexual assault and abuse. Despite this, the Appellate Division is asked to apply pre-amendment language of the Child Sexual Abuse Act to common law claims in connection with claims of sexual assault and abuse. Because such application would be in direct conflict with the express statutory language, contradict the legislative history and intent of the statutory amendments, and run counter to the Supreme Court's interpretation in W.S., the NJSBA urges the Appellate Division to confirm that the statutory amendments apply to all civil claims, including common law claims, for damages stemming from sexual assault and abuse.

I. THE TORT CLAIMS ACT NOTICE WAIVER IN N.J.S.A. 59:8-3(b) APPLIES TO ALL COMMON LAW CLAIMS MADE AGAINST A PUBLIC ENTITY BROUGHT FOR INJURY STEMMING FROM SEXUAL MISCONDUCT

Appellants argue that N.J.S.A. 59:8-3(a) and N.J.S.A. 59:8-3(b) continue to require that notices of claim be timely filed for common law claims against a public entity arising from alleged sexual abuse. For the reasons to follow, the NJSBA contends these arguments are not consistent with the Legislature's intent in amending the statutes and should not be accepted.

N.J.S.A. 59:8-3(a) provides that "[e]xcept as otherwise provided in this section, no action shall be brought against a public entity or public employee under this act unless the claim upon which it is based shall have been presented in accordance with the procedure set forth in this chapter." The 2019 amendments to the law completely eliminated the notice requirements of the Act by amending N.J.S.A. 59:8-3 to add a new subsection (b), which states:

> The procedural requirements of this chapter shall not apply to an action at law for an injury resulting from the commission of sexual assault, any other crime of a sexual nature, a prohibited sexual act as defined in Section 1 of P.L. 1992, c. 7 (C. 2A:30B-2), or sexual abuse as defined in Section 1 of P.L. 1992, c. 109 (C. 2A:61B-1).
> [P.L. 2019, c. 120 §8; N.J.S.A. 59:8-3(b)].

First, in construing a statute, the goal of the court is to divine and effectuate the Legislature's intent. Division of Motor Vehicles v. Kleinert, 198

N.J. Super. 363, 369 (App. Div. 1985). The source of legislative intent is not limited to the language of the statute. No Illegal Points, Citizens for Driver's Rights, Inc. v. Florio, 264 N.J. Super. 318, 323 (App. Div.), certif. denied, 134 N.J. 479 (1993). In other words, in interpreting a statute, one should begin, though not end, with the words of the statute. Richard A. Posner, Statutory Interpretation in the Classroom and in the Courtroom, 50 U. Chi. L. Rev 800, 807 (Spring 1983). "In addition to the wording of the statute, the policy behind it and the legislative history and concepts of reasonableness, are essential aides in determining legislative intent." No Illegal Points, 264 N.J. Super. at 323; see also N.J. Builders, Owners and Managers Ass'n v. Blair, 60 N.J. 330, 338 (1972); Paramus Substantive Certification No. 47, 249 N.J. Super. 1, 8 (App. Div. 1991).

Second, "courts will enforce legislative intent even when it conflicts with the language of the statute." No Illegal Points, 264 N.J. Super. at 323; N.J. Builders, 60 N.J. at 338. "When all is said and done, the matter of statutory construction . . . will not justly turn on literalisms, technisms, or the so-called formal rules of interpretation; it will justly turn on the breadth of the objectives of the legislation and the common sense of the situation." LaFage v. Jani, 166 N.J. 412, 431 (2001) (quoting Jersey City Chap. Prop. Owner's Protective Ass'n v. City Council, 55 N.J. 86, 100 (1969)).

And finally, when "a literal application of the language used would lead to results incompatible with the legislative design," courts are obligated "to give effect to the obvious purpose of the Legislature," Marshall v. Klebanov, 188 N.J. 23, 37 (2006) (internal quotations omitted), so that the "spirit of the law will control the letter." N.J. Builders, Owners and Managers Ass'n, 60 N.J. at 338. Stated somewhat differently, "[a] statute must be interpreted sensibly, rather than literally, with the purpose and reason for the legislation being controlling." Henry v. Shopper's World, 200 N.J. Super. 14, 18 (App. Div. 1985).

Considered in its entirety, the amendatory and supplementary legislation at issue is designed to ameliorate the often harsh and unjust results flowing from an overly strict adherence to the law's technical, procedural requirements for sexual assault and abuse victims. For instance, Chapter 120 greatly extends the statute of limitations for this class of claimant; widely expands the group of applicable claimants; permits a two-year window to file sexual assault claims that had been previously barred by the statute of limitations; and relieves such claimants from complying with the procedural notice provisions in Chapter 8 of the Tort Claims Act (TCA).

The direct language of the amended statute, N.J.S.A. 59:8-3(b), excepted from the TCA notice requirement "action[s] at law for an injury resulting from

the commission of sexual assault, any other crime of a sexual nature, a prohibited sexual act as defined in Section 1 of P.L. 1992, c. 7 (C. 2A:30B-2), or sexual abuse as defined in Section 1 of P.L. 1992, c. 109 (C. 2A:61B-1).” A plain, ordinary reading of this language would certainly include common law claims brought as a result of an injury sustained due to a sexual assault, sexual abuse or other sex crime. Indeed, under the plain and ordinary meaning of the statutory language, there is no need for an aggrieved plaintiff to file a notice of claim with a public entity when they institute an action for injuries stemming from any crime of a sexual nature, which, for example, could include other claims such as those based on N.J.S.A. 2C:14-2, Sexual Assault; N.J.S.A. 2C:14-3, Criminal Sexual Contact; N.J.S.A. 2C:14-4, Lewdness, N.J.S.A. 2C:14-9, Invasion of Privacy; or N.J.S.A. 2C:14-9.1, Sexual Extortion. This expansive view is required by the direct language of the statute.

Applying that language here, Plaintiff brought an “action at law” for “an injury resulting from” either the “commission of sexual assault” or “any other crime of a sexual nature.” Thus, Plaintiff’s instituted action falls squarely within the plain language of the statute.

The Appellate Division is further asked to distinguish between the phrases used in the statute – “an action at law” – and any alternative phrase – “any civil action.” The argument suggests that because the Legislature used the

language "an" action instead of the term "any" that the intention was to somehow narrow the application of the statute. This ignores the actual operative phrase of the statute, that the exemption for the notice requirement applies to an action stemming from "an injury resulting from the commission of" any criminal or prohibited sexual conduct. N.J.S.A. 59:8-3(b).

The purposefully expansive language of the statute aligns with the legislative history and formal statements surrounding the two bills in question. The Senate Judiciary Committee explained that the bills created a "process of filing a lawsuit with service upon the liable public entity or entities . . . [which is] the same as when suing a private organization." S. Judiciary Comm. Statement to S. Comm. Substitute for S. No. 477 (March 7, 2019) at 7. Accordingly, "[p]ublic entities would also be subject, just like a private organization, to the new, extended statute of limitations periods for child and adult victims of abuse . . ." Ibid.

Gov. Murphy commented on the follow-up legislation, Chapter 239, and stated:

> [Chapter 120] inadvertently fails to establish a standard of proof for cases involving claims filed against public entities. . . . I have received assurances that the Legislature will correct this omission by clarifying that public entities should be held to the same standard of liability that is applied to religious and nonprofit organizations. Applying a different standard would be unjustified. [Governor's Statement to S. Comm. Substitute for S. 477 (May 13, 2019)].

The undeniable goal of the statutory amendments was to remove procedural requirements for bringing claims against any and all entities in the context of sexual assault and abuse claims due to their unique nature and the issues that plague so many victims of sexual violence crimes.

Considering the plain meaning of the statutory language, coupled with the stated intent of the legislation, the NJSBA urges the Appellate Division to confirm that the exception to filing a TCA notice of claim pursuant to N.J.S.A. 59:8-3(b) applies to the common law claims made by Plaintiff and other similarly situated litigants. To interpret the statute otherwise would abolish the exact relief that the statute sought to bring to victims and would require all victims of sexual misconduct to file notices of tort claim within 90 days of an incident – the exact restriction this statute sought to eliminate.[1]

[1] If the procedural notice requirement of the TCA is interpreted as defendant suggests, victims would never be able to realize the benefits of the substantive law changes under Title 59 because they did not file a 90-day notice. Such a result does not make sense.

II. W.S. v. HILDRETH SETTLED THE ISSUE THAT PROSPECTIVE APPLICATION OF THE AMENDED STATUTORY LANGUAGE APPLIES TO TIMELY-FILED ACTIONS AND THEREFORE THE AMENDED CHILD SEXUAL ABUSE ACT (CSAA) LANGUAGE APPLIES WITH RESPECT TO THOSE INDIVIDUALS WHO CAN BE FOUND LIABLE UNDER THE CSAA

W.S. v. Hildreth made clear that the amended statutory language of the CSAA should be applied to any case filed after Dec. 1, 2019, the effective date of the new CSAA. W.S., 252 N.J. 506 (2023). Consistent with that detailed analysis, any arguments relying on pre-amendment language, including a "within the household" requirement for passive abusers, are misplaced.

W.S. analyzed the application of N.J.S.A. 59:8-3, which was amended in the same group of statutory amendments as the CSAA. The Court found that the law to be applied was "the law in effect at the time W.S. filed his Complaint." W.S., 252 N.J. at 521. The Court directly confronted the defendants' claims:

> Defendants effectively posit that W.S.'s complaint should not have been subject to the laws in effect at the time it was filed, but rather to laws the Legislature had at that point intentionally repealed. There is no support for that position in the text, structure, purpose or legislative history of N.J.S.A. 59:8-3(b).
> [Ibid.]

The Court noted that nowhere in the statutory amendments did the legislation rely on when an action accrued, but rather they relied on when an

"action at law" is commenced by filing a complaint. Id. at 523. The Court stated:

> If the Legislature intended for the amendment to apply only to causes of action that accrued after December 1, 2019, N.J.S.A. 59:8-3(b) could have stated: "The procedural requirements of this chapter shall not apply to a cause of action that accrues after December 1, 2019 for an injury resulting from the commission of sexual assault, any other crime of a sexual nature, a prohibited sexual act . . . , or sexual abuse." It does not.
> [Ibid.]

Four unpublished decisions have been offered as support for the position that the statute does not apply retroactively. Three of those cases are unpublished trial court decisions, two of which were decided before W.S. (Da154, Da865, Da875). The last is an unpublished district court decision. (Da1066). These cases are irrelevant given the clear direction provided in W.S., holding that "reading the amendments to apply only to those whose cause of action accrues after December 1, 2019, would create an absurd result in light of the Legislature's retroactive extension of the statute of limitations." W.S., 252 N.J. at 510.

Thus, consistent with that language in W.S., the amended statutory language at issue in this case applies irrespective of the accrual date of the underlying cause(s) of action. In other words, "prospective application" means that the statutory language at the time of filing, which includes the amendments to the CSAA, apply to the cause of action, notwithstanding an

accrual date that preceded Dec. 1, 2019. The holding in W.S. is the only sensical interpretation in light of the statutory language and the legislative history.

CONCLUSION

In enacting L. 2019, c. 120 (Chapter 120), and L. 2019, c. 239 (Chapter 239), the Legislature and the Governor intended to eliminate obstacles faced by victims of sexual assault in seeking civil redress for the harm they suffered. The legislative history, the Governor's comments and the jurisprudence regarding statutory interpretation all lend support for an expansive interpretation of the statutory amendments to accomplish this goal. The Supreme Court further recognized this in its comprehensive opinion in W.S. v. Hildreth, 252 N.J. 506, 524 (2023). Dismissing the common law claims of victims of sexual assault and abuse based on pre-amendment requirements would deviate from the statutory language, the legislative intent and the recent precedent of our state's highest court. It would further result in limiting the rights of sexual assault and abuse victims to seek access to justice in connection with their claims. For these reasons, the NJSBA urges the Appellate Division to determine that the statutory amendments at issue apply to all claims of sexual assault and abuse, including those based in common law, and to allow such claims to move forward on their merits.

Respectfully submitted,
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W.S. (initials representing plaintiff) Plaintiff-Respondent vs. DEREK HILDRETH, Defendant and LAWRENCE TOWNSHIP SCHOOL DISTRICT and MYRON L.POWELL ELEMENTARY SCHOOL and its teachers, directors, officers, employees, agents, counselors, servants or volunteers Defendants-Appellants	SUPREME COURT OF NEW JERSEY DOCKET NO.: 086633 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-2066-20T1 SAT BELOW: HON. CARMEN MESSANO, P.J.A.D HON ALLISON E. ACCURSO, J.A.D. HON. LISA ROSE, J.A.D.

BRIEF OF *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION

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PRELIMINARY STATEMENT

The passing of L. 2019, c. 120 (Chapter 120), and L. 2019, c. 239 (Chapter 239) reflected the Legislature's action to statutorily acknowledge and address the trauma and emotional hardship suffered by victims of sexual assault and served the indisputable objective of permitting civil legal recourse for those victims who either had been, or otherwise would have been, rejected due to prior statutory restrictions. To accomplish this objective, the bills extensively broadened the statute of limitations for child and adult victims of sexual violence and sexual abuse and carved out a two-year window for victims who were either denied (or would have been denied) the right to prosecute their claims based on prior procedural restrictions.

To ensure universal access to civil justice for victims, the bills also retroactively expanded institutional liability under the Charitable Immunity Act, making subject organizations liable for mere negligence in hiring, retaining or supervising employees, agents or servants who perpetrate(d) sexual assault on a minor. To further level the playing field, the two-year statute of limitations for public entity defendants pursuant N.J.S.A. 59:8-8 was eliminated for sexual assault victims, along with the requirement to file a notice of tort claim. This change, the Senate Judiciary Committee explained, created a

"process of filing a lawsuit with service upon the liable public entity or entities . . . [which was] the same as when suing a private organization." S. Judiciary Comm. Statement to S. Comm. Substitute for S. No. 477 (March 7, 2019) at 7. Accordingly, "[p]ublic entities would also be subject, just like a private organization, to the new, extended statute of limitations periods for child and adult victims of abuse . . ." Ibid.

After passing L. 2019, c. 120 (Chapter 120), follow-up legislation L. 2019, c. 239 (Chapter 239) cemented the legislative objective, which Governor Murphy reiterated in his May 13, 2019 statement:

> [L. 2019, c. 120 (Chapter 120)] inadvertently fails to establish a standard of proof for cases involving claims filed against public entities. . . . I have received assurances that the Legislature will correct this omission by clarifying that public entities should be held to the same standard of liability that is applied to religious and nonprofit organizations. Applying a different standard would be unjustified.
>
> [Governor's Statement to S. Comm. Substitute for S. 477 (May 13, 2019)].

The basis for the New Jersey State Bar Association (NJSBA) intervention lies at the heart of one of the organization's principal missions: to promote equal access to the justice system for the public and fairness in its administration. While the underlying issue before this Court is one which, in the words of Governor Murphy, "has evoked strong passions on both sides," Governor's Statement to S. Comm. Substitute for S. 477

(May 13, 2019), the actual legal question is not so polarizing. In the face of the crystal-clear intent to pass a statute that opens the door to all victims of sexual assault to bring claims against entities, public and private, for civil redress: was there any legislative intent to deny a class of victims such as W.S. the right to proceed based upon prior tort claim notice requirements? Because such a denial would be entirely irreconcilable with the language of the statutes and the legislative history, and would further result in unsubstantiated denials of access to civil justice to otherwise similarly-situated victims, the answer must be no.

PROCEDURAL HISTORY AND STATEMENTS OF FACTS

The NJSBA relies upon the submitted facts and procedural histories provided by the parties as well as the Appellate Division in its underlying Dec. 21, 2021 published opinion.

LEGAL ARGUMENT

In denying Defendant-Appellant's motion to dismiss for Plaintiff-Respondent's failure to timely file a notice of tort claim, the trial court relied on the provisions of P.L. 2019 c. 120 that relieve sexual assault claimants from, among other burdens, complying with the procedural notice provisions in Chapter 8 of the Tort Claims Act, N.J.S.A. 59:8-3(b), since Plaintiff-Respondent's complaint had been filed after the Dec. 1, 2019 effectivity date of P.L. 2019 c. 120. The trial court did not find retroactivity of the statutory amendment eliminating the requirement to file a notice of claim in P.L. 2019 c. 120 §8. Yet, because Plaintiff-Respondent's cause of action had not yet been finally adjudicated or dismissed, it was revived in the two-year window opened by the statute. Defendant-Appellant challenges this ruling. At issue remains whether the challenged provision, P.L. 2019 c. 120, §8, is prospective only or should be given retroactive effect.

I. Legislative intent is operative and supports retroactivity of P.L. 2019 c. 120, §8.

P.L. 2019 c. 120 was enacted on May 13, 2019, with an effective date of Dec. 1, 2019. P.L. 2019 c. 120 §10; N.J.S.A. 2A:14-2c. Plaintiff-Respondent filed the instant complaint in January 2020, after the new law was adopted and took effect.

Most significant for present purposes, the new law completely eliminates the notice requirements of the Act by amending N.J.S.A. 59:8-3 to add a new subsection (b), which states:

> The procedural requirements of this chapter shall not apply to an action at law for an injury resulting from the commission of sexual assault, any other crime of a sexual nature, a prohibited sexual act as defined in Section 1 of P.L. 1992, c. 7 (C. 2A:30B-2), or sexual abuse as defined in Section 1 of P.L. 1992, c. 109 (C. 2A:61B-1).
>
> [P.L. 2019, c. 120 §8; N.J.S.A. 59:8-3(b)].

This new law also greatly extends the statute of limitations for claims by minors of sexual assault, N.J.S.A. 2A:14-2a, and permits any action for sexual assault that was otherwise time-barred through application of the statute of limitations to be commenced within two years of Dec. 1, 2019. P.L. 2019, c. 120 §9; N.J.S.A. 2A:14-2b(a). Moreover, the new law eases the standards of liability to be applied to a public entity in cases involving claims of sexual abuse, removing any immunity otherwise granted under the Act. P.L. 2019, c. 120, §7, amended by P.L. 2019, c. 239, §1; N.J.S.A. 59:2-1.3(a) and (b).

While a general rule of statutory construction favors prospective application of new legislation, Nobega v. Edison Glen Assocs., 167 N.J. 520, 536 (2001), this principle is not to be applied mechanistically in every case. Johnson v. Roselle EZ

Quick, LLC, 226 N.J. 370, 386-87 (2016); see also Gibbons v. Gibbons, 86 N.J. 515, 552 (1981); Rothman v. Rothman, 65 N.J. 219, 224 (1974). Rather this Court has emphasized that "[w]hen considering whether a statute should be applied prospectively or retroactively, our quest is to ascertain the intention of the Legislature." State v. Ventron Corp., 94 N.J. 473, 498 (1983). See also Johnson, supra, 226 N.J. at 386-87; Kruvant v. Mayor and Council of Cedar Grove Tp., 82 N.J. 435, 440 (1980).

Despite this clear directive, Defendant-Appellant essentially relies on the statutory wording "[t]he provisions of this amendatory and supplementary act . . . shall take effect on December 1, 2019", arguing that this language admits of no other resolution than to apply the challenged provision, P.L. 2019, c. 120, §8, prospectively. In other words, Defendant-Appellant seeks a statutory interpretation that would maintain the tort notice of claim requirement for causes of action accruing before the Dec. 1, 2019 enactment. The statutory language, however, does not expressly or unambiguously state that Section 8's elimination of the Act's notice requirements applies only to claims filed after Dec. 1, 2019. In responding to Defendant-Appellant's "strict construction" contention, this Court must not lose sight of the laudable objectives the new legislation was designed to achieve. That objective, the NJSBA submits,

would be defeated by denying Plaintiff-Respondent access to the courts to seek civil justice.

Left unsaid in Defendant-Appellant's strict "plain language" argument are certain propositions so deeply embedded in our jurisprudence of statutory construction that they rarely find expression, and certainly not in Defendant-Appellant's lexicon. First, in construing a statute, the goal of the court is to divine and effectuate the Legislature's intent. Division of Motor Vehicles v. Kleinert, 198 N.J. Super. 363, 369 (App. Div. 1985). The source of legislative intent is not limited to the language of the statute. No Illegal Points, Citizens for Driver's Rights, Inc. v. Florio, 264 N.J. Super. 318, 323 (App. Div.), certif. denied, 134 N.J. 479 (1993). In other words, in interpreting a statute, one should begin, though not end, with the words of the statute. Richard A. Posner, Statutory Interpretation in the Classroom and in the Courtroom, 50 U. Chi. L. Rev 800, 807 (Spring 1983). "In addition to the wording of the statute, the policy behind it and the legislative history and concepts of reasonableness, are essential aides in determining legislative intent." No Illegal Points, supra, 264 N.J. Super. at 323; see also N.J. Builders, Owners and Managers Ass'n v. Blair, 60 N.J. 330, 338 (1972); Paramus Substantive Certification No. 47, 249 N.J. Super. 1, 8 (App. Div. 1991).

Second, "courts will enforce legislative intent even when it conflicts with the language of the statute." No Illegal Points, supra, 264 N.J. Super. at 323; N.J. Builders, supra, 60 N.J. at 338. "When all is said and done, the matter of statutory construction . . . will not justly turn on literalisms, technisms, or the so-called formal rules of interpretation; it will justly turn on the breadth of the objectives of the legislation and the common sense of the situation." LaFage v. Jani, 166 N.J. 412, 431 (2001) (quoting Jersey City Chap. Prop. Owner's Protective Ass'n v. City Council, 55 N.J. 86, 100 (1969)).

And finally, when "a literal application of the language used would lead to results incompatible with the legislative design," courts are obligated "to give effect to the obvious purpose of the Legislature," Marshall v. Klebanov, 188 N.J. 23, 37 (2006)(internal quotations omitted), so that the "spirit of the law will control the letter." N.J. Builders, Owners and Managers Ass'n, supra, 60 N.J. at 338. Stated somewhat differently, "[a] statute must be interpreted sensibly, rather than literally, with the purpose and reason for the Legislation being controlling." Henry v. Shopper's World, 200 N.J. Super. 14, 18 (App. Div. 1985).

Considered in its entirety, the amendatory and supplementary legislation at issue here is designed to

ameliorate the often harsh and unjust results flowing from an overly strict adherence to the law's technical, procedural requirements for sexual assault victims. For instance, P.L. 2019, c. 120 greatly extends the statute of limitations for this class of claimant; widely expands the group; permits a two-year window to file sexual assault claims that had been previously barred by the statute of limitations; and relieves these claimants from complying with the procedural notice provisions in Chapter 8 of the Tort Claims Act.

Moreover, while the law took effect on Dec. 1, 2019, its legislative history and express language clearly demonstrate that the statute has operative effect before its stated effective date. Consider that all of the following have retroactive effect: the extension of the statute of limitations period for minor and adult victims of sexual assault, N.J.S.A. 2A:14-2a; the two-year window immediately following the law's effective date for lawsuits alleging acts of sexual abuse occurring prior to the new law's effective date that would otherwise be time barred, N.J.S.A. 2A:14-26b(a); and the elimination of the Act's tort claims immunities, P.L. 2019 c. 239 §2.

On this score, Defendant-Appellant seeks to distinguish Section 8, contrasting the lack of explicit language in the statute applying pipeline retroactivity to the Act's notice of

claim requirement. However, given that the aforementioned ameliorative provisions of the law reach back to tortious conduct occurring as long as decades ago, thereby encompassing claims arising well before the law's effective date and otherwise time-barred, it would be utterly incongruous to argue that the Legislature's intention to capture such stale causes of action does not extend to claims filed within the applicable statute of limitations period but lacking strict adherence to a procedural notice rule. In fact, Defendant-Appellant conceded before the Appellate Division that the new law undeniably provides victims of sexual abuse broader rights regarding statute of limitations. Nevertheless, they argued that those rights only began after Dec. 1, 2019, with the notice of claim requirement before Dec. 1, 2019 continuing as mandatory as it had been prior to the legislation, effectively precluding much of the relief provided by the statute.

Defendant-Appellant's attempted distinction must fail. Indeed, Plaintiff-Respondent filed his complaint in January 2020, after the statute became effective on Dec. 1, 2019. At that point in time, Plaintiff-Respondent fell squarely into the statute's two-year window for filing a claim that has not been fully adjudicated on its merits. Failure to relieve this victim, and many others similarly situated, from compliance with the Act's 90-day time requirement would nullify the two-year window

of relief that the statute granted to victims whose cases had not been fully adjudicated or dismissed, or who were otherwise potentially time-barred. It would also mean that every action filed against a public entity after the Dec. 1, 2019 effective date for alleged sexual misconduct preceding that date would be barred if a notice of claim had not been timely filed. The express elimination of the tort claims notice requirement would not take effect for these victims; moreover, other victims, like the plaintiff in R.A. v. W. Essex Reg'l Sch. Bd. of Educ., 2021 N.J. Super. Unpub. LEXIS 1951 (Da136), whose cases were filed prior to the Dec. 1, 2019 effective date but whose cases were pending and not fully adjudicated as of that date, would also be subject to dismissal if unable to meet the prior strict tort claims notice requirements – the very requirements that this statute sought to eliminate, alleviating the burden and leveling the playing field for victims of sexual abuse. Indeed, the only victims of abuse who would be guaranteed the benefit of the elimination of the tort claims notice requirement would be those who were abused after Dec. 1, 2019. Each and every other victim would be required to endure the very analysis that this statute expressly aimed to eliminate. Such an interpretation not only fails to follow clear legislative intent, defeating the central objective of the statute, it places courts in a position where

each must continue to perform problematic claims accrual analysis despite a statute that promised its cessation.[1]

In light of the legislative intent as well as the express language of the statute logically interpreted with its operation and how it will affect a population of sexual assault victims' access to our courts, P.L. 2019 c. 120, §8 must be given retroactive applicability.

II. The "time of the decision" principle supports retroactive application of P.L. 2019 c. 120, §8.

Application of P.L. 2019, c. 120 §8 to the matter at hand is also supported by the "time of decision" principle, which states that "an appellate court on direct review will apply the statute in effect at time of its decision . . .." Kruvant, supra, 82 N.J. at 440. An early pronouncement of the principle is found in United States v. Schooner Peggy, 5 U.S. 103 (1801), wherein Chief Justice Marshall explained:

> It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.
>
> [5 U.S. at 110].

[1] Many of these analyses in the context of sexual assault involve the complication of trauma suppression, where the actual sexual misconduct occurred many decades earlier. See State in the Interest of K.A.W., 104 N.J. 112, 118-19 (1986); see also State v. S.J.C., 471 N.J. Super. 608, fn. 10 (App. Div. Apr. 28, 2022).

See also Pizzo Manten Group v. Tp. Of Randolph, 137 N.J. 216, 235 (1994); Phillips v. Curiale, 128 N.J. 608, 615 (1992); Bradley v. School Bd. Of Richmond, 416 U.S. 696, 711 (1974); Thorpe v. Hous. Auth. Of Durham, 393 U.S. 268, 281 (1969).

Under this principle, courts will apply the law as it exists at the time that the case or appeal is decided. See e.g., State Dep't of Envt'l Prot. v. Ventron, 94 N.J. 473, 498 (1983) ("Under the 'time of decision' rule, when legislation affecting a cause is amended while the matter is on appeal, an appellate court should apply the statute in effect at the time of its decision."); In re Petition of South Lakewood Water Co., 61 N.J. 230, 248 (1972); In re Protest of Costal Permit Program Rules, 354 N.J. Super. 293, 333 (App. Div. 2002); Walker v. N.J. Dep't of Insts. & Agencies, 147 N.J. Super. 485, 489 (App. Div. 1977). "The purpose of the principle is to effectuate the current policy declared by the legislative body – a policy which presumably is in the public interest." Kruvant, supra, 82 N.J. at 440. By applying the presently effective statute to all cases in the courts after the statute's effective date, this Court will advance the legislative intent, commensurate with the goals and objectives of the NJSBA.

To be sure, there are two recognized exceptions to the "time of decision" principle, namely when its application "would

result in manifest injustice or there is statutory direction or legislative history to the contrary." Bradley, supra, 416 U.S. at 711. However, neither of these pertain to this case. As noted, there is no explicit language or clear direction in the new law that Section 8 should be applied only prospectively. Moreover, no party to the NJSBA's knowledge has identified any manifest injustice suffered – much less substantive right significantly and adversely impaired – by Section 8's retroactive application to Plaintiff-Respondent.

III. P.L. 2019 c. 120, §8 is a procedural rule which further supports its application.

Section 8 of P.L. 2019 c. 120, which eliminates the notice requirement of Chapter 8 of the Act, is a rule of procedure. A procedural rule is in general deemed applicable to actions pending on its effective date as well as those instituted thereafter. Busik v. Levine, 63 N.J. 351, 360-61, appeal dism'd, 414 U.S. 106 (1973). This provision does not change settled law related to substantive rights, which if it did would ordinarily warrant prospective application. Phillips, supra, 128 N.J. at 617; Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 95 (1990); see also Johnson, supra, 226 N.J. at 387. Indeed, it cannot be denied that Section 8 of P.L. 2019 c. 120 addresses the Act's procedural requirements by eliminating the notice provisions relative to bringing a sexual abuse lawsuit against public

entities. They are now subject to the new extended limitations periods for victims of abuse and sexual violence as detailed in Section 2 of the new law. See S. Judiciary Comm. Statement to S. Comm. Substitute for S. No. 477 (March 7, 2019).

Interestingly enough, although statutes that change settled law relating to substantive rights are generally prospective only, Section 2 of P.L. 2019 c. 239, which addresses the substantive liability of a public entity by changing the legal standards to be imposed therein, applies those liability provisions retroactively to cases filed prior to Dec. 1, 2019. P.L. 2019, c. 239, §2 ("any cause of action filed prior to that effective date that has not yet been finally adjudicated or dismissed by a court as of that effective date.")If such a substantive rule of law has been given retroactive effect, then *a fortiori*, Section 8 which simply addresses a procedural rule, should be afforded the same treatment.

CONCLUSION

The NJSBA submits that our justice system cannot and should not disregard the available evidence of the Legislature's intent merely to preserve strict legal principles of statutory construction. See, State v. Bey, 112 N.J. 45, 100 (1988) (rejecting State's argument that legislative intent is unimportant "so long as its choice of language brings the instant facts within the reach of the statute"). When primary regard is given to the fundamental purpose of which P.L. 2019 c. 120 was enacted, it is abundantly clear that Section 8 thereof must be applied to preserve Plaintiff-Respondent's cause of action, as well as those of other victims of sexual abuse and sexual violence to whom the statute was clearly intended to apply. To allow otherwise would expressly exclude certain victims from the benefits of the statute, a result that is not supported by the legislative history or the language of the statute.

Respectfully submitted,

s/Jeralyn L. Lawrence
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President, New Jersey State
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Dated: July 7, 2022

SYLLABUS

This syllabus is not part of the Court's opinion. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Court and may not summarize all portions of the opinion.

W.S. v. Derek Hildreth (A-46-21) (086633)

Argued October 24, 2022 -- Decided January 18, 2023

WAINER APTER, J., writing for a unanimous Court.

In this appeal, the Court considers landmark amendments to the Child Sexual Abuse Act (CSAA), Charitable Immunity Act (CIA), and Tort Claims Act (TCA) in determining whether plaintiff W.S.'s claim against defendant Lawrence Township School District and others should have been dismissed for failure to timely file a notice of claim under the TCA.

W.S. alleged that a teacher at Myron L. Powell Elementary School, defendant Derek Hildreth, sexually assaulted him during the 1996-1997 school year when plaintiff was in sixth grade. Both parties agree that plaintiff's claim accrued in 2016, when W.S. was about thirty years old. In January 2017, W.S. moved for leave to file a late notice of tort claim. The trial court denied W.S.'s motion without prejudice to W.S.'s refiling it to comply with the requirements of N.J.S.A. 59:8-9 within ninety days of the accrual of his cause of action. W.S. never refiled the motion or appealed the motion order.

On December 1, 2019, several amendments to the CSAA, CIA, and TCA went into effect. The Legislature extended the statute of limitations for any injury resulting from certain offenses including child sexual abuse to "37 years after the minor reaches the age of majority, or within seven years from the date of reasonable discovery of the injury . . . , whichever date is later," and it explicitly made the amendment retroactive. N.J.S.A. 2A:14-2a(a)(1). Another significant change is that N.J.S.A. 59:8-3(b) was amended to provide that the "procedural requirements" of the TCA "shall not apply to an action at law for an injury resulting" from sexual abuse. In addition to eliminating the TCA's procedural requirements for filing a sexual abuse claim against a public entity or employee, the Legislature narrowed the scope of substantive immunity under the TCA to exclude "an action at law for damages" resulting from sexual abuse under certain circumstances. See N.J.S.A. 59:2-1.3(a). And the Legislature specified that the new statute of limitations would apply to any such action at law against a public entity that had not been finally adjudicated as of December 1, 2019. Id. at (b).

Approximately one month after the amendments went into effect, W.S. filed suit against defendants, bringing claims under the CSAA and Law Against Discrimination, as well as numerous common law claims. Defendants moved to dismiss the complaint for failure to file a notice of claim within ninety days of the claim's accrual as required by N.J.S.A. 59:8-8.

The motion judge denied the motion, finding that the amended TCA "applies to causes of action that were not finally adjudicated as of December 1, 2019" and that "plaintiff's cause of action was not finally adjudicated as of" that date because it was denied without prejudice.

The Appellate Division affirmed, holding that plaintiff's complaint was filed after the amendments became effective and was therefore "subject to the newly enacted N.J.S.A. 59:8-3(b), which specifically eliminated the need to file a notice of claim in advance of filing suit." 470 N.J. Super. 57, 62 (App. Div. 2021). The Appellate Division disagreed with the motion judge as to the import of plaintiff's 2017 motion for leave to file a late notice of claim, determining that "plaintiff never filed 'a cause of action' in 2017" because a motion for leave to file a late notice of claim "does not amount to the commencement of 'civil litigation.'" Id. at 67-68.

The Court granted leave to appeal. 250 N.J. 171 (2022).

HELD: The plain meaning of N.J.S.A. 59:8-3(b) dictates that child sexual abuse survivors who file a CSAA complaint against a public entity after December 1, 2019 -- even if their cause of action accrued much earlier -- need not file a TCA notice of claim before filing suit.

1. As an initial matter, the Court holds that W.S.'s 2017 motion for leave to file a late notice of claim did not commence a civil action and the trial court's dismissal of the motion without prejudice did not constitute a "final[] adjudicat[ion]" of this case within the meaning of the 2019 amendments. The text of the TCA carefully distinguishes between (1) the service of a notice of claim, (2) a motion for leave to file a late notice of claim, and (3) the filing of a lawsuit. For good reason. Pursuant to Rule 4:2-2, "[a] civil action is commenced by filing a complaint with the court." Neither a notice of claim nor a motion for leave to file a late notice of claim constitutes a complaint. Nor is it even a "pleading." See R. 4:5-1(a) (providing an exclusive list of all permissible "pleadings" that can be filed in a civil action). The Appellate Division has thus held that filing a notice of claim under the TCA does not commence civil litigation. See State v. J.R.S., 398 N.J. Super. 1, 5-6 (App. Div. 2008). And a motion for permission to file a late notice of claim is even further removed from beginning a lawsuit. (pp. 15-18)

2. As to W.S.'s January 2020 complaint, the Court holds that the motion judge and the Appellate Division correctly applied the law in effect at that time in denying defendants' motion to dismiss. Since December 1, 2019, N.J.S.A. 59:8-3(b) has provided that "[t]he procedural requirements of this chapter shall not apply to an action at law for an injury resulting from the commission of . . . sexual abuse as defined in [N.J.S.A. 2A:61B-1]." Defendants do not contest that the requirement to file a notice of claim with a public entity within ninety days "after accrual of the cause of action," N.J.S.A. 59:8-8, is a "procedural requirement[]" of the TCA within the meaning of N.J.S.A. 59:8-3(b). And they concede that W.S. filed an "action at law for an injury resulting from the commission of . . . sexual abuse," N.J.S.A. 59:8-3(b), in January of 2020. Therefore, pursuant to the law in effect at the time W.S. filed his complaint, no notice of claim was required. Applying the law in effect at the time a complaint is filed -- even when that law changed the requirements for filing a complaint -- is not applying a statute retroactively; it is applying a statute prospectively to cases filed after its effective date. (pp. 19-20)

3. The Court rejects the argument that what matters for purposes of N.J.S.A. 59:8-3(b) is when a cause of action accrued. The language of the statute indicates otherwise: "The procedural requirements of this chapter shall not apply to an action at law for an injury resulting from the commission of . . . sexual abuse." N.J.S.A. 59:8-3(b) (emphasis added). The text explicitly references an "action at law," which can be commenced only "by filing a complaint with the court." R. 4:2-2. It says nothing about when a cause of action accrues. Likewise, neither of the statutes on which defendants rely -- N.J.S.A. 59:8-8 and -9 -- defines the term "action at law" to mean when a cause of action accrues rather than when a complaint is filed in court. Finally, reading the amendments to apply only to those whose cause of action accrues after December 1, 2019, would create an absurd result in light of the Legislature's retroactive extension of the statute of limitations until the victim reaches the age of fifty-five. See N.J.S.A. 2A:14-2a(a)(1). (pp. 21-24)

AFFIRMED.

CHIEF JUSTICE RABNER; JUSTICES PATTERSON, SOLOMON, and PIERRE-LOUIS; and JUDGE SABATINO (temporarily assigned) join in JUSTICE WAINER APTER's opinion. JUSTICE FASCIALE did not participate.

SUPREME COURT OF NEW JERSEY

A-46 September Term 2021

086633

W.S.,

Plaintiff-Respondent,

v.

Derek Hildreth,

Defendant,

and

Lawrence Township
School District and
Myron L. Powell
Elementary School,
and its teachers, directors,
officers, employees, agents,
counselors, servants or volunteers,

Defendants-Appellants.

On appeal from the Superior Court,
Appellate Division, whose opinion is reported at
470 N.J. Super. 57 (App. Div. 2021).

Argued	Decided
October 24, 2022	January 18, 2023

Jerald J. Howarth argued the cause for appellants (Howarth & Associates, attorneys; Jerald J. Howarth, on the briefs).

Kevin P. McCann argued the cause for respondent (Chance & McCann, attorneys; Claudia J. Gallagher, on the briefs).

Daniel M. Vannella, Assistant Attorney General, argued the cause for amicus curiae Attorney General of New Jersey (Matthew J. Platkin, Attorney General, attorney; Daniel M. Vannella, of counsel and on the brief).

Craig J. Hubert argued the cause for amicus curiae New Jersey State Bar Association (New Jersey State Bar Association, attorneys; Jeralyn L. Lawrence, President, of counsel, and Craig J. Hubert and Thomas J. Manzo, on the brief).

Eric G. Kahn argued the cause for amicus curiae New Jersey Association for Justice (Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins, attorneys; Eric G. Kahn, of counsel and on the brief, and Annabelle M. Steinhacker, on the brief).

Marci A. Hamilton, of the Pennsylvania bar, admitted pro hac vice, argued the cause for amicus curiae CHILD USA (CHILD USA, attorneys; Alice Nasar Hanan, on the brief).

JUSTICE WAINER APTER delivered the opinion of the Court.

In this appeal we consider landmark amendments to the Child Sexual Abuse Act (CSAA), Charitable Immunity Act (CIA), and Tort Claims Act (TCA). We do so in determining whether the motion judge and Appellate Division erred in denying a motion to dismiss filed by defendants Lawrence Township School District and Myron L. Powell Elementary School and its

teachers, directors, officers, employees, agents, counselors, servants and volunteers (collectively, defendants) for failure to timely file a notice of claim under the TCA, N.J.S.A. 59:1-1 to :12-3.

Plaintiff W.S. alleged that a teacher at Myron L. Powell Elementary School, defendant Derek Hildreth, sexually assaulted him during the 1996-1997 school year when plaintiff was in sixth grade. Both parties agree that plaintiff's claim accrued in 2016.

In 2019, the Legislature overhauled the CSAA, CIA, and TCA. See L. 2019, c. 120; L. 2019, c. 239. An amendment to the CSAA allowed survivors of child sexual abuse to file a claim any time before reaching the age of fifty-five, or seven years after discovering the harm, whichever is later. The Legislature made that extended statute of limitations retroactive, reviving claims that would have been barred under the prior two-year statute of limitations. An amendment to the TCA, of paramount importance here, removed the requirement that plaintiffs bringing CSAA complaints against public entities file a TCA notice of claim within ninety days of their claim accruing. All amendments went into effect on December 1, 2019. See N.J.S.A. 2A:14-2c; L. 2019, c. 239, § 2.

In January 2020, W.S. sued defendants, Hildreth, and others, alleging violations of the CSAA and the New Jersey Law Against Discrimination

(LAD), as well as several common law claims. Defendants moved to dismiss the complaint for failure to file a TCA notice of claim within ninety days. The motion judge denied the motion, holding that the 2019 amendments applied to W.S.'s complaint and W.S. was therefore not required by the TCA to file a notice of claim. The Appellate Division affirmed.

We now affirm the Appellate Division's decision. We hold that the plain meaning of the relevant statutes dictates that child sexual abuse survivors who file a CSAA complaint against a public entity after December 1, 2019 -- even if their cause of action accrued much earlier -- need not file a TCA notice of claim before filing suit.

I.

A.

According to W.S.'s complaint, defendant Derek Hildreth[1] was a teacher at Myron L. Powell Elementary School. "On numerous occasions" between 1998 and 2003, Hildreth "sexually assaulted, sexually abused and/or had sexual contact" with plaintiff and with other male children on school property. According to W.S.'s answers to interrogatories, during the 1996-1997 school

[1] Defendant Hildreth has not appeared or participated in this case. See W.S. v. Hildreth, 470 N.J. Super. 57, 61 n.3 (App. Div. 2021).

year, W.S. was a student in Hildreth's sixth-grade homeroom class and Hildreth sexually assaulted W.S. twice.

W.S. turned eighteen in 2004. He became aware of the harm caused by the abuse in 2016, when he was about thirty years old. On January 16, 2017, W.S. moved for leave to file a late notice of tort claim against defendants in Cumberland County. The trial court denied W.S.'s motion without prejudice to W.S.'s refiling it to comply with the requirements of N.J.S.A. 59:8-9 -- that is, "supported by affidavits based upon personal knowledge . . . showing sufficient reasons constituting extraordinary circumstances for his failure to file notice of claim" within ninety days of the accrual of his cause of action. W.S. never refiled the motion or appealed the motion order.

B.

On December 1, 2019, several amendments to the CSAA, CIA and TCA went into effect. Chapter 120, signed into law on May 13, 2019, extended the statute of limitations for any injury resulting from child "sexual assault, any other crime of a sexual nature, a prohibited sexual act . . . , or sexual abuse" to "37 years after the minor reaches the age of majority, or within seven years from the date of reasonable discovery of the injury . . . , whichever date is later." N.J.S.A. 2A:14-2a(a)(1). The amendment was explicitly made retroactive, applying to child sexual abuse that "occurred prior to, on or after"

December 1, 2019. Ibid. The same amendment extended the statute of limitations on claims for sexual abuse perpetrated against adults to seven years after the date of discovery. See id. at (b)(1).

Chapter 120 also modified the TCA requirements for filing a CSAA complaint of sexual abuse against a public entity. The TCA sets forth general procedural requirements for filing claims for damages against public entities. See N.J.S.A. 59:8-1 to -11. For example, a claim against a local public entity such as a school district must be signed by the claimant or a person acting on the claimant's behalf; must include the "names of the public entity, employee or employees" that caused the injury, the amount of damages claimed, and a general description of the injury; and must be filed with the local public entity. N.J.S.A. 59:8-4(d) to (f), -5, -7. The claim must be presented to the public entity within ninety days "after accrual of the cause of action"; "[a]fter the expiration of six months from the date notice of claim is received, the claimant may file suit in an appropriate court of law." N.J.S.A. 59:8-8. If a claimant fails "to file the claim with the public entity within 90 days of accrual of the claim," they "shall be forever barred from recovering against a public entity or public employee," id. at (a), subject to limited exceptions, see N.J.S.A. 59:8-9.

However, Section 8 of Chapter 120 specifically amended the TCA, effective December 1, 2019, to provide an exclusion from those general rules

for cases arising from sexual abuse. Because Section 8 is central to the disposition of this case, we reproduce it in full here:

> 8. N.J.S.59:8-3 is amended to read as follows:
>
> 59:8-3. Claims for damages against public entities. ~~No~~ a. Except as otherwise provided in this section, no action shall be brought against a public entity or public employee under this act unless the claim upon which it is based shall have been presented in accordance with the procedure set forth in this chapter.
>
> b. The procedural requirements of this chapter shall not apply to an action at law for an injury resulting from the commission of sexual assault, any other crime of a sexual nature, a prohibited sexual act as defined in [N.J.S.A. 2A:30B-2], or sexual abuse as defined in [N.J.S.A. 2A:61B-1].
>
> [L. 2019, c. 120, § 8 (deletion italicized and marked with strikethrough; additions underlined).]

Thus, as of December 1, 2019, N.J.S.A. 59:8-3(b) has provided that the "procedural requirements" of the TCA "shall not apply to an action at law for an injury resulting" from sexual abuse.

The Senate Judiciary Committee Statement to Section 8 explained:

> This section eliminates the "New Jersey Tort Claims Act" two-year statute of limitations period, set forth in N.J.S.59:8-8, for bringing a sexual abuse lawsuit against a public entity, as well as any of the act's procedural requirements, such as the 90-day period for filing notice of a claim of liability against a public entity for such lawsuits; the process of filing a lawsuit with service upon the liable public entity or entities would thus be the same as when suing a private

> organization. Public entities would also be subject, just like a private organization, to the new, extended statute of limitations periods for child and adult victims of abuse detailed in section 2 . . . .
>
> [S. Judiciary Comm. Statement to S. 477 (Mar. 7, 2019) (emphasis added).]

In addition to eliminating the TCA's procedural requirements for filing a sexual abuse claim against a public entity or public employee, the Legislature narrowed the scope of substantive immunity under the TCA. Chapter 239 -- signed into law on August 9, 2019, and also made effective December 1, 2019 -- provided that the TCA's conferral of substantive immunity from civil liability would "not apply to an action at law for damages" resulting from sexual abuse "which was caused by a willful, wanton, or grossly negligent act of the public entity or public employee," or, for acts committed against a minor, "which was caused by the negligent hiring, supervision, or retention of any public employee." L. 2019, c. 239, § 1 (codified at N.J.S.A. 59:2-1.3(a)). Chapter 239 also specified that any such action at law involving a public entity would be subject to the same new statute of limitations set forth in L. 2019, c. 120. See N.J.S.A. 59:2-1.3(b). Chapter 239 specifically stated:

> This act shall take effect on December 1, 2019, the same day that L. 2019, c. 120 ([N.J.S.A.] 2A:14-2a et al.) takes effect, and shall apply to any cause of action filed on or after that date, as well as any cause of action filed prior to that effective date that has not yet been

> finally adjudicated or dismissed by a court as of that effective date.
>
> [L. 2019, c. 239, § 2.]

C.

Approximately one month after the amendments went into effect, W.S. filed suit in the Law Division in Gloucester County against defendants, Hildreth, and others. "On numerous occasions between . . . 1998-2003," W.S. alleged, "Hildreth sexually assaulted, sexually abused and/or had sexual contact" with him and with other male children on defendants' property. W.S. brought claims under the CSAA and LAD, as well as numerous common law claims including intentional infliction of emotional distress; assault and battery; failure to supervise; negligent/gross negligent or intentional hiring, supervision and/or retention; breach of fiduciary duty; and respondeat superior/vicarious liability.

Defendants moved to dismiss the complaint for failure to file a notice of claim within ninety days of the claim's accrual in 2016. The motion judge denied the motion. The motion judge found that the pertinent amendments to the TCA "d[id] not apply retroactively," but that "simply following the clear language of the statute . . . provides that the Act applies to causes of action that were not finally adjudicated as of December 1, 2019." "[P]laintiff's cause of action was not finally adjudicated as of December 1, 2019," the motion

judge held, because the dismissal of W.S.'s motion for leave to file a late notice of tort claim in 2017 "without prejudice was not a final adjudication of the cause of action in this matter." The motion judge denied defendants' motion for reconsideration.

The Appellate Division affirmed, "albeit for reasons other than those expressed by the motion judge." W.S. v. Hildreth, 470 N.J. Super. 57, 61 (App. Div. 2021). "Simply put," the Appellate Division determined, "the newly enacted statute of limitations in N.J.S.A. 2A:14-2a," which became effective on December 1, 2019, "resuscitated" "plaintiff's complaint, which otherwise would have been time-barred." Id. at 61-62. In the Appellate Division's view, plaintiff's complaint, filed after the amendments became effective, "was now subject to the newly enacted N.J.S.A. 59:8-3(b), which specifically eliminated the need to file a notice of claim in advance of filing suit." Id. at 62.

The Appellate Division disagreed with the motion judge's reasoning in one significant respect. According to the Appellate Division, "plaintiff never filed 'a cause of action' in 2017." Id. at 67. Instead, he filed a motion for leave to file a late notice of claim, which "does not amount to the commencement of 'civil litigation.'" Id. at 68 (quoting State v. J.R.S., 398 N.J. Super. 1, 5-6 (App. Div. 2008)). The Appellate Division nonetheless

affirmed the motion judge's orders. Id. at 61. Reviewing the text and legislative history of Chapters 120 and 239, the Appellate Division concluded that the Legislature "intentionally resuscitated claims, like plaintiff's, that had accrued prior to December 1, 2019, and otherwise would have been time-barred under the prior statute of limitations." Id. at 69. The Legislature also intentionally "eliminated all 'procedural requirements' of the TCA for claims of sexual abuse." Id. at 70 (quoting N.J.S.A. 59:8-3(b)). Therefore, at the time plaintiff filed his claim, "there was no longer any precondition . . . to file a notice of claim under the TCA before filing suit, regardless of when the cause of action accrued." Ibid. Because W.S. "was under no obligation to file a notice of tort claim as a prerequisite to [filing] suit," the Appellate Division affirmed the denial of defendants' motion to dismiss. Ibid.

We granted defendants' motion for leave to appeal. 250 N.J. 171 (2022). We also granted leave to appear as amici curiae to the Attorney General; the New Jersey Association for Justice (NJAJ); Child USA; and the New Jersey State Bar Association (NJSBA).

II.

Defendants maintain that the Appellate Division retroactively applied N.J.S.A. 59:8-3(b) by absolving W.S. "from filing a TCA notice for a claim which accrued in 2016, prior to the effective date of the amendment." Such a

retroactive application of 59:8-3(b), defendants continue, is contrary to legislative intent. Defendants make two primary arguments. First, defendants contend, W.S. "commenced civil litigation in 2017 and simply abandoned the claim," so "[t]o allow a reboot in 2020 based on an amendment which eliminated the notice requirement . . . in 2019, is contrary to the intent of legislators and prevailing law in 2017." Second, defendants assert that the relevant date for purposes of N.J.S.A. 59:8-3(b) is not when a complaint was filed, but when a cause of action accrued. For a cause of action that accrued prior to December 1, 2019, defendants argue, the "legislative intent could not be clearer" -- the Legislature intended for the amendment to the TCA notice provisions to apply only prospectively, not retroactively.

W.S. asserts that his 2017 motion for leave to file a late notice of claim did not commence civil litigation. Relying on Rule 4:2-2's prescription that "[a] civil action is commenced by filing a complaint with the court," W.S. urges that his action did not commence until he filed his complaint in 2020. According to W.S., the Appellate Division interpreted N.J.S.A. 59:8-3(b) prospectively, not retroactively. Nothing in N.J.S.A. 59:8-3(b), W.S. submits, indicates that the date on which the cause of action accrued, rather than the date on which the complaint was filed, matters. Additionally, W.S. contends that reading the amendments to extend the statute of limitations but

simultaneously to prevent survivors whose claims fall within the newly extended statute of limitations from suing public entities would frustrate the Legislature's intent in amending the statutes.

The Attorney General largely supports W.S.'s position, arguing that N.J.S.A. 59:8-3(b) should apply retroactively. Otherwise, revived complaints would instantly be blocked because the plaintiff had not filed a notice of claim when the cause of action originally accrued. The Attorney General also asks us to clarify that the retroactivity of N.J.S.A. 59:8-3(b) applies only to CSAA sexual abuse claims against public entities, not to all tort claims filed against public entities.

The NJAJ, Child USA, and NJSBA all assert that legislative history and caselaw confirm a retroactive application for N.J.S.A. 59:8-3(b). In their view, the Legislature passed Chapter 120 to broaden legal recourse for all victims of child sexual abuse, and defendants' proposed interpretation would defeat that principal legislative purpose.

III.

We review de novo a trial court's denial of a motion to dismiss a complaint for failure to state a claim under Rule 4:6-2(e). Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, PC, 237 N.J. 91, 108 (2019). Questions of statutory interpretation are also reviewed de novo; this

Court owes no deference to the legal conclusions reached by the trial court and Appellate Division. State v. Lane, 251 N.J. 84, 94 (2022).

In statutory interpretation cases, this Court aims to effectuate the Legislature's intent. Gilleran v. Township of Bloomfield, 227 N.J. 159, 171 (2016). The "best indicator" of legislative intent "is the statutory language." Lane, 251 N.J. at 94 (citing DiProspero v. Penn, 183 N.J. 477, 492 (2005)). This Court "ascribe[s] to the statutory words their ordinary meaning and significance and read[s] them in context with related provisions so as to give sense to the legislation as a whole." DiProspero, 183 N.J. at 492 (citing Lane v. Holderman, 23 N.J. 304, 313 (1957); Chasin v. Montclair State Univ., 159 N.J. 418, 426-27 (1999)). When the plain language of a statute is clear and unambiguous, we apply the law as written. See In re Civil Commitment of W.W., 245 N.J. 438, 449 (2021). If the statutory text is ambiguous, we may turn to extrinsic evidence including legislative history to aid our inquiry. DiProspero, 183 N.J. at 492-93; Marino v. Marino, 200 N.J. 315, 329 (2009).

Statutes must be read in their entirety. W.W., 245 N.J. at 449. Pursuant to traditional rules of statutory construction, "each part or section should be construed in connection with every other part or section to provide a harmonious whole." Ibid. (quoting In re Expungement Application of D.J.B., 216 N.J. 433, 440 (2014)). Additionally, when amendments are passed jointly

or as part of a legislative scheme, we must construe them together to make sense of the legislative intent. See Nw. Bergen Cnty. Utils. Auth. v. Donovan, 226 N.J. 432, 444 (2016). Critically, "[a] court may neither rewrite a plainly-written enactment of the Legislature nor presume that the Legislature intended something other than that expressed by way of the plain language." O'Connell v. State, 171 N.J. 484, 488 (2002).

IV.

We now affirm the Appellate Division's decision. The plain meaning of N.J.S.A. 59:8-3(b) dictates that child sexual abuse survivors who file a CSAA complaint against a public entity after December 1, 2019 -- even if their cause of action accrued much earlier -- need not file a TCA notice of claim before filing suit.

A.

As an initial matter, we hold that W.S.'s 2017 motion for leave to file a late notice of claim did not commence a civil action and the trial court's dismissal of the motion without prejudice did not constitute a "final[] adjudicat[ion]" of this case within the meaning of L. 2019, c. 239, § 2. As the Appellate Division explained, W.S. "never filed 'a cause of action' in 2017." W.S., 470 N.J. Super. at 67. Instead, he filed a motion for leave to file a late

notice of claim, which "does not amount to the commencement of 'civil litigation.'" Id. at 68 (quoting J.R.S., 398 N.J. Super. at 5-6).

The text of the TCA carefully distinguishes between (1) the service of a notice of claim, (2) a motion for leave to file a late notice of claim, and (3) the filing of a lawsuit. While N.J.S.A. 59:8-8 prescribes that "the claimant may file suit in an appropriate court of law" six months after "the date notice of claim is received," N.J.S.A. 59:8-9 discusses "[a]pplication to the court for permission to file a late notice of claim." The statute is thus clear that neither the service of a notice of claim, nor an application to the court for permission to file a late notice of claim, constitutes "fil[ing] suit in an appropriate court of law." N.J.S.A. 59:8-8.

For good reason. Pursuant to Rule 4:2-2, "[a] civil action is commenced by filing a complaint with the court." Neither a notice of claim nor a motion for leave to file a late notice of claim constitutes a complaint. Seemingly acknowledging this point, defendants contend that civil litigation begins when a "pleading," rather than a complaint, is filed. But Rule 4:5-1(a) provides an exclusive list of all permissible "pleadings" that can be filed in a civil action: a complaint, an answer, an answer to a counterclaim, an answer to a cross-claim, a third-party complaint and third-party answer, and a reply to an affirmative defense. Neither a TCA notice of claim nor a motion for leave to

file a late notice of claim appears on the list, and the rule concludes: "No other pleading is allowed." R. 4:5-1(a).

The Appellate Division has thus held that filing a notice of claim under the TCA does not commence civil litigation. See J.R.S., 398 N.J. Super. at 5-6. Instead, a notice of claim informs public entities of "[p]otential future litigation or notice of intent to commence a civil suit at some future time." Id., at 6. "Although the filing of a tort claims notice under N.J.S.A. 59:8-8 is an indispensable jurisdictional prerequisite to the prosecution of common law tort claims against a public entity, the mere serving of this notice upon the public entity does not amount to the commencement of 'civil litigation.'" Id. at 5-6 (citing Velez v. City of Jersey City, 180 N.J. 284, 290 (2004)). As we have noted, one of the purposes of the notice of claim is "to allow the public entity at least six months for administrative review with the opportunity to settle meritorious claims prior to the bringing of suit." Velez, 180 N.J. at 290 (emphasis added) (quoting Beauchamp v. Amedio, 164 N.J. 111, 121 (2000)). That would be impossible if a notice of claim itself began civil litigation.

A motion for permission to file a late notice of claim is even further removed from beginning a lawsuit. Whereas a notice of claim directly informs a public entity of potential future litigation, a motion for permission to file a late notice of claim is a request for a judicial extension of the period of time in

which to supply such information. Such a motion is focused on the facts relevant to the request for additional time, rather than the underlying claim itself: pursuant to N.J.S.A. 59:8-9, if there are "sufficient reasons constituting extraordinary circumstances" for the failure to file a timely notice of claim, a judge has discretion to permit a person to file a late notice of claim "within one year after the accrual of his claim," so long as the public entity will not be substantially prejudiced thereby. By the plain text of that provision, a court's decision to authorize a claimant to file a late notice of claim does not itself commence a civil action; a decision denying a claimant such authorization clearly does not.[2]

For all those reasons, W.S.'s 2017 motion for leave to file a late notice of claim did not begin a civil action, and the trial court's denial of that motion without prejudice did not finally adjudicate any CSAA action for child sexual abuse.

[2] We recognize that the caption on the trial court's order denying W.S.'s motion to file a late notice of claim is labeled "civil action" and includes a Law Division docket number. That designation was purely administrative. It did not transform W.S.'s motion for leave to file a late notice of claim into a civil complaint initiating a lawsuit. Cf. R. 4:11-1 (analogously concerning petitions for pre-suit discovery filed with the court).

B.

W.S. did eventually file a civil action, in January 2020, by filing a fourteen-count complaint in the Gloucester County Law Division against defendants, Hildreth, and several others. We hold that the motion judge and the Appellate Division correctly applied the law in effect at the time W.S. filed his complaint in denying defendants' motion to dismiss.

Contrary to defendants' assertions, the Appellate Division did not "breathe[] retroactive application into N.J.S.A. 59:8-3(b)" or "improperly resuscitate[]" W.S.'s claim. Instead, the court afforded N.J.S.A. 59:8-3(b) prospective effect and correctly applied the statutory text to W.S.'s complaint. As the Appellate Division found, "as of December 1, 2019, there was no longer any precondition for a plaintiff alleging sexual abuse as a minor by a public employee or public employer to file a notice of claim under the TCA before filing suit, regardless of when the cause of action accrued." W.S., 470 N.J. Super. at 70.

This is clear from the plain language of the statute that was in effect at the time W.S. filed his complaint. Since December 1, 2019, N.J.S.A. 59:8-3(b) has provided that "[t]he procedural requirements of this chapter shall not apply to an action at law for an injury resulting from the commission of sexual

assault, any other crime of a sexual nature, a prohibited sexual act as defined in [N.J.S.A. 2A:30B-2], or sexual abuse as defined in [N.J.S.A. 2A:61B-1]."

Defendants do not contest that the requirement to file a notice of claim with a public entity within ninety days "after accrual of the cause of action," N.J.S.A. 59:8-8, is a "procedural requirement[]" of the TCA within the meaning of N.J.S.A. 59:8-3(b). And they concede that W.S. filed an "action at law for an injury resulting from the commission of sexual assault, any other crime of a sexual nature, a prohibited sexual act . . . or sexual abuse," N.J.S.A. 59:8-3(b), in January of 2020. Therefore, pursuant to the law in effect at the time W.S. filed his complaint, no notice of claim was required.

Defendants maintain that this applies N.J.S.A. 59:8-3(b) "retroactively" rather than "prospectively." That is incorrect. Applying the law in effect at the time a complaint is filed -- even when that law changed the requirements for filing a complaint -- is not applying a statute retroactively; it is applying a statute prospectively to cases filed after its effective date. Defendants effectively posit that W.S.'s complaint should not have been subject to the laws in effect at the time it was filed, but rather to laws the Legislature had at that point intentionally repealed. There is no support for that position in the text, structure, purpose, or legislative history of N.J.S.A. 59:8-3(b).

According to defendants, what matters for purposes of N.J.S.A. 59:8-3(b) is when a cause of action accrued, not when an action at law is filed. But the language of the statute indicates otherwise: "The procedural requirements of this chapter shall not apply to an action at law for an injury resulting from the commission of sexual assault, any other crime of a sexual nature, a prohibited sexual act as defined in [N.J.S.A. 2A:30B-2], or sexual abuse as defined in [N.J.S.A. 2A:61B-1]." N.J.S.A. 59:8-3(b) (emphasis added). The text explicitly references an "action at law," which can be commenced only "by filing a complaint with the court." R. 4:2-2. It says nothing about when a cause of action accrues. If the Legislature intended for the amendment to apply only to causes of action that accrued after December 1, 2019, N.J.S.A. 59:8-3(b) could have stated: "The procedural requirements of this chapter shall not apply to a cause of action that accrues after December 1, 2019 for an injury resulting from the commission of sexual assault, any other crime of a sexual nature, a prohibited sexual act . . . , or sexual abuse." It does not.

During oral argument, defendants pointed to N.J.S.A. 59:8-8 and N.J.S.A. 59:8-9 for support. But neither defines the term "action at law" to mean when a cause of action accrues rather than when a complaint is filed in court. As earlier noted, N.J.S.A. 59:8-8 provides:

> A claim relating to a cause of action for death or for injury or damage to person or to property shall be

> presented as provided in this chapter not later than the 90th day after accrual of the cause of action. After the expiration of six months from the date notice of claim is received, the claimant may file suit in an appropriate court of law. . . .

N.J.S.A. 59:8-9 then continues:

> A claimant who fails to file notice of his claim within 90 days as provided in section 59:8-8 of this act, may, in the discretion of a judge of the Superior Court, be permitted to file such notice at any time within one year after the accrual of his claim provided that the public entity or the public employee has not been substantially prejudiced thereby. . . .

Rather than assist defendants, those provisions demonstrate that the Legislature can explicitly reference when a cause of action accrues, rather than when an action at law is filed, when it chooses to do so. It did not in N.J.S.A. 59:8-3(b). See Goldhagen v. Pasmowitz, 247 N.J. 580, 600 (2021) ("When 'the Legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded.'" (quoting In re Plan for Abolition of Council on Affordable Hous., 214 N.J. 444, 470 (2013))).

Finally, defendants' reading of the statute would lead to absurd results. All agree that the purpose of Chapter 120 and Chapter 239 was to "greatly increase[] the ability of victims of sexual abuse to pursue justice through the court system." See Governor's Statement to S. 477 1 (May 13, 2019). The Legislature's fiscal statement warned that "the bill will expose the State,

school districts, and local units of government to civil claims that may result in . . . substantial settlements and judgments against affected governments," specifically school districts, which "may be the most exposed to the filing of additional tort claims . . . given the nature of their responsibilities." Legislative Fiscal Estimate to S. 477 2, 3 (Mar. 29, 2019).

However, in defendants' view, only those subjected to sexual abuse by a public entity or employee after December 1, 2019, or whose cause of action for such abuse accrued after December 1, 2019, would be able to pursue justice in court. For everyone else, the Legislature would have intentionally resuscitated child sexual abuse claims against public entities or employees that accrued many years before by retroactively extending the statute of limitations until the victim reached the age of fifty-five through N.J.S.A. 2A:14-2a(a)(1), only for the claim to be immediately dismissed because the victim did not file a notice of claim within ninety days of the cause of action originally accruing. That would be senseless.

When W.S. filed his complaint, the plain language of N.J.S.A. 59:8-3(b) provided, as it still does: "The procedural requirements of this chapter shall not apply to an action at law for an injury resulting from the commission of sexual assault, any other crime of a sexual nature, a prohibited sexual act . . . , or sexual abuse." W.S. filed an action at law for an injury resulting from the

commission of sexual abuse. The procedural requirements of the TCA therefore did not apply. The Appellate Division and motion judge properly denied defendants' motion to dismiss.[3]

V.

The judgment of the Appellate Division is affirmed, and the matter is remanded to the trial court for further proceedings.

CHIEF JUSTICE RABNER; JUSTICES PATTERSON, SOLOMON, and PIERRE-LOUIS; and JUDGE SABATINO (temporarily assigned) join in JUSTICE WAINER APTER's opinion. JUSTICE FASCIALE did not participate.

[3] In its amicus brief, the Attorney General requests that this Court clarify "that the waiver of the TCA's notice-of-claim requirement shall apply solely to claims of 'sexual abuse' as defined under the CSAA, as opposed to mere 'negligence' claims or any other claims that do not rise to liability under the CSAA." According to the Attorney General, "Plaintiff . . . brings not only sexual abuse/CSAA claims against Defendant-Appellants, but also claims of simple negligence, 'breach of fiduciary duty,' 'breach of duty to stand in loco parentis,' 'tortious [interference] with parental or filial consortium,' and negligent/intentional infliction of emotional distress." Although we quoted extensively from the relevant TCA amendments above, supra at 7-8 (quoting L. 2019, c. 120, § 8; L. 2019, c. 239, § 1), this argument was not raised by the parties. We generally decline to consider arguments raised for the first time by an amicus curiae before this Court. See State v. Mosley, 232 N.J. 169, 180 n.2 (2018). The Attorney General may ask the trial court, on remand, to determine which of plaintiff's claims fall within the language of the 2019 amendments and which, if any, must be dismissed for failure to file a timely notice of claim.

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STATE OF NEW JERSEY, Plaintiff, v. JASON BURGOS, Defendant.	SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, FAMILY PARTK CAMDEN COUNTY Docket No. FO-04-000384-23 CIVIL ACTION

BRIEF OF *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION

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Date Submitted: January 17, 2023

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PRELIMINARY STATEMENT

Thirty years ago, the Supreme Court of New Jersey recognized the constitutional right of indigent defendants facing consequences of magnitude to have effective counsel. Madden v. Twp. of Delran, 126 N.J. 591 (1992). Falling short of ordering such right to be publicly funded, the Court created the Madden system of assignments seeking to equitably impose these assignments on attorneys as a "stop-gap measure," at the same time acknowledging that there would be times that an attorney may not be experienced to handle the assignment. "We have no doubt that on occasion [an attorney's] inexperience has affected their representation, but the fact is that over these many years no substantial complaints of a failure of justice have been brought to our attention." Id., at 607-08. Three decades later, that time has not just arrived, it has revisited itself over and over again. This is one such case.

As a result of Madden, an attorney who, while having passed the bar, has worked as a computer programmer and a non-attorney consultant for almost 23 years has been assigned to defend a contempt of domestic violence charge. He is not simply "rusty" in the practice of law, he has not seen a courtroom as an attorney for over 20 years. This attorney should be excused from service.

More importantly, the indigent defendant in this case and all indigent defendants subject to a Madden-assigned attorney, deserve more than a "physical

presence" at their court proceedings. This is not what the constitution envisioned – nor could it be what the Court envisioned. The effective right to counsel enshrined in the federal and state constitutions is purposeless without an effective way to ensure competent, knowledgeable counsel.

The Court acknowledged its implicit power to require another branch to provide funding to secure effective assistance of counsel for indigent defendants, but has declined to go that far. See Madden, 126 at 612-13. Instead, the Court has taken piecemeal steps to encourage or obtain funding for discrete types of cases, and, in some instances has declined to impose consequences of magnitude where the provision of such counsel was not readily available.

Against this backdrop, Madden assignments, such as the one in this case, continue. In light of Michael Haya's certification about his lack of knowledge and expertise to competently represent the defendant in this matter, the NJSBA urges this court to relieve him of this assignment and to take immediate, affirmative steps to protect future indigent litigants from a two-tiered system of justice that provides representation by counsel in name only in many cases.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The NJSBA relies upon the Order to Show Cause and accompanying certification.

LEGAL ARGUMENT

POINT I

MICHAEL HAYA SHOULD BE RELIEVED AS COUNSEL BECAUSE HE HAS CERTIFIED THAT HE CANNOT PROVIDE THE CONSTITUTIONALLY AFFORDED EFFECTIVE COUNSEL REQUIRED TO REPRESENT JASON BURGOS

A. The Madden System of Assignments Has Been Used as a Repository for Right to Counsel Matters, the Expansion of Which Under the Current Madden Assignment System Belies the Underlying Principles to Ensure Effective Counsel for Indigent Defendants.

The Supreme Court in Madden recognized at least infrequent or inconsequential "failures" resulting from a mandatory pro bono system. "We touch on the problems underlying the foregoing system. With its fairness goes the possibly, indeed the certainty, that some attorneys will be assigned who have no experience either in municipal court or indeed in any court." Madden, 126 N.J. at 607. Nevertheless, since the Madden decision, the Court has continued to expand the right to counsel for indigent defendants without further acknowledging the limited resources to meet that mandate absent a publicly funded, compensated counsel system. This has resulted in the "specter of a two-tiered system" that leaves indigent litigants with a "physical presence" in the courtroom – not constitutionally mandated effective counsel. See State v. Miller, 216 N.J. 40, 54 (2013). Acknowledging that indigent litigants deserve effective counsel and then defining effective counsel as

the random assignment of an attorney required to provide assistance at no cost, regardless of the attorney's background, knowledge, training or expertise, is an injustice that cannot be countenanced. Indigent litigants have a right to more than a mere "physical presence" to represent them.

A person's right to counsel in matters affecting fundamental rights is enshrined in the federal and state constitutions. Penson v. Ohio, 488 U.S. 75, 84 (1988) (United States Constitution's equal protection clause). Time and again, the New Jersey Supreme Court has found that the right to due process of law is implicit in Article I, Paragraph 2 of the state Constitution. Pasqua v. Council, 186 N.J. 127, 147 n.5 (2006); see also In re Adoption of J.E.V., 226 N.J. 90, 106 (the right to counsel emanates from New Jersey Constitution's equal protection guarantee); Rodriguez v. Rosenblatt, 58 N.J. 281, 205 (1971) ("[A]s a matter of simple justice, no indigent defendant should be subjected to conviction entailing imprisonment in fact or other consequence of magnitude without first having had due and fair opportunity to have counsel assigned without cost.")

The right to counsel is not just for a "physical presence" but for effective counsel. United States v. Cronic, 466 U.S. 648, 654 (1984) ("The special value of the right to assistance of counsel explains why '[i]t has long been recognized that the right to counsel is the right to effective assistance of counsel.'") (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)). Indeed, effective counsel is a

prerequisite to the assertion of nearly every other right. As the U.S. Supreme Court observed, "it is through counsel that all other rights of the accused are protected: 'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other right he may have.'" Penson, 488 U.S. at 84 (1988) (internal citations omitted).

Over the years, the Court has continued to expand the right to counsel, recognizing that fundamental rights are meaningless without a corresponding way to assert them. Since Madden, assignments have increased in complexity from municipal court matters that could take one day to complex private adoption cases that could take weeks or months. See Bolyard v. Berman, 274 N.J. Super. 565 (App. Div. 1994) (parole revocation hearings); Doe v. Poritz, 142 N.J. 1 (1995) (Megan's Law review); In re Civil Commitment of D.L., 351 N.J. Super. 77 (App. Div. 2002) (appeals from orders of commitment pursuant to the Sexually Violent Predator Act); Pasqua v. Council, 186 N.J. 127 (2006) (child support obligors facing potential incarceration); J.E.V., 226 N.J. 90 (2016) (indigent parents facing termination of parental rights in private adoption proceedings); New Jersey Dep't of Child & Fams. v. L.O., 460 N.J. Super 1 (App. Div. 2019) (administrative proceedings in child abuse and neglect determinations); Kavadas v. Martinez, Docket No. MER-L-1004-15 (Law Div. 2019) (child support obligors facing suspension of driver's licenses). Despite its serious limitations, the Madden system of random assignments has been

the default mechanism utilized by the court to attempt to provide indigent defendants with their due process. While that system provides representation, it does not provide equal access to justice. Principles of fundamental fairness dictate that if representation is constitutionally mandated, that representation must be effective. Equal justice and due process in matters of fundamental rights should not be illusory for people in need.

This was not lost on the Madden Court, which noted that there is "the possibility, indeed the certainty, that some attorneys will be assigned who have no experience" to perform the mandated pro bono assignment. Madden, 126 N.J. at 607. Rather than expound upon the issue in its decision, the Court seemingly dismissed the notion as unsubstantial. Id., at 607-08. Over 30 years later, the NJSBA has not only pointed out the substantial injustice, the courts have witnessed it firsthand through the humbling pleas of attorneys who have been forced to admit those "failures" more often than not, to no avail.[1]

In 2020, the Appellate Division addressed the representation provided by assigned counsel in an appellate case involving a contested adoption and referred to

[1] There does not appear to be a public source to identify how many times courts have received requests to be relieved from a Madden assignment and the outcome of such requests. Such lack of information makes the Madden pronouncement difficult to gauge without a measurable source of whether requests for relief were made or a litigant suffered a substantial failure as a result of counsel whose plea to be excused or reassigned was denied.

it as a "structural failure". In Matter of Adoption of Child by C.J., 463 N.J. Super. 254, 261 (App. Div. 2020). The court noted not just the complexity of appellate practice, but also contested adoptions. While it was clear that assigned counsel was ill-equipped to represent the indigent litigant, the Appellate Division simply acknowledged Madden's shortcomings and admonished assigned counsel. Its answer? Counsel should have read the website material on the New Jersey Courts website concerning contested adoptions and Part II of the Rules of Court. Id. at 260. Another option provided was for assigned counsel to hire substitute counsel to fulfill the obligation placed on counsel by the court to effectively represent the indigent litigant. Id. The result? An adjournment to seek new appellate counsel and re-hear the matter. Id., at 262. The result, the Madden assignment system failed the indigent litigant and wasted the court's resources at the expense of an attorney presumably attempting to answer the call under the Judiciary's mandatory pro bono assignment system.

These are not new issues. Perceived failures of the Madden assignment system have been raised early in its implementation by the Judiciary. In 1995, the *New Jersey Law Journal* highlighted concerns with the mandatory pro bono assignment system:

> "The present system serves only one goal: it provides a sense of comfort to the court which justifiably believes that counsel should be provided in these matters. We agree. But this burden is one that should be handled on a

> full-time basis by attorneys skilled and experienced in these matters. And this is not the burden of the legal profession alone. Its costs should be paid for by taxpayers."

"Assigned Counsel", New Jersey Law Journal, 139 N.J.L.J. 222 (1/16/95).

In 1997, the Supreme Court convened the Supreme Court Ad Hoc Committee on Pro Bono Assignments, led by the Hon. Eugene D. Serpentelli, A.J.S.C., to review a number of issues regarding mandatory pro bono services. In its findings, the committee said "[i]f attorneys must be asked to provide free representation which more appropriately should be paid for by the government, then they should be granted the greatest degree of flexibility in helping to devise a response to this need, consistent with the constitutional mandate that representation be provided." Report of The Supreme Court Ad Hoc Committee on Pro Bono Assignments, p. 12 (Nov. 23, 1998). The committee went on to recommend the establishment of a voluntary pro bono assignment system, "particularly one where attorneys handle cases in their area of expertise" because it serves the interests of the Bar, the public and the judiciary. Id.

The Madden assignment system assures that counsel will be provided to an indigent defendant who has asked for one. But that alone does not justify the mere appointment of any counsel, especially one who in this instance is now caught in the unenviable position of having to profess, on the record, that he is not qualified to handle this matter. "The mere appointment of counsel, however competent, does not

alone satisfy the constitutional guarantee of the right to effective counsel." Miller, 216 N.J. at 79 (Albin dissent) (citing Avery v. Alabama, 308 U.S. 444, 446 (1940)); see also State v. Sugar, 84 N.J. 1, 17 (1980) ("The right to counsel would be an empty assurance if a formal appearance by an attorney were sufficient to satisfy it."). The mere appointment of counsel is not the standard in providing effective counsel and can certainly be characterized as "a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel." Avery, 308 U.S. at 446. That was not the intent of Madden, nor can it be. The principles of Madden belie any such conclusion.

B. The Judiciary has the Implicit, if Not Express Authority to Mandate a Publicly Funded Compensated Counsel System to Meet the Constitutional Mandate of Effective Counsel for Indigent Litigants

Funding for representation of indigent defendants has been debated in New Jersey for the past 50 years. In 1992, the Court held that indigent defendants are entitled to representation and urged the Legislature to take action, but it stopped short of ordering such action. Madden, 126 N.J. at 595. The Court created the current Madden system providing a random appointment of counsel to represent litigants at no cost as a stop-gap measure until the Legislature acted. Although New Jersey now has a funded municipal court public defender system, the rationale of Madden has been used repeatedly to solve the issue of inaction by the Legislature to fund representation in a multitude of right to counsel matters. Moreover, while the

Madden Court acknowledged an implied power to require funding of counsel in assigned cases, no such mandate has been imposed. Id. at 613-14 (citing to Antini, 53 N.J. at 494-95). The Madden Court stopped short of ordering funding because of the budget implications that would stem from it. There was no statewide municipal public defender system and less than half of municipalities had one; Jersey City, one of New Jersey's largest cities, had just announced its cancellation of such system. Since this time, the Court has worked cooperatively with other branches of government and interested stakeholders to implement a statewide system of municipal public defenders. Similar work was done to allow the state Office of the Public Defender to take on certain quasi-criminal right to counsel cases, such as representation of defendants challenging a Megan's Law tier classification, parents facing termination of parental rights, litigants facing orders of commitment issued pursuant to the Sexually Violent Predator Act and, most recently, parents defending against child abuse allegations in administrative proceedings. Aside from this piecemeal action, little else has been done to resolve the overarching funding issue with regard to matters of right to counsel. Yet, Madden assignments, such as the one at issue in this case, continue.

There is precedent where the Court has recognized a constitutional right and required other branches of government to take action. See Lewis v. Harris, 188 N.J. 415, 464 (2006) (requiring the Legislature to either amend the marriage statutes or

enact an appropriate statutory structure within 180 days following the decision); Abbott by Abbott v. Burke, 153 N.J. 480, 518-19 (1998) (outlining "remedial measures that must be implemented in order to ensure that public school children from the poorest urban communities receive the educational entitlements that the Constitution guarantees them.").

Absent such action, in at least two instances, the right to counsel has been recognized, but pursuit of such matters was restricted due to lack of funding. In 2006, the Court held that child support obligors facing potential incarceration were entitled to counsel. Pasqua, 186 N.J. at 149. But coercive incarceration as an available sanction was disallowed absent a funding source for such right to counsel. Id. at 153. In 2014, indigent parents facing license suspensions were held to be entitled to counsel, but the judge again disallowed such suspensions unless appointed counsel was made available. Kavadas v. Martinez, Docket No. MER-L-1004-15 (Law Div. 2019).

In its report, Achieving Effective Representation in Right to Counsel Matters, the NJSBA's Right to Counsel Committee urged the Court to recognize that the Madden assignment system has proven to be an obstacle to equality, a barrier to access and justice, and a disservice to all. NJ State Bar Association, Achieving Effective Representation in Right to Counsel Matters, njsba.com/personifybusiness/Leadership/NJSBAReports/ReportsandComments,

(April 6, 2021), at p. 3. It outlined 13 recommendations to address how to implement the constitutional right in a more effective manner than the current system of Madden assignments, including using a multi-pronged approach to funding the right to counsel including additional funding to the Office of the Public Defender to handle cases most aligned with their current work (parole revocation, contempt of domestic violence hearings, civil commitments, and other such cases); authorizing municipal public defenders to handle municipal appeals; funding non-profit providers with expertise in particular types of cases (private adoptions, guardianship, paternity); and increasing pool attorney rates. Id. These recommendations provide a potential roadmap to address the need for representation of indigent litigants absent a disparate impact on attorneys who are inexperienced, overworked, or simply unable to take on a mandatory pro bono assignment.

The simple, but dispositive fact is that the Judiciary is in the position to institute – and in doing so order payment of - a publicly funded compensated counsel system, or at least take proactive steps to dismantle the Madden system of assignments to more effectively meet the constitutional mandate of providing indigent litigants with effective counsel. Until it does, the "structural failures" of ineffective counsel remain.

CONCLUSION

For the foregoing reasons, the NJSBA urges this Court to relieve Michael Haya as counsel, assign experienced publicly compensated counsel for Jason Burgos, and take any all appropriate steps to ensure the provision of constitutionally-mandated effective counsel for future indigent defendants.

Respectfully submitted,

THE NEW JERSEY STATE BAR ASSOCIATION

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Dated: January 17, 2023

NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

In re Michael Haya	SUPERIOR COURT OF NEW JERSEY CAMDEN COUNTY CHANCERY DIVISION, FAMILY PART DOCKET NO: FO-04-00384-23 *Civil Action*

Decided: February 24, 2023

Matthew Spence, Esq., for Plaintiff, State of New Jersey

Michael Haya, Esq., for Defendant, Jason Burgos

Edward J. Zohn, Esq., for Applicant, Michael Haya, Esq.

Jeralyn L. Lawrence, Esq., Sharon A. Balsamo, Esq., for Amicus Curiae, New Jersey State Bar Association

DEBORAH SILVERMAN KATZ, A.J.S.C.

INTRODUCTION

This action comes before this court by way of an Order to Show Cause. On January 7, 2023, Michael Haya, Esq. filed the present application before the court, seeking a preliminary injunction relieving him as counsel for Defendant, Jason Burgos, which was supported by the New Jersey State Bar Association [hereinafter, the "NJSBA"] participating as Amicus Curiae.

Upon careful consideration of the parties' filings and arguments, the court hereby **DENIES** the relief requested by Mr. Haya and the NJSBA.

FACTUAL AND PROCEDURAL BACKGROUND

On December 14, 2022, pursuant to Madden v. Delran, 126 N.J. 591 (1992), the Court assigned Michael R. Haya, Esq. to represent Jason Burgos, a Defendant charged with contempt under N.J.S.A. 2C:29-9(b) for violating a domestic violence restraining order under the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to 35. Mr. Haya objected to the assignment, claiming that his primary job is not as an attorney, and that he does not have sufficient vacation time to take on the assignment, which could result in the loss of his job. Importantly, Mr. Haya also claimed that the "private" legal work that he occasionally undertakes on weekends generally involves retirement plan and third-party administration matters, services that could be handled by non-lawyer accountants. As such, he claims he is without experience and sufficient knowledge to properly and competently represent Mr. Burgos.

On December 22, 2022, Mr. Haya's request to be excused was denied.

On January 7, 2023, Mr. Haya filed an Order to Show Cause [hereinafter, "OTSC"], seeking an injunction and emergency relief to be relieved as counsel for Mr. Burgos. Mr. Haya pled that his appointed representation of Mr. Burgos would require him to knowingly violate the Rules of Professional Conduct,[1] thereby prejudicing them both.

[1] Specifically, Mr. Haya claims that his appointment puts him at risk of violating (1) R.P.C. 1.1, which states that a lawyer shall not "[h]andle a matter in such a matter that the lawyer's conduct constitutes gross negligence[;]" (2) R.P.C. 1.3, which states that a lawyer must "act with reasonable diligence and promptness in representing a client[;]" (3) R.P.C. 1.16, which states that "a lawyer shall not represent a client or, where representation has commenced, shall withdrawn from the representation of a client if: … the representation will result in a violation of the Rules of Professional Conduct or other law[;]" and (4) R.P.C. 6.2, which states that "a lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause," which includes representation that "is likely to result in violation of the Rules of Professional Conduct[.]"

On January 17, 2023, the NJSBA filed a Motion to Participate as Amicus Curiae, pursuant to R. 1:13-9, seeking to participate in Mr. Haya's OTSC hearing. On February 8, 2023, the Court granted that application. The NJSBA supports Mr. Haya's application to be relieved as counsel, and "urge[s] the Court to take any and all appropriate steps to ensure that all future indigent defendants are afforded effective counsel in appropriate cases, not just randomly assigned counsel."[2] Rather than continuing with the current system of Madden appointments, the NJSBA requests the funding of counsel in assigned cases, or alternatively, to adopt one of the NJSBA's Right to Counsel Committee's 13 recommendations.[3]

CONCLUSIONS OF LAW

A. Madden Assignment System

The NJSBA challenges the system of compulsory representation that was upheld in Madden v. Delran. 126 N.J. 591, 595-96 (1992). In Madden, the Supreme Court held that it would not force a municipality to pay an attorney assigned by the municipal court to represent an indigent defendant accused of driving while intoxicated.[4] Id. at 594, 596-97 (1992). Instead, the Court opted to standardize the system of pro bono appointments, by requiring Assignment

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[2] NJSBA Cert., para. 13.

[3] These recommendations include:

> [U]sing a multi-pronged approach to funding the right to counsel including additional funding to the Office of the Public Defender to handle cases most aligned with their current work (parole revocation, contempt of domestic violence hearings, civil commitments, and other such cases); authorizing municipal public defenders to handle municipal appeals; funding non-profit providers with expertise in particular types of cases (private adoptions, guardianship, paternity); and increasing pool attorney rates.
>
> [NJSBA's Br. at 12].

[4] The municipal court found the system unfair, and the Appellate Division agreed. As the trial court stated, "the issue is now ripe for the Supreme Court's consideration." Madden v. Delran, No. L-099058-86 at 22 (Law Div. June 15, 1988).

Judges to maintain a list of every attorney licensed to practice in their respective vicinages and make assignments based on an alphabetical rotation.[5] Id. at 606. The Court, thereafter, sent a Memo to the Bar confirming the establishment of a computer system to assist Assignment Judges "in administering the assignment lists to help ensure that all municipal court assignments of counsel for indigent defendants in any county will be made strictly in alphabetical rotation..." and clarifying applicable exemptions. Memorandum from Chief Justice Robert N. Wilentz, New Jersey Supreme Court to Members of the Bar (Feb. 16, 1993).[6]

Madden was not the first time the Court revisited the state's long history of mandatory pro bono assignments. Prior to Madden, the Supreme Court rejected a similar attempt to challenge New Jersey's system of pro bono appointments in State v. Rush, 46 N.J. 399, 415 (1966). In fact, the Supreme Court has since expanded the scope of the Madden list. See Doe v. Poritz, 142 N.J. 1 (1995); N.J. Div. of Youth & Family Servs. v. B.R., 192 N.J. 301, 306-07 (2007).

As a general matter, the Supreme Court's rule-making power derives from two provisions of the New Jersey Constitution. In re P.L. 2001, Chapter 362., 186 N.J. 368, 379 (2006). Article VI, Section 7, Paragraph 1 of the New Jersey Constitution states that "[t]he Chief Justice of the Supreme Court shall be the administrative head of all the courts in the State [and] shall appoint an Administrative Director to serve at his pleasure." Further, Article VI, Section 2, Paragraph 3, states that "Supreme Court shall make rules governing the administration of all courts in the

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[5] While the Court warned that it "cannot forever accept a system so clearly inefficient, historically unfair, and potentially unconstitutional[,]" it expressed confidence that the Legislature would eventually address this problem. Id. at 595-596.

[6] Mr. Haya's attorney, Mr. Zohn, stated that he was unable to find a Directive establishing the Madden system. This Memo to the Bar references Madden. Moreover, Madden is a longstanding decision with the force of law. Directives addressing exemptions have also since been promulgated. See Memo to the Bar from Robert D. Lipscher, Administrative Director of the Courts (Mar. 13, 1995).

State and, subject to law, the practice and procedure in all such courts." Together, these "two provisions give the Chief Justice and the Supreme Court sweeping authority to govern their own house." In re P.L. 2001, Chapter 362, 186 N.J. at 379.

"As administrative head of the court system," the Chief Justice "can promulgate binding directives either directly or through the Administrative Director of the Courts." State v. Morales, 390 N.J. Super. 470, 472 (App. Div. 2007). "It is well-established that the Court has rule-making authority over all state courts." ABC Bail Bonds, Inc. v. Grant, 459 N.J. Super. 340, 345 (App. Div. 2019) (citing N.J. Const. art. VI, § 2, para. 3). "The Court's Rule-making authority may be exercised by the promulgation of formal rules to be included in the published Rules of Court, R. 1:1. It may also be exercised in the form of general directives or specific orders." In re Yaccarino, 101 N.J. 342, 351 (1985). The "Court's authority to engage in rulemaking includes the exclusive power to establish or modify Court Rules through judicial decisions." State v. J.M., 182 N.J. 402, 416 (2005) (quoting State v. Clark, 162 N.J. 201, 205 (2000)).

Beyond its exclusive rule-making power, the Supreme Court makes independent constitutional determinations through its decisions. See State v. Western World, Inc., 440 N.J. Super. 175, 202 n.16 (App. Div. 2015); J.M., 182 N.J. at 416. See also Western World, 440 N.J. Super. at 187 (noting instances in which the Supreme Court accorded "more expansive protection" for "the right to appointed counsel for indigent litigants… under [] state law than federal law"); Rodriguez v. Rosenblatt, 58 N.J. 281, 295 (1971) (concluding "no indigent defendant should be subjected to a conviction entailing imprisonment in fact or other consequence of magnitude without first having… counsel assigned without cost" in quasi-criminal municipal court prosecutions). Such constitutional determinations also include "defin[ing] the scope and content of the [respective] constitutional provision." Abbott v. Burke,

119 N.J. 287, 303 (1990). While the superior court is not precluded from weighing in on constitutional matters (see Garden State Equality v. Dow, 216 N.J. 314, 319 (2013)), the Supreme Court has nevertheless cautioned trial level courts against dispositions "that would reach far beyond the particular case." Jackson v. Muhlenberg Hospital, 53 N.J. 138, 142 (1969).

Granting the relief sought by the NJSBA would not just affect Mr. Haya. It would "reach far beyond" and delve into the state's system of Madden appointments. As such, it would be inappropriate for this Court to repeal and replace the state's long-standing system of pro bono assignment for indigent defendants.[7] See State v. Rush, 87 N.J. Super. 49, 55-56 (Cty. Ct. 1965), aff'd in part, 46 N.J. 399 (1966) ("This court has neither legislative nor rule-making power, and in the absence of the exercise of such by the Legislature or the Supreme Court, has absolutely no authority to" compensate counsel assigned by the court). For that reason, this Court will not disturb the Supreme Court's Madden decision and its progeny and further declines to impose the remedies proposed by the NJSBA.

B. Motion to Relieve as Counsel

Mr. Haya seeks relief from his assignment by way of a preliminary injunction. See Crowe v. De Gioia, 90 N.J. 126, 132 (1982).[8]

The Court is not convinced that Mr. Haya's appointment would cause irreparable harm. In Madden, the Supreme Court recognized "the possibility, indeed the certainty, that some

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[7] New Jersey's history of compelling attorneys to represent indigent defendants dates back to at least March 6, 1795, when its Legislature adopted what was apparently the first compulsory representation statute in the nation. See Madden v. Delran, 126 N.J. 591, 600 n.2 (1992) (citing Arnold S. Trebach, *The Indigent Defendant*, 11 RUTGERS L. REV. 625, 629 (1956)). In fact, New Jersey was the first state to pass legislation providing assigned counsel to indigent defendants. Western World, 440 N.J. Super. at 187 (citing Robert J. Martin and Walter Kowalski, New Jersey Development: "A Matter of Simple Justice": Enactment of New Jersey's Municipal Public Defender Act, 51 RUTGERS L. REV. 637, 645 (1999)).

[8] Mr. Haya claims (1) the pro bono assignment would cause irreparable harm to both him and Mr. Burgos; (2) there is no adequate remedy at law; and (3) there is a reasonable probability of success on the merits.

attorneys will be assigned who have no experience either in municipal court or indeed in any court." 126 N.J. at 607. Even though attorneys may lack experience, the Supreme Court still found that those attorneys "were required not only to learn how to defend those cases but to find out where the courthouse is." Id. at 607-08. That is the reason educational material is provided by the judiciary. In re Adoption of a Child by C.J., 463 N.J. Super. 254, 260 (App. Div. 2020).

Mr. Haya further argues that his representation of Mr. Burgos would create a Catch-22, wherein compliance with the Court's assignment would compel him to violate RPC 1.1 and RPC 1.3.[9] The Appellate Division has previously considered the RPCs dealing with diligence and gross negligence in the context of pro bono representation. In re Adoption of a Child by C.J., 463 N.J. Super. at 259. While the RPCs apply to pro bono representation, courts recognize that assigned lawyers may not be experts in certain legal fields. Id. at 260. Additionally, although the NJSBA and Mr. Haya claim that the educational material is insufficient, an assigned counsel still has the option to secure a substitute if unable to obtain sufficient knowledge in the subject area. Ibid. See also Madden, 126 N.J. at 614. The Court is thus unpersuaded by the argument. Mr. Haya is registered with the state as an active, practicing lawyer. He has demonstrated the ability to become a member of the bar by graduating law school and passing the bar exam. He has certified that he renders advice as it generally relates to retirement plans and associated matters. He is certainly capable of reading and understanding the primers provided by the court in undertaking representation of Mr. Burgos. Accordingly, the Court denies the application for a preliminary injunction.

CONCLUSION

[9] Mr. Haya also raises concerns about RPC 1.16 and RPC 6.2. The Court's findings apply to those RPCs as well.

For the reasons set forth above, the Court denies the relief requested by Mr. Haya and the NJSBA. The Court will issue an order consistent with this decision.

Deborah Silverman Katz

DEBORAH SILVERMAN KATZ, A.J.S.C.

Dated: February 24, 2023

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