

# PRESIDENT'S PERSPECTIVE

WILLIAM H. MERGNER JR.

## Amicus advocacy is a pillar of the NJSBA's mission



When the New Jersey State Bar Association acts as *amicus curiae* before the state and federal courts, it harnesses the limitless expertise in the Association's membership to address the most pressing issues facing our profession and the justice system. We owe our thanks to the attorney volunteers who prepare the briefs and present oral arguments, all on a *pro bono* basis, for performing one of the NJSBA's most

vital functions—to advance the rule of law and serve as the voice of New Jersey attorneys.

*Amicus* advocacy is a pillar of the Association's mission. Even with the high standard set over the years by numerous volunteers, the recent advocacy has been exceptional.

In a previous column I described the importance of the NJSBA combating Opinion 745 by the Advisory Committee on Professional Ethics (ACPE), a rule that prohibited certified attorneys in New Jersey from paying referral fees to out-of-state lawyers. I warned of the harm this opinion would inflict on attorneys in practice, their clients and the public. It has the potential to upend fee arrangements and place attorneys in a quandary between an ethics violation for honoring a referral fee agreement or a lawsuit for breaking it. The public faced even worse consequences, with attorneys across state lines less inclined to send knowledgeable New Jersey attorneys to clients.

In October, the Association had its day in court. I was proud to watch NJSBA Treasurer Diana C. Manning argue to the state Supreme Court that the ACPE erroneously considered referral payments a fee for legal services rendered in violation of the Rule of Professional Conduct 1.5(e). The opinion was a solution in search of a problem, as Manning put it. For many years attorneys interpreted the plain language of the rule to permit payment of referral fees, without regard for services performed or responsibility assumed by the referring attorney. Referral fees, in

this construct, are distinguished from the general rule prohibiting the division of a fee by and between lawyers who are not in the same firm, Manning argued. NJSBA members Christina Vasiliou Harvey and Kyle A. Valente contributed to the brief.

Several entities joined the NJSBA in challenging Opinion 745, including the New Jersey Association for Justice; the Trial Attorneys of New Jersey; the American Board of Trial Advocates; Blume, Forte, Fried, Zerres & Molinari; and Bergen, Essex, Hudson and Middlesex county bar associations. Fortunately, the Court stayed Opinion 745 pending disposition. The NJSBA awaits the Court's decision.

In another important effort to protect the livelihood and reputation of attorneys, the NJSBA urged the Court to reject an additional ACPE decision, Opinion 735, which allows attorneys to purchase the names of other attorneys as keyword searches to redirect web traffic to their own sites for a competitive edge. NJSBA member Bonnie C. Frost argued before the Court in September that the that the practice is unethical, deceptive, misleading and allows someone to profit from another attorney's reputation. NJSBA Assistant Executive Director/General Counsel Sharon A. Balsamo joined Frost in writing the brief. Andrew J. Cevasco made similar arguments on behalf of the Bergen County Bar Association.

The ACPE issued a finding in 2019 that the practice is not deceptive because these keyword-purchase websites are marked as paid or sponsored. The NJSBA noted that the issue is ripe given the pace of technology advancements in the profession and unsettled nature of the issue. Special Adjudicator and Appellate Division Judge Jeffrey R. Jablonski found, after three days of hearings, that users often cannot differentiate between paid ads and regular, or organic, search results. Notably, a majority of other states examining the practice have found it to be misleading and unethical. We hope New Jersey will follow their lead.

It's not often the NJSBA's advocacy reaches the U.S. Supreme Court. In October, the Supreme Court heard arguments in *Lackey v. Stinnie*, a case on whether prevailing party

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The contributors to this special edition are staunch supporters of victims of domestic violence and for protections against abuse of the PDVA. The special co-editors, Albertina Webb, Rita M. Aquilio and Matheu D. Nunn, are all family law practitioners whose daily practice is impacted by these issues and are tasked with ensuring that the application of the PDVA is that of a shield, not a sword, as the case law tells us. We extend our special thanks to NJSBA Past President, Jeralyn L. Lawrence, who submitted our lead-off column. It is very personal and gives a frank perspective of domestic violence, again, making herself and her history bare to the reader. It is our hope that this will resonate with other victims of domestic violence so they can be empowered to break the cycle of violence.

Articles featured in this special edition include:

- Awareness, Hope and Strength in the Face of Domestic Violence by Lawrence
- Home Horrors: When Technology Becomes a Nightmare by Melissa E. Cohen, Christine C. Fitzgerald and Jenna N. Shapiro
- How AI and Deepfakes Can Impact Domestic Violence Cases by Stacey A. Cozewith
- Coercive Control: Recognizing the Invisible Chains that Constitute Domestic Abuse by Alissa D. Hascup
- Legal Implications of Coercive Control in Religious Contexts by Nunn, Eliana Baer, and LaDonna Cousins
- Balancing Justice: Ethical Examination of Unwilling Victim Prosecution by Chad Pace
- Effective Examinations of the Parties in Domestic Violence Cases by Daniel Burton
- Finding Fairness in the TRO Process: The Delicate Balancing Act of Protect-

ing Victims While Recognizing the Rights of Defendants by Thomas J. DeCataldo

- A Lawyer's Personal Behavior in Person and on the Internet is Not Immune From Discipline by Bonnie C. Frost

The breadth and depth of the articles contained in this edition are as varied as the stories and the history of the Prevention of Domestic Violence Act. We offer practical “nuts and bolts” perspectives, articles about the impacts of artificial intelligence and technology, and prosecutorial and criminal law views of the topic. In all, we believe that while this complement of articles may never tell every story and every perspective, it is the gateway to bridging the gap to begin the journey.

We thank you for this opportunity, as family law practitioners, to address this powerful and always pertinent topic. ■

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status, and therefore attorney's fees, are available in cases rendered moot by a legislative change. The Association did not participate in oral argument, though retired state Supreme Court Justice Gary S. Stein contributed a brief with assistance from NJSBA Past-President Robert B. Hille and Association members Dominique Kilmartin, Peter J. Gallagher and James A. Lewis, V.

The NJSBA joined the Virginia case to advocate for clarity in the law so NJSBA's member attorneys can advise and provide effective representation to their clients. The case involves a group of individuals who challenged a state law that suspended their driver's licenses without a hearing or due process. When Virginia repealed the law following the issuance of a preliminary injunction, plaintiffs

declared they were eligible for fees as the prevailing party in the litigation. In its briefs, the Association asked the Court to affirm lower court rulings awarding fees in certain circumstances where no final relief was obtained, but to establish uniform criteria to determine those circumstances. The Association pointed to previous Supreme Court precedent in urging the Court to require court-ordered, enduring relief to establish prevailing party status.

I would feel remiss not to acknowledge a long-running *amicus* effort that started under NJSBA Past-Presidents Jeralyn L. Lawrence and Timothy F. McGoughran and concluded in October. At long last, the state Supreme Court ended New Jersey's uncompromising approach to disbarment and established a pathway back to the law for some disbarred attorneys. The NJSBA advocated that the Court reconsider disbarment in

*In re Wade*, a case Hille argued before the Court and contributed a brief with Abdus-Sami M. Jameel. The Association was also a critical contributor to the exhaustive work by the Wade Commission, created to study the disbarment process in New Jersey.

The steps to readmission are rigorous but fair. They protect the public while holding attorneys to the highest ethical standards. Thanks to the collaborative work by the bench and bar, attorneys whose conduct was caused by addiction, illness or personal struggle will have a chance at redemption.

I urge you to read about the Association's vigorous advocacy program on the NJSBA's website. As always, we encourage members to bring potential *amicus* issues to our attention. Submissions are always welcome on issues for the benefit of New Jersey attorneys, the profession and the public. ■