of review and that it has applied the standard of review, and I would take the position that if the record demonstrates that, that mandamus review would not be appropriate and both the trial court and the courts of appeals have discretion to say that.

CHAIRMAN BABCOCK: Okay. Any other comments? Okay. Great. Justice Christopher, thank you so much for that. We're now up to Item 9, and, Kyle, you and -- are you going to present or is your colleague going to be present?

MR. SCHNITZER: It will be me presenting.

CHAIRMAN BABCOCK: Kyle Schnitzer is with Jim Adler & Associates, about a lawyer advertising, and I'm going to recuse myself from this discussion because I've represented Jim Adler in the past on advertising issues, but more importantly, I currently represent Google on a very closely related case to this issue, so Buddy is going to come over here in the chair seat.

MR. LOW: Why don't you just sit?

CHAIRMAN BABCOCK: Buddy, as you all know, is our co-chair -- no, no, come up on up to the head. Justice Hecht needs some love from you.

MR. LOW: He came to Beaumont, the only Chief Justice we've ever had in Beaumont.

MS. ADROGUE: Oh, that's nice.
MR. LOW: All right. You may proceed.

MR. SCHNITZER: Good morning, everyone. I'm here today to talk about an ethics question on a specific type of internet advertising, specifically under what circumstances is it appropriate for a Texas attorney to use another attorney's name under a pay-per-click advertising scheme and target their advertisements at a specific class of potential clients. Now, given the specificity of this issue, I did want to take a moment and talk very briefly about how pay-per-click advertising systems work. Relevant advertising is effective advertising, so that's true in whatever medium. It's why when you watch a football game you tend to see an uptick in the number of beer commercials and that sort of thing. That certainly applies, too, for internet advertising.

When you do a Google search or a Bing search or any type of search engine really and you put in your search terms, you're very likely to see related links pop up, sponsored links, advertisements related to your search terms. The reason you see that is because those advertisers, the websites behind those links, have purchased from Google their right to associate their ad with that search term, that keyword. In fact, Google makes hundreds of millions of dollars each day, as do other search engine providers, through this pay-per-click...
system, so named because if the ad is effective and the internet user clicks on that advertisement Google is paid and the user is taken to that website.

Now, the way the system is set up Google and the other search engine providers don't have a real strong economic incentive to regulate which persons can buy what search terms, what keywords. It's in their interest, in fact, to allow multiple parties to bid on keywords, whether they're generic terms or potentially intellectual property, which gives rise to the following potential scenario: Say there are two attorneys practicing family law in Houston, Allen Alpha and Bob Beta. They're not affiliated but they do pursue the same client pool. Bob Beta advertises on TV and radio in Houston, advertising his effectiveness as a divorce attorney, so much so that a Houston native like Greta Gamma, who wants to divorce her husband, the first thing she thinks of when she thinks of a divorce attorney in Houston is Bob Beta. So she goes online to Google or Bing or whatever search engine she prefers, types in the word "Bob Beta," and among her results is a sponsored link for "yourhoustondivorceattorneys.com." There's nothing in that link or that advertisement telling her what attorney is behind it, so she clicks on it; and of course, it turns out that it's Allen Alpha's website because he's paid
Google or Bing or whatever for the right to use "Bob Beta" as his keyword; and ultimately in this scenario perhaps Greta Gamma retains Allen Alpha as her divorce attorney instead of Bob Beta, the person she searched for.

Now, it's our position that there's at least two things about this scenario that should concern the committee, hopefully concern the Texas bar as a whole. First, in a scenario where Bob Beta's name is trademarked, you arguably have an intellectual property violation, a trademark infringement. Now, the law in this area is still developing. The Lanham Act that allows Bob Beta to pursue either potentially Google or Allen Alpha for infringement was written well before the internet was a going concern, so there's a dispute within the courts as to whether or not this sort of keyword PPC or pay-per-click advertising is a use in commerce violation. That said, there are courts that have at least allowed this to survive a summary judgment, both in California that I'm aware of.

There's a Minnesota case that I'm aware of where this is still ongoing, but the second point I'd like to make is that independent of whether or not this is a formal trademark violation that's actionable under the statute as written, it would certainly seem to implicate the same concerns that trademark law is designed to
protect against. For example, a trademark protects the mark's owner's interest in the goodwill that he has associated with his mark, building up that mark's reputation in the public, and what you have in the scenario I described is Allen Alpha is free riding on that mark. It's the same sort of concern that trademark infringement is worried about, and in that respect the North Carolina State Bar, which I believe I cite the opinion in -- or Mr. Adler and I cite the opinion in the letter that was written to this committee, has held under a very similar situation that that would be considered -- or Allen Alpha's conduct would be a violation of their -- or their Rules of Disciplinary Procedure 8.04(c), which is substantively identical to Texas' Rule 8.04(a)(3).

In addition, this conduct by Allen Alpha runs the risk of confusing the consumer, which is the second purpose of trademark protection. When a user searches for a particular trademark they expect to find goods or services that are actually affiliated with that mark. There are disclosure obligations and responsibilities that attorneys ethically have, even if it's not a formal trademark infringement violation where it's not unreasonable for Greta Gamma to think that she searched for Bob Beta, she goes to this website, she realizes, okay, this is actually Alpha's website, but, the
link came up when I searched for Bob Beta, perhaps they're affiliated, related attorneys somehow, and so you still have that confusion that should be a concern.

The bar has long taken the position, I think, and rightfully so, that we should protect potential clients from the risk of having to understand unnecessary ambiguities or misconceptions in attorney's communications with them, and it would be within the bar's authority to encourage advertisers online through PPC conduct either to prohibit this sort of conduct completely as the North Carolina bar has or to increase the -- perhaps the disclosure requirements on an attorney like Allen Alpha in the future. So we do feel that this is a problem that is occurring in Texas, and it's worthy of this committee's consideration.

MR. LOW: Let me ask you one question. Have -- I know there's an advertising committee, correct, that you put through. There's also the ethics committee, which doesn't answer questions of law, a remedy for the Legislature. What do you think is the approach or answer to this? What could we do that you couldn't do with a lawsuit to enjoin somebody and establish the law? What's wrong with that?

MR. SCHNITZER: Certainly, and two points in response to that. The first is whether -- if we do bring
a lawsuit on an individual basis, that only stops the one
offender, and so you're chasing around putting out fires.
This is an ethical concern that should concern the bar, we
feel, such that there should be an obligation as a
community of lawyers to hold ourselves to a higher
standard, even if we are able to individually litigate
successfully each individual offender; and the second
question is, we are pursuing other remedies --

MR. LOW: Yeah.

MR. SCHNITZER: -- as we can. There was a
letter written to the Ethics Commission, I believe, within
Texas asking for an opinion on this subject. To my
knowledge, I'm not sure whether or not it's been formally
taken up, and because one of the requirements for asking
for an ethics opinion is to not have that subject be in
litigation, we've held off on formally filing suit.

MR. LOW: I understand, but I was chairman
of the ethics committee for 25 years, and we steered clear
of answering any question of law when we considered
questions, so you might have trouble there. Any comments?

MR. SCHNITZER: I guess I should -- I'm
sorry. I wanted to clarify that we weren't asking the
ethics committee to answer whether or not it's a trademark
violation so much as just whether this conduct would
violate one of the existing --
MR. LOW: Canons of ethics.

MR. SCHNITZER: Yes, sir.

MR. LOW: I understand. Comments? Thank you very much.

CHAIRMAN BABCOCK: You've got one here.

MR. LOW: Oh, I'm sorry. Roger, excuse me.

MR. HUGHES: I guess I'm -- one of my questions is along the line of why aren't existing laws sufficient to halt this? I mean, we do have both state and Federal anti -- unjust competition laws in the Lanham Act. Why then do we need an ethics rule?

MR. SCHNITZER: Well, I guess my two points to that are, one, the courts have been so far reluctant or mixed as to whether or not those laws apply to this conduct in a way that would actually stop it.

MR. LOW: Carl.

MR. HAMILTON: Why doesn't 804.3 take care of it?

MR. SCHNITZER: The North Carolina bar held that the intentional purchase of the recognition associated with one lawyer's name to direct consumers to a competing lawyer's website would be dishonest conduct under their rules, so they slipped it in under dishonesty in terms of attorney dealings.

MR. HAMILTON: We have that under 804.3.
MR. SCHNITZER: And that was the rule that we asked the Ethics Commission to rule on. It's just that to my knowledge they have not yet, so we also wrote a letter to this committee, and this committee was kind enough to offer some time for us to present that position.

MR. LOW: Anybody else? Thank you very much.

HONORABLE NATHAN HECHT: Richard.

MR. LOW: Chip.

CHAIRMAN BABCOCK: Munzinger had something.

MR. LOW: I'm trying to get out of this chair.

MR. MUNZINGER: I wanted to make sure I understood what the problem is. If I click or if I put "Allen Alpha" into Google and press the button, Google comes back and on the left-hand side of the screen is Allen Alpha, and he's the first guy on the screen theoretically, and over here on the right-hand side of the screen is a list of Bob Beta and Joe Schmoe, et cetera, who are competitors to Allen Alpha. Am I correct so far?

MR. SCHNITZER: I was using the names reversed, but certainly I follow you, yes, sir.

MR. MUNZINGER: Regardless of their names, in essence what you're saying is you don't want competition.
MR. SCHNITZER: No, I don't think we would phrase it that way, sir.

MR. MUNZINGER: I understand you wouldn't. I know you wouldn't phrase it that way, but I am, and my point is -- and that's my whole point, so we have a new -- internet is a new way of advertising. It's a new way of getting information to consumers. It's the cat's meow, and you want to stop people from finding out that there's other people who do divorce work when they ask for Allen Alpha. He hadn't trademarked his name insofar as you know. It isn't the same as a trademark violation. Trademark violations require proof of the mark and proof of the public acceptance of the mark, and so you've done a number of giant steps. My only point is not to debate you except to say I don't think it's quite as stark as you have presented it, and I don't think it is limited to an ethical question.

MR. SCHNITZER: Yes, sir, and I wanted to clarify that we have no quarrel or any issue with these two attorneys buying the generic term such as "divorce lawyer" or "family law lawyer" or a scenario like that. It's specifically trading on the other attorney's name, the other attorney's reputation, that we were concerned about, and there was another point, but I'm afraid it's escaping me.
MR. LOW: All right.

MR. VIVIALA: My name is Toby Viviala. I also work at the Jim Adler Law Firm. I'm his internet marketing director. One comment I would like to make is there is a way to look at a search query and specifically denote that a trademark name was used versus advertising on something like "divorce attorney" or things like that, so you can differentiate between generic advertising and advertising specifically on a trademark name.

MR. LOW: Anybody else? Thank you, and we might come back or refer back at this point, I think you can probably wait to see.

MR. SCHNITZER: Yes, sir. Thank you.

CHAIRMAN BABCOCK: Thanks, Buddy. Nicely done. Man, competition for me. Next on our list is Don Jackson, who is the president of Texas ABOTA, and has a matter that he wishes to present to us which I know Texas ABOTA has been working on very hard for a number of months, if not years. Don, thank you.

MR. DON JACKSON: Thank you, Chip, and thank you to the committee for giving us a few minutes to talk about this topic this morning. I did want to confess that during the last speech I called my marketing director, and we bought the name Rusty Hardin out, so we'll be over there on the right side.