

# Ethics Trivia: Real Life Ethical Issues Facing Corporate Counsel

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Presented by:

Anna Berman

[Anna.Berman@KutakRock.com](mailto:Anna.Berman@KutakRock.com)



Marcos Barbosa

[Marcos.Barbosa@KutakRock.com](mailto:Marcos.Barbosa@KutakRock.com)



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## Rules

- Find a group. Group Leaders are throughout the room with red/green cards.
- Groups should be 8-10 people.
- Answer as a Group.
- Keep your Group score.
- Talking is encouraged.
- Have fun!

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## Question 1

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### What's the Matter?

Moose Co. and Hoz Co. are subsidiaries. Yost is in-house counsel for both companies. Moose Co. is involved in litigation adverse to Bautista Co. Yost frequently communicates with the lawyers for Bautista Co. regarding the litigation. Bautista Co. regularly supplies baseballs to Hoz Co.



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## What's the Matter?

Hoz Co. approaches Yost regarding an invoice from Bautista Co. There is a discrepancy between the number of baseballs listed on the invoice and the number of baseballs received by Hoz Co. Hoz Co. asks Yost to contact the sales representative at Bautista Co. regarding the discrepancy.



## What's the Matter?

True or False: Yost can contact the sales representative at Bautista Co. regarding the invoice.

## What's the Matter?

Model Rule 4.2 [KS 4.2 / MO 4-4.2]

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

## What's the Matter?

Model Rule 4.2 [KS 4.2 / MO 4-4.2]

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

## What's the Matter?

Comment [4] to Model Rule 4.2:

This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation.

## What's the Matter?

Colorado Rule 4.2:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Rule 4.2 attaches only once an "adversarial relationship" sufficient to trigger an organization's right to counsel arises.

## Question 2

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### Solicitor Investor



Start-Up seeks legal advice from Solicitor Investor regarding his business, Silicon Valley, a new social media site. Rather than entering into a traditional fee arrangement, Start-Up offers to give Solicitor Investor 10,000 shares of the pre-IPO offering price of Silicon Valley in exchange for legal services.

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## Solicitor Investor

True or False: Solicitor Investor cannot accept the stock in lieu of a monetary fee.

## Solicitor Investor

So long as Solicitor Investor takes care to comply with Rule 1.8(a) (regarding business transactions) and Rule 1.5 (regarding reasonableness of fees), ethics rules do not prohibit Solicitor Investor from accepting the stock in lieu of monetary payment.

## Question 3

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### Solicitor Investor



Solicitor Investor accepts the 10,000 shares and prepares the offering when Company goes public. For the next several years, Solicitor Investor acts as counsel for Silicon Valley and continues to hold her 10,000 shares.

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## Solicitor Investor



Silicon Valley is hacked, and during the data breach user email addresses and dates of birth are leaked. Solicitor Investor is asked to advise Silicon Valley regarding its duty to disclose the data breach to regulators. Solicitor Investor fears that this revelation might cause a sharp dip in Silicon Valley's stock price.

## Solicitor Investor

True or False: Solicitor Investor cannot advise Silicon Valley regarding its duty to disclose.

## Solicitor Investor

Model Rule 1.7 [KS 1.7 / MO 4-1.7]

- 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) the lawyer reasonably believes that the lawyer will be able to provide **competent and diligent representation to each affected client**;
  - 2) the representation is not prohibited by law;
  - 3) 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; and
  - 4) each affected client gives **informed consent, confirmed in writing**.

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## Solicitor Investor

Model Rule 2.1 [KS 2.1 / MO 4-2.1]

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

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## Solicitor Investor

ABA FORMAL OP. 00-418 (July 7, 2000)

Solicitor Investor must evaluate her ability to maintain the requisite professional independence as a lawyer in Silicon Valley's best interest by subordinating any economic incentive arising from her stock ownership. The lawyer also must consider whether her stock ownership might create questions concerning the objectivity of her opinion.

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## Question 4

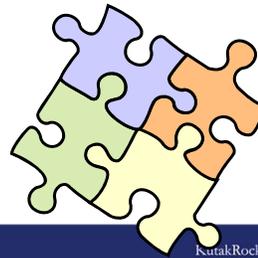
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## Four's Company

Sub-Sub I Co. and Sub-Sub II Co. are wholly owned subsidiaries of Sub Co. Sub Co. is a wholly owned subsidiary of Parent Co. Parent Co., Sub Co., Sub-Sub I Co., and Sub-Sub II Co. (“Four’s Company”) are involved in the construction of an apartment building.

Construction does not go well.



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## Four's Company

Parent Co.’s in-house counsel conducts a post-construction investigation in anticipation of construction defect litigation. In furtherance of this investigation, In-House interviews and communicates with employees and officers from Sub Co., Sub-Sub I Co. and Sub-Sub II Co.

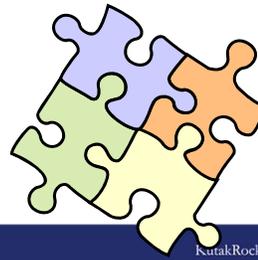


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## Four's Company

In-House shares the results of his investigation with Sub Co., Sub-Sub I Co. and Sub-Sub II Co. Sometime after, a defective construction suit is filed and Four's Company are named as defendants.



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## Four's Company

True or False: In-House's communications with Sub Co., Sub-Sub I Co., and Sub-Sub II Co. are privileged.

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## Four's Company

*State ex rel. Syntex Agri-Bus., Inc. v. Adolf*, 700 S.W.2d 886 (Mo. App. E.D. 1985) (citing *Insurance Company of North America v. Superior Court*, 108 Cal. App. 3d 758 (1980)).

Documents shared among family of corporations does not destroy privilege so long as “disclosure [is] reasonably necessary to accomplish the corporate client’s purpose in consulting counsel.”



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## Four's Company

Commonality required to assert “common interest” doctrine varies by jurisdiction.

*Bank of America, N.A. v. Terra Nova Ins. Co. Ltd.*, 211 F. Supp. 2d 493, 496 (S.D.N.Y. 2002).

Bank and Insurer to whom Bank extended letters of credit were held not to have sufficiently common interests in a lawsuit brought by the Bank against the Re-Insurer who allegedly failed to provide security on the letters of credit. The court held that while Bank and Insurer were in a “collaborative effort”, each party was interested in making the terms of the transaction favorable to itself. Their interests were not identical, so communications related to the letter of credit negotiations were not privileged.



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## Question 5

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### Spoli-Who?

Day Trader sues Wall St. for gender discrimination. Wall St. knows of the likelihood of litigation in April. In August, In-House Counsel meets with key employees regarding their duties to preserve evidence. Outside Counsel also meets with employees. The meetings are followed with written instructions.



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## Spoli-Who?



Although Outside Counsel meets with the key employees, she does not become fully familiar with Wall St.'s document retention policies or Wall St.'s data retention architecture. No one instructs IT to preserve back-up tapes until Day Trader's attorneys specifically ask for emails stored on backup tapes (almost a year later).

## Spoli-Who?



After several rounds of discovery and motion practice, Wall St. agrees to restore several back-up tapes. The restoration reveals that a number of emails on the back-up tapes are not included in Wall St. employees' "active files." The newly discovered emails are produced two years after the initial discovery requests are made and some emails cannot be recovered.

## Spoli-Who?



Day Trader believes emails from Wall St. were intentionally or negligently deleted. He brings a motion for sanctions seeking an adverse inference due to spoliation.

## Spoli-Who?

True or False: Outside Counsel complied with his responsibilities to preserve evidence.

## Spoli-Who?

Court found that while counsel did not need to supervise every step of the document production process, counsel was responsible for coordinating the client's discovery efforts. That includes overseeing the location of relevant information, the duty to preserve and duty to timely produce.

## Spoli-Who?

Outside Counsel failed to ask questions. Some employees at Wall St. had separate computer files pertaining to Day Trader. Some printed emails and retained them in hard copy only.

One employee referred to her retention system as "archiving." Outside Counsel incorrectly assumed this employee's "archiving" meant the back-up tapes.

## Spoli-Who?

In-House Counsel and Outside Counsel also failed to communicate the litigation hold to a key HR employee and failed to produce some emails they were given.

Wall St. was not blameless. Its employees failed to turn over requested emails to counsel.

## Spoli-Who?

*Zubulake V*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004);  
*See FTC v. Affiliate Strategies, Inc.*, 2011 WL 2084147  
(D. Kan. May 24, 2011)

Court ultimately found that duty to preserve rests on the party and issued an adverse inference.

## Question 6

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### Do Tell...



Politician is an attorney running for county office. Prior to running for office, Politician represented Doe in various matters. Through his representation, Politician learns that Doe accused her probation officer of sexual misconduct and filed a publicly available complaint including such allegations.

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## Do Tell...



Doe later alleges that she and Politician had a sexual relationship that arose during Politician's representation of her. She accuses Politician of sexual misconduct and files an ethical complaint against him.

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## Do Tell...



News of Doe's allegations against Politician spreads quickly and becomes a focus of the political race. Politician is asked to comment and he states, "[Doe] previously was in a situation with her probation officer, which I later found out was alleged sexual misconduct."

It is widely understood that Politician is trying to shore up his reputation by insinuating that Doe has made false claims of sexual misconduct in the past.

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## Do Tell...



In response to Politician's statements, Doe amends her ethical complaint to include violations of the Duty of Confidentiality, Model Rule 1.6.

## Do Tell...

True or False: Politician did not violate the Duty of Confidentiality.

## Do Tell...

Model Rule 1.6 [KS 1.6 / MO 4-1.6]

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

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## Do Tell...

*In re Marzen*, (Iowa, No. 08-1546, 3/19/10)

The Iowa Supreme Court held that disclosure of client information is not excused simply because the same information could be obtained from publicly available court records. “[I]he rule of confidentiality is breached when an attorney discloses information learned through the attorney-client relationship even if that information is otherwise publicly available.”

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## Do Tell...

Check your local rules.

Comments to MA Rule 1.6 and NY Bar Association Opinion on Rule 1.6 include exceptions for information that is “widely known” or “widespread”.

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## Rager

Old Tymer attends a hearing with Laker and Mr. Pro Se, both of whom are opposing parties in a personal injury action. During the hearing, Old Tymer tells Mr. Pro Se, “Be quiet kid, I am talking.” Old Tymer also calls Laker, “Mr. Out-of-Town Attorney” and tells Laker to “go jump in the lake.”



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## Rager

The hearing is conducted before Judge. Judge does not rule in Old Tymer’s favor. Old Tymer accuses Judge of colluding with Laker. After the hearing, Old Tymer follows Judge to chambers and says, “It’s a good thing you’re still wearing that robe.” When Judge asks what Old Tymer means by that, Old Tymer responds, “Why don’t you take it off and step out here and I’ll show you?”



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## Rager

Later on, Old Tymer attempts to schedule a meeting with Newbie, an opposing attorney in a divorce case. During the discussion, Old Tymer becomes angry. He calls Newbie a “liar.” Old Tymer also pokes Newbie in the chest and says “why don’t you just punch me?”



## Rager

True or False: Old Tymer engaged in conduct prejudicial to the administration of justice?

## Rager

Model Rule 8.4 [KS 8.4 / MO 4-8.4]

It is professional misconduct for a lawyer to:

- a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- d) engage in conduct that is prejudicial to the administration of justice;
- e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

## Rager

*In re Clothier*, No. 112,658

Ethics and professional responsibility extends beyond clients and the Court. All attorneys have a duty to treat opposing counsels with respect.

## Question 8

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### What's Yours is Mine

Greedy is in-house counsel for various businesses owned by Innocent. One such business is Condo. Condo is owned 70/30 between Innocent and Naïve. Greedy represents Naïve in matters unrelated to Condo.



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## What's Yours is Mine

Without consulting Innocent or Naïve, Greedy prepares a letter resignation for Naïve. The letter transfers Naïve's ownership interest in Condo in exchange for a severance package. Greedy also prepares a blank assignment of interest form to reassign Naïve's interest in Condo.



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## What's Yours is Mine

Greedy recommends that Naïve Execute the resignation and tells Naïve that Innocent no longer wants to do business with Naïve. Naïve executes the resignation documents and accepts the severance. One of Greedy's companies is listed as the recipient of Naïve's 30% interest in Condo.



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## What's Yours is Mine

True or False: Greedy's acquisition of a 30% interest in Condo is permissible.

## What's Yours is Mine

Model Rule 1.7 [KS 1.7 / MO 4-1.7]

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  - 2) the representation is not prohibited by law;
  - 3) 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; and
  - 4) each affected client gives informed consent, confirmed in writing.

## What's Yours is Mine

Model Rule 1.8 [KS 1.8 / MO 4-1.8]

- 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 on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably 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 on 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.

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## Question 9

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## What's Yours is Mine



Greedy commits various misdeeds during her representation of Innocent and his companies. Innocent fires Greedy and sues for malpractice and breach of fiduciary duty. Greedy defends the suit by alleging that she was fired for recommending that Innocent end his business relationship with Broker. Broker provided insurance to Innocent and his companies. The case is assigned to Judge.

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## What's Yours is Mine



Judge has a 35-year business relationship with Broker and purchases all of his insurance products from Broker.

Thirty years ago, Broker supported Judge's efforts to obtain public office by donating to Judge personally, fundraising for Judge and acting as Judge's Campaign Treasurer.

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## What's Yours is Mine



Ten to fifteen years ago, Judge and Broker worked “extensively” with one another in various political initiatives and were partners in a failed business venture.

Five years ago, they played bridge with one another on a weekly basis. The games were held at one of their private residences.

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## What's Yours is Mine



Judge discloses some of his prior dealings with Broker throughout the *Innocent v. Greedy* litigation, but does not recuse himself. Greedy tells Judge that Broker will be a key, material witness in the litigation. Judge is comfortable handling the case and judging Broker's credibility.

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## What's Yours is Mine

True or False: Judge was required to recuse himself when he learned Broker might be a witness.

## What's Yours is Mine

### Canon 1

A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

### Canon 2

A judge shall perform the duties of judicial office impartially, competently, and diligently.

### Canon 3

A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.

## What's Yours is Mine

Court found that Judge's ongoing insurance business relationship with Broker was sufficient to warrant recusal because it created an appearance of impropriety.

## What's Yours is Mine

*Kaye v. Rosefelde*, 75 A.3d 1168 (N.J. Super. Ct. App. Div. 2013)

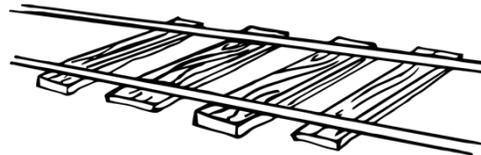
*In re Perskie*, 207 N.J. 275 (2011)

## Question 10

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### Railroaded

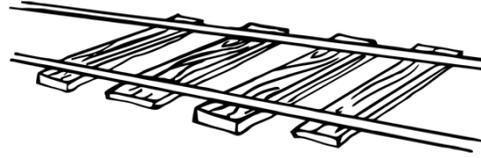


Model Railroad employees Witness and Injured are working on an engine. Injured falls and is injured. Witness prepares two witness statements, one shortly after the fall and a second about an hour later. Statement One says that Injured “slipped & fell.” Statement Two says “I saw Injured slip & fall.”

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## Railroaded

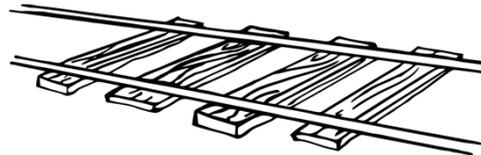


Injured sues Model Railroad. Model Railroad sends Attorney to defend it at Witness' deposition. Prior to the deposition, Witness meets with Attorney and Attorney confirms that Witness did not see Injured fall. Attorney also tells Witness that Attorney will represent him at the deposition and that Witness' job will not be affected so long as he tells the truth.

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## Railroaded



At the deposition, Witness testifies that he did not see Injured fall. Attorney cross-examines Witness and marks Statement Two as an exhibit. Attorney does not mark Statement One. After the deposition, Witness is fired from Model Railroad for making a false statement (Statement Two).

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## Railroaded

True or False: Attorney violated the rules of ethics during Witness' deposition.

## Railroaded

Model Rule 1.7 [KS 1.7 / MO 4-1.7]

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## Railroaded

*Yanez v. Plummer*, 164 Cal. Rptr. 3d 309 (Cal. Ct. App. 2013).

Court found that Witness submitted a triable issue regarding Attorney's violation of Model Rule 1.7.

Attorney "highlighted" Witness's testimony that he did not actually see Injured fall, introduced Statement Two at the deposition, got Witness to admit that Statement Two conflicted with his testimony, failed to introduce Statement One at the deposition, and did not give Witness a chance to explain the discrepancy between Statement One and Statement Two.

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## Tie Breaker

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## Tie Breaker

Barrister is an attorney in California who frequently handles traffic citations and DUIs. On her website, Barrister advertises that she is “certified” in the area of “vehicular related infractions”.

In reality, Barrister is not “certified” in any specialty area and the State Bar of California Board of Legal Specialization does not offer specialty certification for “vehicular related infractions”.



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## Tie Breaker

True or False: Barrister's advertising is protected Free Speech under the First Amendment.



## Tie Breaker

### Model Rule 7.4 [KS 7.4 / MO 4-7.4]

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

...

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

- (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and
- (2) the name of the certifying organization is clearly identified in the communication.



## Tie Breaker



Generally, attorney advertising **IS** protected by the First Amendment. But that protection only applies if the advertising is not false, misleading, or deceptive, and complies with the Model Rules.

Barrister's advertising was false.

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Presented by:

Anna Berman

Anna.Berman@KutakRock.com



Marcos Barbosa

Marcos.Barbosa@KutakRock.com



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