PRIMER ON LAWYER ADVERTISING

J. NICK BADGEROW
SPENCER FANE LLP
OVERLAND PARK, KANSAS

OVERVIEW



SOME HISTORY

LAWYER ADVERTISING IS FREE SPEECH

BUT: LAWYER ADVERTISING CAN BE REGULATED

RULES REGULATE

EXAMINE RULES – 7.1 – 7.5

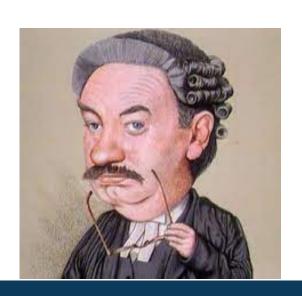
GOOD TASTE SHOULD MODULATE

SUGGEST SOME "DO'S" AND "DON'T'S"

ASPIRATIONAL GOALS

HISTORY

OLDEN TIMES: LAWYERS DO NOT ADVERTISE LAWYERS DO NOT NEED TO ADVERTISE ADVERTISING WAS UNSEEMLY AND PLEBIAN

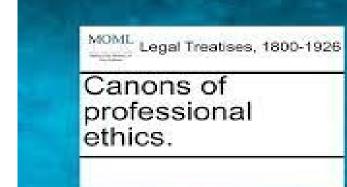


CANONS OF PROFESSIONAL ETHICS

1908 - FIRST FORMAL NATIONAL CODE OF ETHICS

TAKEN FROM ALABAMA CANONS

1909 - ADOPTED IN KANSAS







CANONS - NO ADVERTISING

UNPROFESSIONAL - CIRCULARS OR ADVERTISEMENTS
UNPROFESSIONAL - PROCURE BUSINESS BY TOUTERS
INSPIRING NEWSPAPER COMMENT - SELF-LAUDATION

- = DEFY THE TRADITIONS OF THE BAR
- = LOWER THE TONE OF OUR HIGH CALLING
- = ARE INTOLERABLE



MODEL CODE

Model Code of Professional Conduct

1969 – ABA

1969 - KANSAS

As amended October 19, 2019

NO SELF-LAUDATORY COMMENTS

TV, RADIO, FILM, PAPER, MAGAZINE, BOOK

NO COMMERCIAL PUBLICITY

[OK = BUSINESS, CIVIC, PROFESSIONAL, POLITICAL ORG.]

NO CHASER OR PRESS, RADIO, TELEVISION PUBLICITY

WHY DO MODERN LAWYERS HAVE TO ADVERTISE?

MORE LAWYERS = MORE COMPETITION
ECONOMY STRUGGLES
SOME LAWYERS: "LAW IS A BUSINESS"
CLIENTS DEMANDING LESS

- GOING WITHOUT
- IN-HOUSE COUNSEL









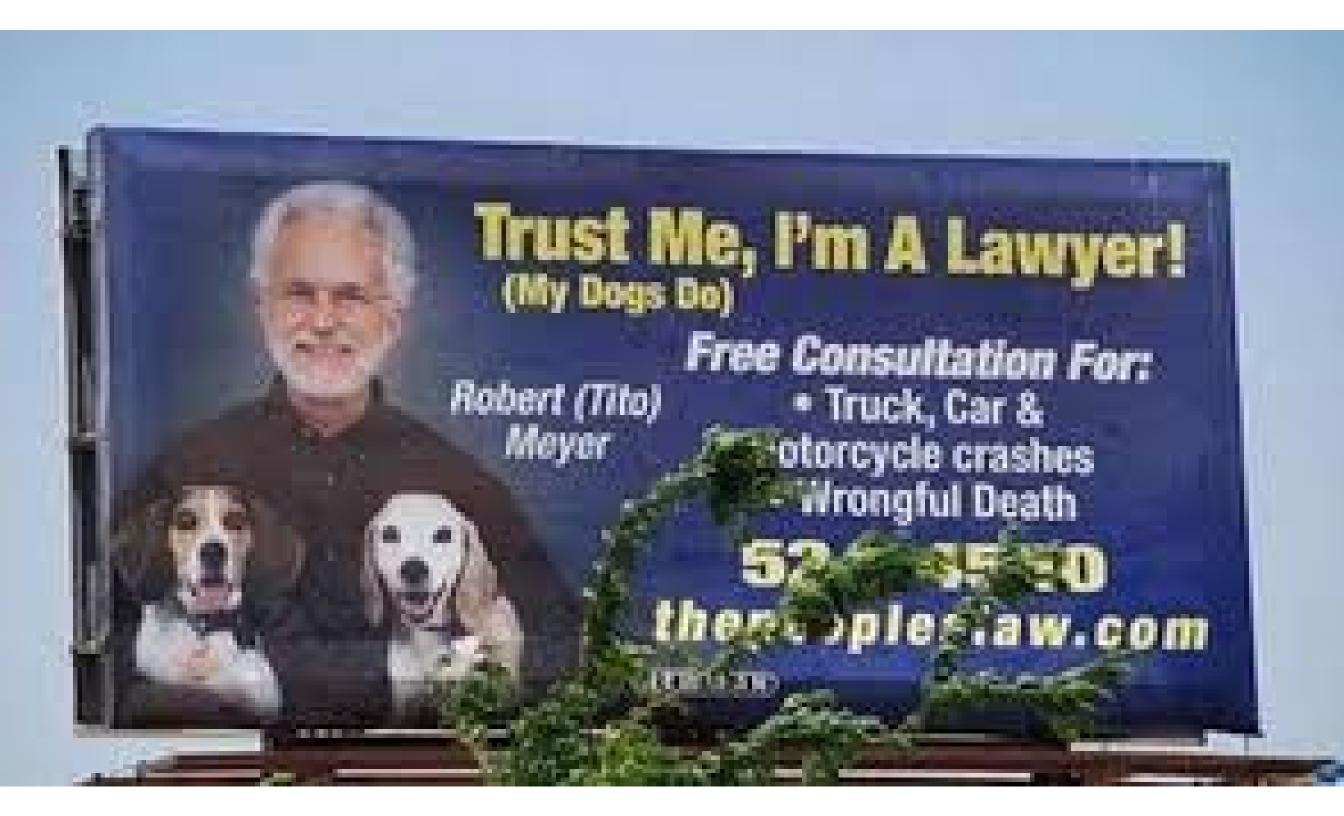


PROUD SPONSORS OF:













"Dopest Attorney"



Affison Margolin
Harvard Law & Affordable

Need a warrant recalled?

Want to smoke pot on probation?





SO: LAWYERS FEEL NEED TO ADVERTISE

DIGITAL MARKETING

SEARCH ENGINE OPTIMIZATION = "SEO"

BLOGGING

PRINT AND DIGITAL ADS

EVERYONE IS DOING IT

CONFLICT BETWEEN YE OLDE RULES AND NEW DEMANDS



SO: LAWYERS TESTED THE OLD LIMITS

1977 - BATES V. STATE BAR OF ARIZONA: 1ST AMENDMENT FREE SPEECH

- CANNOT PROHIBIT NEWSPAPER AD
- YE OLDE RULE IS OUTDATED

BUT: NOT PROTECT "FALSE, DECEPTIVE, OR MISLEADING" AD

- MAY IMPOSE REASONABLE RESTRICTIONS



PROGENY OF BATES

1985 -ZAUDERER V. OFFICE OF DISCIPLINARY COUNSEL

AD = IUD DEVICE

EMBARASSING OR OFFENSIVE?

BENEATH SOME LAWYERS' DIGNITY?

- = COMMERCIAL FREE SPEECH
- **= CANNOT PROHIBIT**



PROGENY OF BATES

1988 - SHAPERO V. KENTUCKY BAR ASSOCIATION

DIRECT MAIL ADVERTISING

= PROTECTED COMMERCIAL SPEECH

= CANNOT BAN

UNLESS FALSE AND MISLEADING



PROGENY OF BATES - "HOWEVER"

1995 - FLORIDA BAR V. WENT FOR IT

BAR CAN PROTECT AGAINST

UNSOLICITED CONTACT BY LAWYERS

REPEATED INVASION ERODE CONFIDENCE IN THE PROFESSION



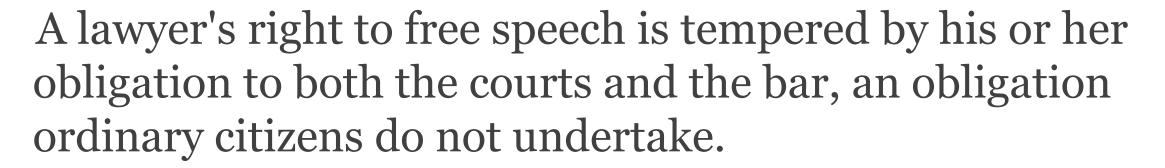
KANSAS SUPREME COURT AGREES

2007 - IN RE. COMFORT

LAWYERS TRADE CERTAIN FREE SPEECH

RIGHTS - FOR

LICENSE TO PRACTICE LAW



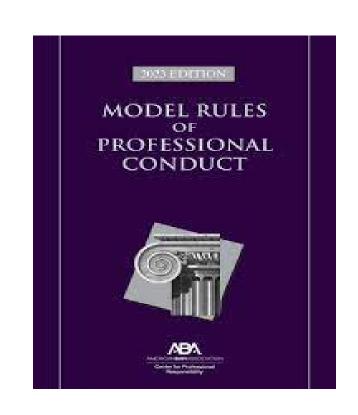
MODEL RULES

ABA: 1983 – INCL. PRINCIPLES IN BATES AND PROGENY

OVERHAULED THE CODE

1988 – ADOPTED IN KANSAS

SECTION 7 - ADVERTISING WILL DISCUSS NOW



SECTION 7 – ADVERTISING - SUMMARY

- 7.1 COMMUNICATIONS ABOUT SERVICES
- 7.2 ADVERTISING
- 7.3 SOLICITATION OF CLIENTS



- 7.4 FIELDS OF PRACTICE
- 7.5 FIRM NAMES AND LETTERHEADS

RULE 7.1 - NO FALSE OR MISLEADING ADVERTISING

NO FALSE OR MISLEADING COMMUNICATION ABOUT THE LAWYER OR THE LAWYER'S SERVICES =

- NO MATERIAL MISREPRESENTATION OF FACT OR LAW

- NOT OMIT NECESSARY FACT



RULE 7.1 (CONT.)

-NOT CREATE AN UNJUSTIFIED EXPECTATION ABOUT RESULTS

- NOT STATE/IMPLY THAT LAWYER CAN ACHIEVE RESULTS BY VIOLATING RULES OR LAW

- NOT MAKE UNJUSTIFIED/UNSUBSTANTIATED COMPARISON WITH OTHER LAWYER'S SERVICES



RULE 7.1 – NO FALSE OR MISLEADING ADVERTISING

2015 - IN RE BARKER: UPS BOX = "OFFICE"

1990 - PIZEL V. ZUSPANN: GUARANTEED RESULT

1989 - OP. 89-6: "FIRM" IS NOT A FIRM

2006 – OP. 06-03: DISBARRED LAWYER IN FIRM'S NAME

2003 – IN RE FRANCO: BUSINESS CARD, IMPLYING ADMISSION IN STATE

2012 – IN RE WEAVER: TWO-LAWYER FIRM = "NATIONWIDE NETWORK"

1987 – IN RE ZANG (ARIZ.): TV AD = LAWYERS IN COURTROOM

1995 – STATE V. CARPENTER (COLO.): FALSE MULTIPLE FIELDS OF PRACTICE



RULE 7.1 - SUMMARY

NO FALSE STATEMENTS

NO MISLEADING STATEMENTS

NO GUARANTEES

NO FALSE COMPARISONS



MAY ADVERTISE

WRITTEN, RECORDED OR
COMMUNICATION
INCLUDING PUBLIC MEDIA

•(NO INTERNET IN 1983)



ELECTRONIC



KEEP COPY OF ALL VERSIONS, ALL ADS
TWO YEARS AFTER LAST DISSEMININATION
RECORD: WHEN / WHERE USED
DISCIPLINARY ADMINISTRATOR WILL AUDIT
RULE 236



NOT PAY FOR RECOMMENDING LAWYER'S SERVICES

EXCEPT: MAY PAY COST OF ADVERTISEMENTS

EXCEPT: MAY PAY USUAL CHARGES OF NOT-FOR-

PROFIT LAWYER REFERRAL SERVICE

ALL ADS: INCLUDE THE NAME OF AT LEAST ONE

LAWYER RESPONSIBLE



RULE 7.2 – CELEBRITY ENDORSEMENTS?

KANSAS = NO PAID CELBRITY ENDORSEMENTS

MISSOURI: A COMMUNICATION IS FALSE AND MISLEADING IF IT:



CONTAINS A PAID TESTIMONIAL OR ENDORSEMENT WITHOUT CONSPICUOUS IDENTIFICATION THAT PAYMENT HAS BEEN MADE

= PAID ENDORSEMENT IS OK, IF CONSPICUOUSLY STATE PAYMENT HAS BEEN MADE (MO. RULE 4-7.1(h))

RULE 7.2 - DISCLAIMER

MANY STATES REQUIRE CONSPICUOUS DISCLAIMER:

"THE CHOICE OF A LAWYER IS AN IMPORTANT DECISION AND SHOULD NOT BE BASED SOLELY UPON ADVERTISEMENTS."

MISSOURI DOES REQUIRE – RULE 4-7.2 KANSAS DOES NOT REQUIRE



KANSAS OP. 08-03 (2008):

FLYER TO FAMILIES OF ACCIDENT VICTIMS:

"TIME MAY BE RUNNING OUT!" - WARNING RE. S/L

"BEFORE SIGNING MEDICAL RELEASE FORMS" – WARNING NOT TO SETTLE CHEAP

"INSURANCE CLAIMS FOR FAMILY MEMBERS" - ADVICE

SYMPATHY – S/L STARTS AT DATE OF DEATH



KANSAS OPINION 08-03:

ADVERTISING IS FREE SPEECH

MUST SAY: "Advertising Material" (SEE RULE 7.3)

SOON AFTER ACCIDENT, MAY BE "COERCION, DURESS OR HARASSMENT" – (SEE RULE 7.3)

ALLOW "SUFFICIENT TIME" = NOT "COERCION, DURESS OR HARASSMENT."

HOW LONG IS "SUFFICIENT TIME"?



SUMMARY OF RULE 7.2

MAY ADVERTISE VIA SOCIAL MEDIA

MUST MAINTAIN COPY ALL ADVERTISING FOR 2 YEARS

MUST NOT GIVE FEE FOR RECOMMENDING LAWYER - EXCEPT:

- •LEGAL SERVICE PLAN OR
- NOT-FOR-PROFIT OR
- QUALIFIED LAWYER REFERRAL SERVICE

MUST INCLUDE NAME OF AT LEAST ONE LAWYER RESPONSIBLE FOR ITS CONTENT IN ALL ADS

RECOMMENDEL

RULE 7.2 – NO REFERRAL FEE?

RULE 7.2 - NO PAYMENT FOR <u>RECOMMENDATION</u>

WHAT ABOUT REFERRALS?

THANK YOU GIFTS ARE COMMON

FEE SHARING

KANSAS: PERMITS FEE SHARING FOR REFERRAL IF:

TOTAL FEE REASONABLE

CLIENT ADVISED – NOT OBJECT – RULE 1.5(g)



REFERRAL FEES - MISSOURI

MISSOURI: PERMITS FEE SHARING ONLY IF:

DIVISION IS ACTUALLY <u>PROPORTIONAL</u> TO WORK DONE BY EACH

EACH LAWYER ASSUMES JOINT RESPONSIBILITY

CLIENT AGREES – CONFIRMED IN WRITING

TOTAL FEE IS REASONABLE



RULE 7.3 – SOLICITATION

NO IN-PERSON, LIVE TELEPHONE OR REAL-TIME ELECTRONIC CONTACT

TO SOLICIT PROFESSIONAL EMPLOYMENT

UNLESS: CONTACT

(1) IS A LAWYER; OR





RULE 7.3 – NO DIRECT SOLICITATION - WHY

POTENTIAL FOR OVERREACHING

IMPORTUNING BY THE TRAINED ADVOCATE

CONTACT MAY FEEL OVERWHELMED BY THE CIRCUMSTANCES



DIFFICULT TO FULLY EVALUATE AVAILABLE ALTERNATIVES

RULE 7.3 – NO DIRECT SOLICITATION - WHY

CONTACT MAY NOT USE REASONED JUDGMENT AND APPROPRIATE SELF-INTEREST

IN FACE OF LAWYER'S PRESENCE AND INSISTENCE

FRAUGHT WITH THE POSSIBILITY OF UNDUE INFLUENCE, INTIMIDATION, AND OVERREACHING



RULE 7.3 - NO DIRECT SOLICITATION

WHAT IS REAL-TIME ELECTRONIC CONTACT?

PHONE CALL = YES

TEXT = YES



CHAT ROOMS? STATES VARY (KANSAS NOT SPOKEN)

NOT FACEBOOK, X, SOCIAL MEDIA, OR BLOG POSTINGS



RULE 7.3 – SOLICITATION

NO WRITTEN, RECORDED, ELECTRONIC SOLICITATION - AND NO IN-PERSON, TELEPHONE OR REAL-TIME ELECTRONIC CONTACT EVEN IF PERMITTED ABOVE –

IF

TARGET HAS MADE KNOWN DESIRE NOT TO BE SOLICITED
OR

SOLICITATION INVOLVES COERCION, DURESS OR HARASSMENT



COMMENT [3] TO RULE 7.2

- ELECTRONIC ADVERTISING = MOST POWERFUL MEDIA FOR GETTING INFORMATION TO THE PUBLIC

- PROHIBITING TELEVISION, INTERNET, AND OTHER FORMS OF ELECTRONIC ADVERTISING WOULD IMPEDE THE FLOW OF INFORMATION

RULE 7.3 – SOLICITATION

WRITTEN, RECORDED, OR ELECTRONIC SOLICITATION

KNOWN TO BE IN NEED OF LEGAL SERVICE

MUST INCLUDE

"ADVERTISING MATERIAL" -

OUTSIDE ENVELOPE



• (UNLESS RECIPIENT IS LAWYER OR CLOSE RELATIONSHIP)



RULE 7.3 - SOLICITATION

NO SOLICITATION: IF PROSPECTIVE CLIENT HAS NOT SAID "NO SOLICITATION"

[CAN PARTICIPATE IN PRE-PAID OR GROUP LEGAL PLAN WHICH SOLICITS VIA IN-PERSON OR TELEPHONE CONTACT]

NO SOLICITING



SUMMARY OF RULE 7.3

NO IN-PERSON OR LIVE SOLICITATION:

OUNLESS LAWYER OR FAMILY/FRIEND





- •- IF TOLD "NO"
- •- IF INVOLVES COERCION, DURESS OR HARASSMENT
- •[NOT A GOOD WAY TO GET BUSINESS ANYWAY]

MUST INCLUDE "ADVERTISING MATERIAL" ON E-MAIL OR LETTER

RULE 7.4 - FIELDS OF PRACTICE

LAWYER MAY LIST AREAS OF PRACTICE ENGAGE / NOT ENGAGE

- "SPECIALIST" =
 - PATENT LAWYER
 - ADMIRALTY LAWYER
 - CERTIFIED BY APPROVED ORGANIZATION CLEARLY ID IN AD
 - \circ KANSAS = 0
 - \circ ABA = 18



RULE 7.5. - FIRM NAMES/LETTERHEADS

NO MISLEADING

NOT IMPLY GOVERNMENT

MULTIPLE STATES: LIST WHERE EACH LAWYER LICENSED

LAWYER IN PUBLIC OFFICE NOT IN FIRM NAME UNLESS ACTIVELY/REGULARLY PRACTICING IN FIRM



NOT CLAIM PARTNERSHIP IF NOT TRUE

SUMMARY: NO MISLEADING FIRM NAME OR LETTERHEAD

ELECTRONIC MEDIA ADVERTISING

RULES WERE WRITTEN IN DAYS OF NEWSPAPER AND RADIO

 \circ MRPC = 1983

SAME RULES APPLY TO ELECTRONIC ADVERTISING

•INTERNET = 1993



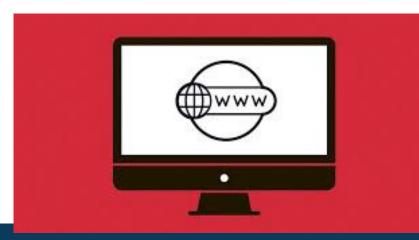
WEBSITES

EVERY FIRM HAS ONE

2016 – IN RE HOLYOAK [KANSAS]: WEBSITE INCLUDED WIFE AND HER MEDIATION SERVICES

OMITTED FACTS = MATERIALLY MISLEADING

UNCLEAR IF WIFE IS LAWYER VIOLATED KRPC 7.1



WEBSITES

2012 – IN RE. WEAVER [KANSAS]: CLAIMED FIRM = NATION-WIDE NETWORK OF ATTORNEYS

(ONLY ONE OTHER ATTORNEY)

"PROVIDE BANKRUPTCY AND OTHER LEGAL SERVICES"

(NO INTENTION OF EVER PROVIDING SUCH SERVICES)

= VIOLATED KRPC 7.1



BLOGS

BLOG ("WEBLOG") - INFORMATIONAL WEBSITE - OFTEN INFORMAL DIARY-STYLE TEXT POSTS

2013 – HUNTER V. VA. STATE BAR: BLOG IS A FORM OF LAWYER ADVERTISING

- COVERED BY THE RULES
- MUST NOT BE MISLEADING
- [MUST INCLUDE THE REQUIRED DISCLAIMER]



E-MAIL SOLICITATION

E-MAIL ADVERTISING IS PERMITTED

NOT THE PRESSURE OF REAL-TIME SOLICITATION

= IT MAY BE IGNORED

MUST CONTAIN THE LEGEND "ADVERTISING MATERIAL"

AS REQUIRED BY RULE 7.3(c)

(UTAH ETHICS OP. 02-02)



"X" - TWITTER

MAY USE TWITTER TO PROMOTE PRACTICE
BUT TWEETS MUST NOT BE MISLEADING (LIKE ANY ADVERTISING)

2015 - IN RE McCOOL (LA.)

TWEETS WERE "FALSE, MISLEADING, AND

INFLAMMATORY"

DISBARRED



WIDELY USED

LAWYER ADVERTISING = "A BILLION DOLLAR INDUSTRY"

NO LIMITS?

MORE TIME FOR VIEWER REFLECTION AND DELIBERATION

2005 – FLA. BAR V. PAPE: IMAGE OF A PIT BULL WEARING A SPIKED

COLLAR

FIRM'S PHONE NUMBER, 1-800-PIT-BULL

FOUND TO BE MISLEADING

THAT WAS 2005



2010 - ALEXANDER V. CAHILL: STATE ENJOINED DISCIPLINE TV

ADS:

JINGLES

SPECIAL EFFECTS – DRAMATIZATIONS - COMICAL SCENES

LAWYERS ACTING

PROVIDING LEGAL ASSISTANCE TO SPACE ALIENS

SLOGAN = WE ARE "HEAVY HITTERS" - "THINK BIG" - "WE'LL

GIVE YOU A BIG HELPING HAND"

2ND CIR: ALL OK



2014 - RUBENSTEIN V. FLA. BAR: TV AD LISTING "PAST PERFORMANCE OR RESULTS" = OK

2012 – BELLINSON LAW LLC V. IANNUCCI: MERE PUFFERY = OK

1990 – LIEHE V. NORTHERN CAL. COLLECTION SERV.: BRAGGING ABOUT LAWYER'S SKILLS AND OFFERINGS, INCL. COST ADVANTAGES = OK

2011 – PUBLIC CITIZEN V. LA. BOARD: MOTTOS OR NICKNAMES THAT STATE OR IMPLY AN ABILITY TO OBTAIN RESULTS – NOT OK



SOME STATES REQUIRE TV ADS TO BE SUBMITTED FOR PRIOR APPROVAL

FLORIDA, CONNECTICUT

KANSAS NOT REQUIRE – COMMENT:

- **BURDENSOME**
- **EXPENSIVE [TO STATE]**
- DOUBTFUL CONSTITUTIONALITY



SPIFFS AND PRODUCTS

SPIFF = SALES PERFORMANCE INCENTIVE FUND

• FIRM LOGO – CUPS – BAGS - SHIRTS

FIRM'S LOGO:

- NOT EXTOL FIRM'S EXPERTISE
- NOT ENCOURAGE CONTACT THE FIRM
- DOES NOT REQUEST EMPLOYMENT

= OK

NOT NEED TO CONTAIN THE WORDS "ADVERTISING MATERIAL" ON THEM

2002 - UTAH ETHICS OP. 02-02



- 1.DO NOT MISLEAD
 - a. DO NOT STATE FALSE OR MISLEADING FACTS
 - b. DO NOT OMIT FACTS NECESSARY TO MAKE THE STATEMENT TRUE



- 2. DO NOT CREATE UNJUSTIFIED EXPECTATIONS
 - a.DO NOT GUARANTEE RESULTS
 - b.DO NOT MAKE A COMPARISON TO OTHER ATTORNEYS UNLESS OBJECTIVELY JUSTIFIED
- 3. KEEP COPIES OF ALL ADVERTISING FOR TWO YEARS
- 4. INCLUDE THE NAME OF AT LEAST ONE LAWYER ON ALL ADVERTISING





- 5. NO IN-PERSON, REAL TIME SOLICITATIONS (INCLUDING TELEPHONE AND ELECTRONIC)

 EXCEPT TO ANOTHER ATTORNEY, FAMILY MEMBER, OR PERSONAL/BUSINESS FRIEND
- 6. NO IN-PERSON, REAL-TIME SOLICITATION OF ANYONE IF THE TARGET HAS COMMUNICATED A DESIRE NOT TO RECEIVE SOLICITATION OR IF IT INVOLVES COERCION, DURESS OR HARASSMENT

- 7. DO INCLUDE "ADVERTISING MATERIAL" ON ALL SOLICITATIONS (NOT ADS)
- 8. DO INCLUDE FIELDS WHERE LAWYER PRACTICES/DOES NOT PRACTICE; LIST PATENT ATTORNEY OR ADMIRALTY OR CERTIFIED BY RECOGNIZED AGENCY
- 9. DO NOT USE A MISLEADING FIRM NAME OR INCLUDE THE NAME OF A DISBARRED ATTORNEY



RULES = LOWER LIMIT

SHOULD ETHICAL, PROFESSIONAL LAWYER ASPIRE TO MORE?

PROFESSIONALISM

DIGNITY

ASPIRE TO MORE THAN AVOIDING DISCIPLINE



LAWYER ADVERTISING – BEYOND THE RULES



ABA ASPIRATIONAL GOALS FOR LAWYER ADVERTISING

- INHERENT DIGNITY AND PROFESSIONALISM
- INSPIRE PUBLIC CONFIDENCE
- COMMITMENT
- LEARNED PROFESSION

ABA ASPIRATIONAL GOALS FOR LAWYER ADVERTISING

- 1. PUBLIC'S CONFIDENCE
- 2. PUBLIC UNDERSTAND LEGAL RIGHTS
- 3. DIGNITY AND GOOD TASTE
- 4. NOT BE AMBIGUOUS OR CONFUSING
- 5. DESCRIBE FEES AND COSTS



ABAASPIRATIONAL GOALS FOR LAWYER ADVERTISING



- 6. DRAMATIC, UNSEEMLY, HAWKISH, SLAPSTICK, OUTLANDISH
- 7. UNDERSTANDABLE, RESPECTFUL AND APPROPRIATE
- 8. PROFESSIONAL CONSULTANTS
- 9. COMPETENT TO HANDLE
- 10. AFFORDABLE TO THE PUBLIC



ABA ASPIRATIONAL GOALS FOR LAWYER ADVERTISING

HTTPS://WWW.AMERICANBAR.ORG/GROUPS/PROFES
SIONAL RESPONSIBILITY/RESOURCES/PROFESSIONA
LISM/PROFESSIONALISM ETHICS IN LAWYER ADVE
RTISING/ABAASPIRATIONALGOALS/



CONCLUSION

FREE SPEECH

NO BLANKET SUPPRESSION"

BUT: REASONABLE REGULATION

= RULES 7.1 – 7.5, KRPC

FLAGRANT - UNPROFESSIONAL

WE ARE IN THIS TOGETHER - BEYOND THE RULES

ABA ASPIRATIONS

DIGNIFIED AND RESTRAINED



THANK YOU



NICK BADGEROW
SPENCER FANE LLP
OVERLAND PARK, KANSAS