

Chapter 3

Ethical Misadventures in the Practice of Law—Presentation Slides

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Portland, Oregon

MCLE FORM 1: Recordkeeping Form (Do Not Return This Form to the Bar)

Instructions:

Pursuant to MCLE Rule 7.2, every active member shall maintain records of participation in **accredited** CLE activities. You may wish to use this form to record your CLE activities, attaching it to a copy of the program brochure or other information regarding the CLE activity.

Do not return this form to the Oregon State Bar. This is to be retained in your own MCLE file.

Name:		Bar Number:	
Sponsor of CLE Activity: OSB Professional Liability Fund/OSB SSFS			
Title of CLE Activity: Ethical Misadventures in the Practice of Law		Program Number: 558*2194	
Date:	Location:		
<input checked="" type="checkbox"/> <i>Activity has been accredited by the Oregon State Bar for the following credit:</i> ____ General 1 ____ Prof Resp-Ethics ____ Access to Justice ____ Abuse Reporting ____ Practical Skills ____ Pers. Mgmt/Bus. Dev.*	<input type="checkbox"/> Full Credit. <i>I attended the entire program and the total of authorized credits are:</i> ____ General ____ Prof Resp-Ethics ____ Access to Justice ____ Abuse Reporting ____ Practical Skills ____ Pers. Mgmt/Bus. Dev.*	<input type="checkbox"/> Partial Credit. <i>I attended _____ hours of the program and am entitled to the following credits*:</i> ____ General ____ Prof Resp-Ethics ____ Access to Justice ____ Abuse Reporting ____ Practical Skills ____ Pers. Mgmt/Bus. Dev.*	

*Credit Calculation:

One (1) MCLE credit may be claimed for each sixty (60) minutes of actual participation. Do not include registration, introductions, business meetings and programs less than 30 minutes. MCLE credits may not be claimed for any activity that has not been accredited by the MCLE Administrator. If the program has not been accredited by the MCLE Administrator, you must submit a Group CLE Activity Accreditation application (See MCLE Form 2.)

Caveat:

If the actual program length is less than the credit hours approved, Bar members are responsible for making the appropriate adjustments in their compliance reports. Adjustments must also be made for late arrival, early departure or other periods of absence or non-participation.

*Personal Management Assistance/Business Development. See MCLE Rule 5.13 and Regulation 5.300 for additional information regarding Category III activities. Maximum credit that may be claimed for Category III activities is 6.0 in a three-year reporting period and 3.0 in a short reporting period.

Oregon State Bar


Ethical Misadventures in the Practice of Law

(And What You Can Learn From Them...)

David J. Elkanich
July 7, 2017
Solo and Small Firm Conference 2017
Riverhouse on the Deschutes, Bend, Oregon

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No. 1. Late night internet stalking is never a good idea...

IN THE SUPREME COURT OF THE STATE OF OREGON
In re Complaint as to the Conduct of
JIM CARPENTER,
Accused.
(OSB 02-32; SC S50321)
En Banc



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Lessons learned

1. Always a Lawyer (RPC 8.4(a)(3))
2. Nothing is anonymous

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No. 2. The “E” in email is not for “easy”.

» Dear Mr. Berenson...

Enclosed, please find a lot of confidential information about our client’s discussion regarding settlement or civil and criminal penalties for its alleged inappropriate marketing of an antipsychotic drug...

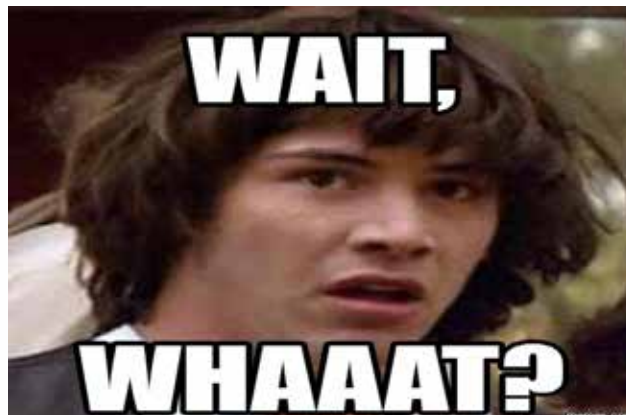
Then...

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Settlements

Eli Lilly Considers \$1B Zyprexa Settlement



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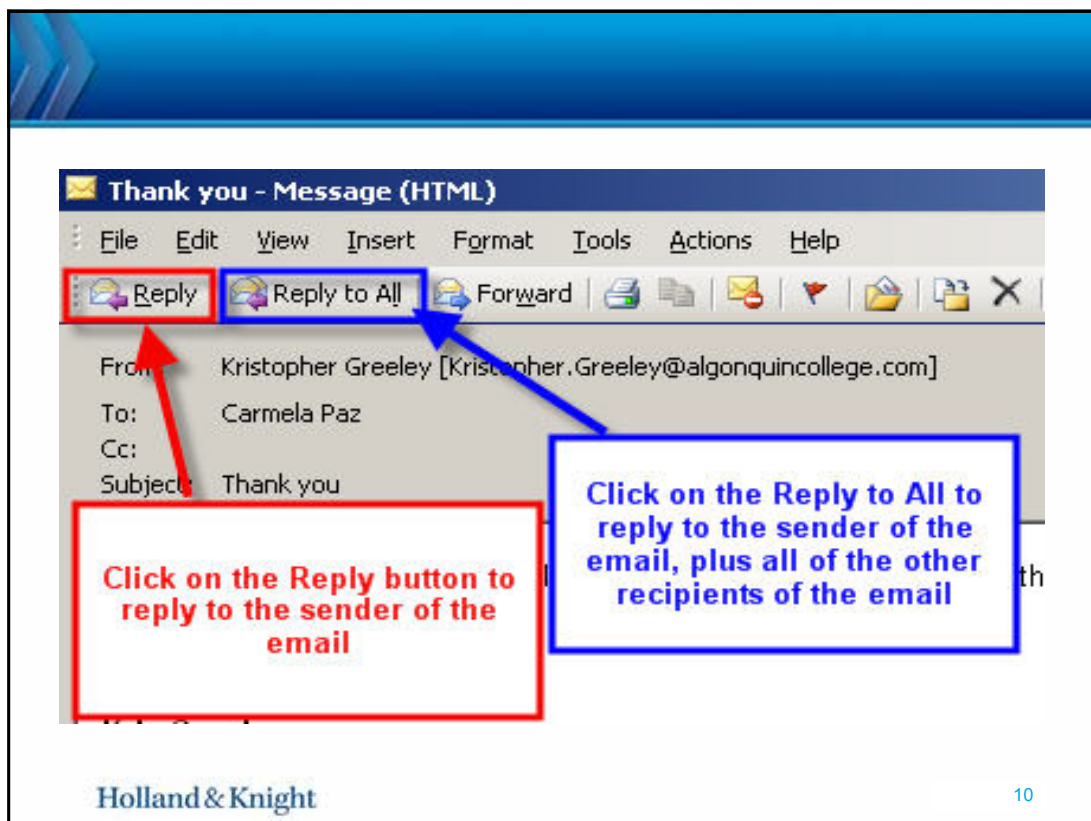
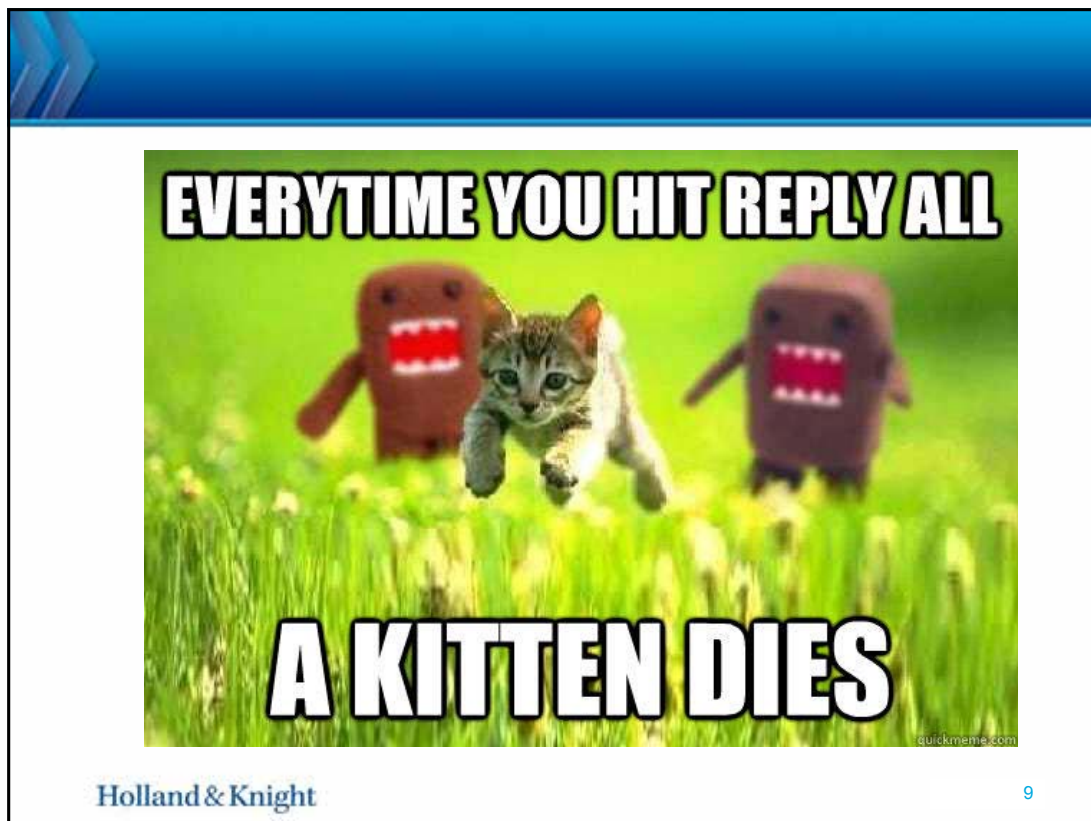
Lessons learned

1. Send emails to the right person (RPC 1.1)
2. Talk to your client about emails and how we communicate (RPC 1.4, 1.6(a))

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No. 3. Honesty remains an essential ingredient.



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Lessons learned

1. Don't be false or misleading (RPC 7.1)
2. Advertising rules apply online

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No. 4. An Illinois blogger went a bit too far

- » Judge was “a total a—hole”
- » Another judge was “Judge Clueless”
- » Failed to inform the judge of her client’s false statements; the lawyer described her conversation with the client:
 - “Huh? You want to go back and tell the judge that you lied to him, you lied to the pre-sentence investigator, you lied to me? And you expect what to happen if you do this? I’ll tell you what would happen; the sentence just pronounced would be immediately vacated and you’d go to prison, that’s what would happen.”

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- » #127409 (the client's jail identification number) This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because "he's no snitch." I managed to talk the prosecutor into treatment and deferred prosecution, since we both know the older brother from prior dealings involving drugs and guns. My client is in college. Just goes to show you that higher education does not imply that you have any sense.
- » "Dennis," the diabetic whose case I mentioned in Wednesday's post, did drop as ordered, after his court appearance Tuesday and before allegedly going to the ER. Guess what? It was positive for cocaine. He was standing there in court stoned, right in front of the judge, probation officer, prosecutor and defense attorney, swearing he was clean and claiming ignorance as to why his blood sugar wasn't being managed well.

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Lessons learned

1. Be mindful of your social media
2. Confidentiality applies online

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No. 5. Being ethical even with older clients.

PROVIDENCE, R.I. — Joseph Caramadre contends he was a philanthropist and a clever lawyer, offering \$2,000 payments to people who were dying. The United States attorney contends that he was a scam artist, preying on the very ill and getting rich by defrauding insurance companies.

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Lessons learned

1. Don't cheat, lie and steal
(RPC 8.4(a)(2), (a)(3))
2. Think about necessary due diligence when working with others

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No. 6. Spoliation is always spoliation.

- ❑ *Lester v. Allied Concrete Co.*
- ❑ Discovery request for FB
- ❑ P Lawyer advised client to “clean up” the FB page because “we do NOT want blow ups of other pics at trial so please, please clean up your facebook and myspace.”



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Lessons learned

1. Must be competent with eDiscovery and technology (RPC 1.1, 1.6)
2. Cannot obstruct another's access to evidence (RPC 3.4(a))

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The very, very basics of eDiscovery

- ☐ Know the technology and the issues OR utilize those who do know
- ☐ The Basics: preserve, collect, produce ESI
 - ☐ Litigation holds
 - ☐ Defensible eDiscovery collection and production practices
 - ☐ Monitor client compliance



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Duh.



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No. 7. You can't tell client secrets even to your best friend...



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Data security can take different forms...

From: The Office of The State Attorney <com.department@outlook.com>
Sent: Wednesday, November 30, 2016 9:37 AM
To: [REDACTED]
Subject: The Office of The State Attorney Complaint

Dear Bar Member:

A complaint has been filed against your Business.

Enclosed is a copy of the complaint which requires your response. You have 10 days to file a rebuttal if you so desire.

You may view the complaint at the link below.

[complaint88947.pdf](#)

Rebuttals should not exceed 15 pages and may refer to any additional documents or exhibits that are available on request.

The Office of The State Attorney cannot render legal advice nor can The Office of The State Attorney represent individuals or intervene on their behalf in any civil or criminal matter.

Please review the enclosed complaint. If filing a rebuttal please do so during the specified time frame.

Sincerely,

The Office of The State Attorney

This document and any files transmitted with it are confidential and intended solely for the use of the individual or entity to whom they are addressed. If you have received this email in error, please notify the system manager. This message contains confidential information and is intended only for the individual named. If you are not the named addressee, you should not disseminate, distribute or copy this email.

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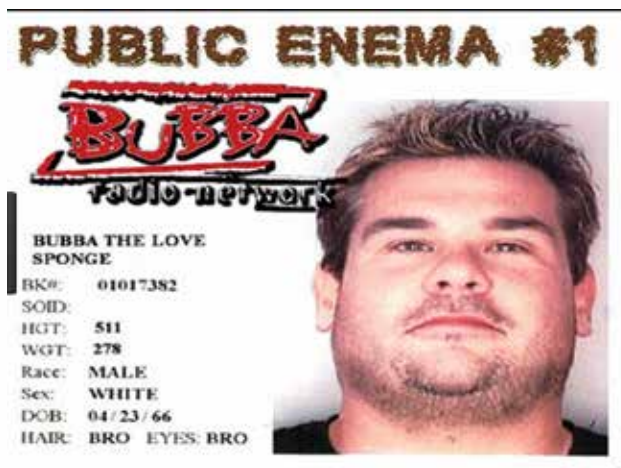
Lessons learned

1. Be vigilant with client confidentiality
2. Do not click on unknown links – but either way, know who you are going to call at 1 in the morning

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No. 8. Some defenses should not be pursued.



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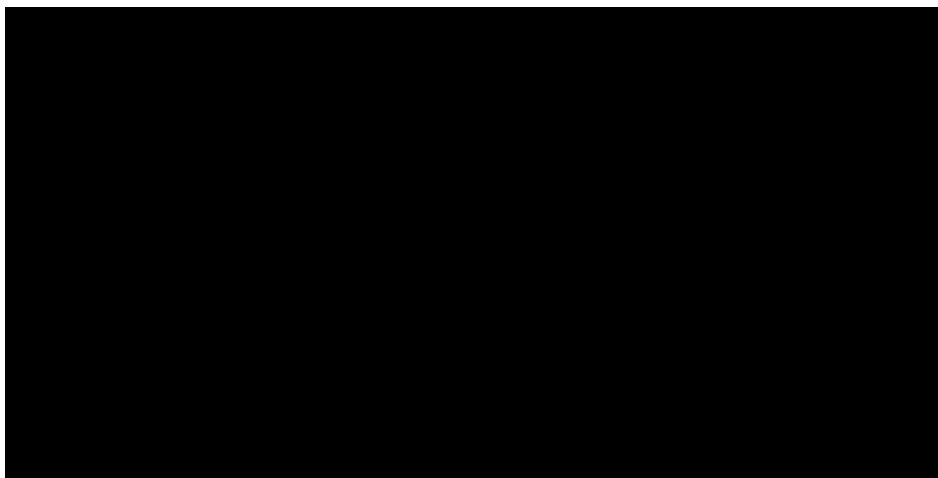
Lessons learned

1. Obey the law (RPC 8.4(a)(2))
2. Don't falsify evidence (RPC 3.4(b))

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No. 9. Should the 26-year secret have been kept?



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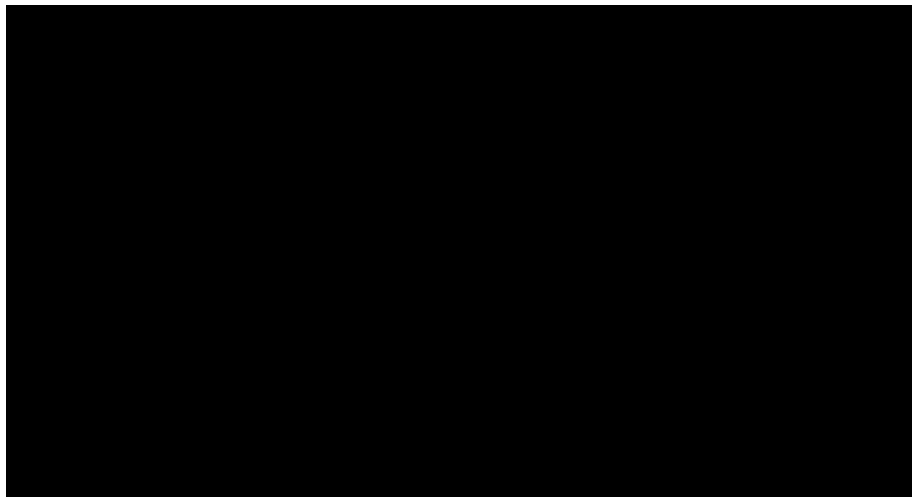
Lessons learned

1. Like it or not sometimes, the duty of confidentiality is the heartbeat of the RPCs.
2. There are some exceptions – in Oregon, they are generally not mandatory. (RPC 1.6(b))

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No. 10. And a good note to end on...



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» David Elkanich is a partner in Holland & Knight's Portland office, where he focuses his practice on litigation, with an emphasis on legal ethics and risk management. Mr. Elkanich advises both lawyers and law firms in a wide range of professional responsibility matters. He has extensive experience defending lawyers in attorney discipline matters, and in related litigation, such as sanction, withdrawal and disqualification motions, and fee disputes.

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