

Chapter 7

The Sweet and Sour of Solo and Small—Presentation Slides

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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: Ethics - The Sweet and Sour of Solo and Small		Program Number: 558*2196	
Date:	Location:		
<input checked="" type="checkbox"/> <i>Activity has been accredited by the Oregon State Bar for the following credit:</i> ___ General <u> 1 </u> 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

The Sweet & Sour of Solo & Small

David J. Elkanich

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Solo and Small Firm Conference 2017
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The Practice of Law is Hard.

- We are not perfect
- Even if we were, we would still be at risk
- Bad things happen to good people
- Murphy's Law applies to lawyers
- So do hubris and overconfidence
- One key question is therefore what you have in place to catch/protect against the consequences of foreseeable risk



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No. 1. Managing your clients and your schedules.

Sweet: Freedom to manage own schedule.

Sour: Busy. Wear multiple hats. Easy to put matters on backburner or not have a disciplined schedule.



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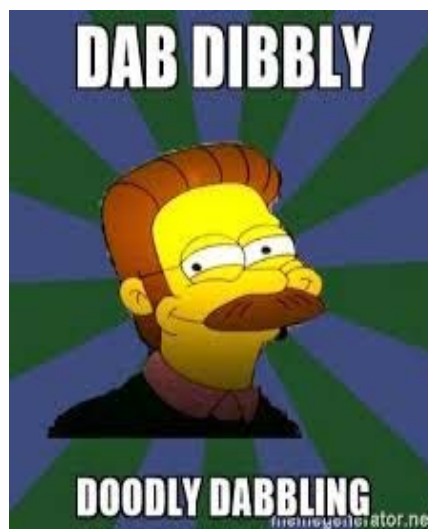
- RPC 1.3: Don't neglect your client's legal matter.
- RPC 1.4: Communicate with your client
 - Keep them reasonably informed about the status
 - Promptly comply with reasonable requests for info
 - Explain it so the client can make informed decisions

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No. 2. Red flags, door law, and dabbling

- » Sweet: Can pick your clients and can turn the spigot on and off whenever you want.
- » Sour: May lead to “dabbling” and taking on too many red flag clients.



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RPC 1.1

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Cmt [2] to the ABA Model Rule

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

Dabbling concerns

- » Questions regarding competency
 - Always playing catch-up. Exhausting.
- » May lead to increased bills for clients
 - Do you decide not to bill or bill at a lower rate?
- » Dabbling prevents you from charging high-dollar rates/fees.
 - Never become an expert.
- » Difficult to effectively market your services
 - What do you do? How do you advertise.
 - What is your elevator speech.

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Red flag clients

- » Musical firms
 - » Fee nitpicking
 - » Secret / hidden motive
 - » High pressure / demanding client
 - » Over-involved and obsessed client
 - » Dependent / depressed client
 - » The “know-it-all” client
 - » The “sky is falling” client
 - » The “it is everyone else’s fault” client
-
- » Discovery difficulties



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No. 3. Clients and money – formalizing the informal.

- » Sweet: Your clients trust you; the relationships may be more informal. Fee agreements don't have to be 35 pages.
- » Sour: May be too informal and money issues are the easiest for the Bar to prove.



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EXHIBIT A

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- » Engagement
 - Set boundaries / expectations / limited scope (see RPC 1.2(b))
 - Outline fees / costs / billing practices
 - Other terms? E.g., interest rate, arbitration, withdrawal, etc.
 - Communicate clearly

- » Must have fee agreement:
 - Contingency fees – see ORS 20.340
 - “Earned upon receipt” fees – see Oregon RPC 1.5(c)(3)

- » No contingency in criminal defense/domestic matters RPC 1.5(c)

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Updating your fee agreement for “fixed” or “flat” fees

- RPC 1.5(c)(3): a fee denominated as "earned on receipt," "nonrefundable" or in similar terms unless it is pursuant to a written agreement signed by the client which explains that:
 - (i) the funds will not be deposited into the lawyer trust account, and
 - (ii) the client may discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee if the services for which the fee was paid are not completed.

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Amending fee agreement mid-stream carries risk.

- RPC 1.5(a): A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee or a clearly excessive amount for expenses.
- OSB Formal Ethics Op. No. 2005-97: “A modification of a fee agreement in the lawyer’s favor requires client consent based on an explanation of the reason for the change and its effect on the client.”

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Trust account transfers

- » No “cushions” to avoid overdrafts. See OSB Ethics Op. 2005-145
- » Not required to wait reasonable period of time after invoice (but can).
- » Funds in trust may be withdrawn when earned if not aware of any dispute. RPC 1.15-1(e).
- » If funds in dispute, can’t withdraw. See RPC 1.15-1.
- » But don’t have to replenish funds that become in dispute after withdrawal.

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No. 3. Dealing with contract lawyers.

Sweet: Don't have staff.
Can use contract lawyers.

Sour: Can use contract lawyers. How to bill for them? How to contract with them?

Attorney's Sample File
300 East North Street
Orlando, FL 32814

Invoice for Professional Services

Client: 018810008
3507 Shadyloke Place
Orlando, FL 32814

Date: 6/22/13
Invoice #: 3
Meter:

Date	Description	Hours/Qty	Rate	Amount
6/22/13	Meeting with client to review information about the letter re: construction	2.0	250.00	500.00
6/22/13	Legal research about something	1	250.00	250.00
6/22/13	Preparation of some documents	0.5	250.00	125.00
6/22/13	FC with client regarding something	0.5	250.00	125.00
			7.00%	8.75
Total				\$1,008.75
Phone # 354-251-1222				90.00
Fax #				90.00
E-mail				\$1,098.75

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Primary considerations with contract attorneys:

- » Do you need to obtain client consent to a fee split? See RPC 1.5(d).
 - Bar thinks you do.
 - Recent Trial Panel Opinion disagrees.
 - Bar did not appeal the decision.
- » Can you surcharge the contract lawyer's rate?
 - See ABA Formal Opinion 00-420, which concludes that surcharges are permissible if the contract attorney is billed as "legal services" and not "an expense."



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- » How much supervision do you need to provide?
 - See RPC 5.1 – which deals with ordering, ratifying, or failing to mitigate/take remedial action.

- » Confidentiality. Limit access to necessary client files and materials.

- » Conflicts. Imputation “should not” apply.
 - Must still run conflicts – 1.7, 1.9

- » Be clear with the contract attorney.
 - Discuss scope, rate/billing, location, client file access and ensure software computability.

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Difference with “of counsel” relationships.

- » What is an “of counsel”?
 - A close and continuing relationship bw lawyer and firm. See RPC 7.5.

- » Can a lawyer be “of counsel” to more than one firm?
 - Yes, see OSB Formal Ethics Op.

- » How are conflicts dealt with between “of counsel” and the firm?
 - Imputed! - it’s a two way street.
 - See RPC 1.0(d) & OSB Formal Ethics Op. 2005-155

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No. 4. Re-think office space and office sharing

- » Sweet: creative, geographically limitless, less expensive space, collaborate, better use of resources.
- » Sour: ethical concerns, from confidentiality to possible conflicts.

Law Firm
Suites | SHARED
OFFICE SPACE
FOR LAWYERS

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Brick &
Mortar | Virtual
Law
Office

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- » You are not the same firm – imputation does not apply (RPC 1.0(d))
 - Don't suggest that you are or mislead your relationships (RPC 7.5(a))

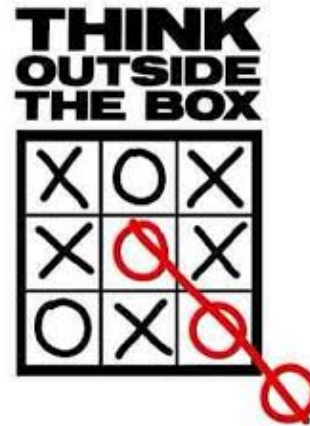
- » Can represent opposing parties if
 - you both are not part of the same firm
 - respect confidentiality of information (and employees)
 - keep respective files separately

- » Use the same file room? Generally yes, but:
 - Segregate and limit access
 - To be observed by all

- » Same telephone system / staff? Generally yes but:
 - Messages, mail, etc., containing confidential information should not be given by shared personnel.
 - See OSB Formal Ethics Op 2005-50

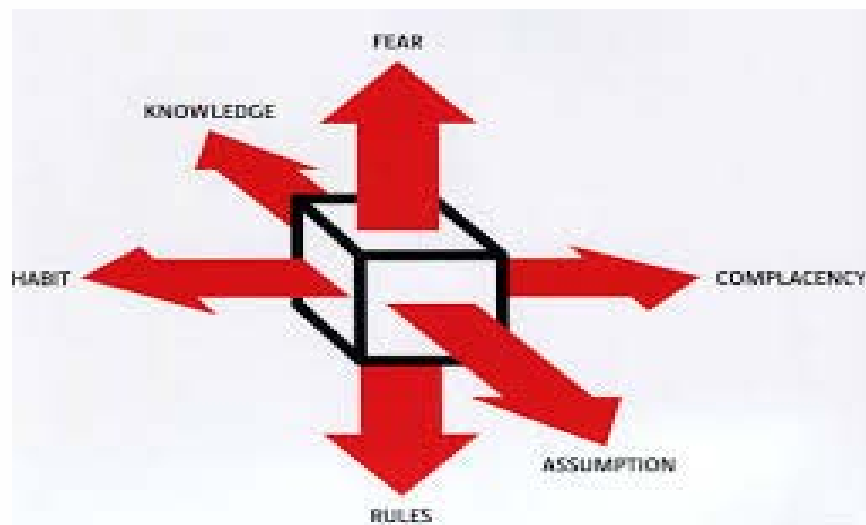
No. 5. #Innovation in the practice of law

- » Sweet: you have more flexibility to #reinvent how you practice and to #innovate the practice of law.
- » Sour: you will face ethical speedbumps along the way.



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- » Technology is driving the change. How can it make you a better lawyer? Use tech to:
 - Market your legal services
 - Take advantage of commoditization and automation software
 - Deliver better services to clients
 - Video meetings
 - Client portals and cloud-based management
 - AI and machine learning
 - Force collaboration (and interactive work forces)

- » But innovation comes in other forms too.
 - Billing metrics and considering value for services
 - Ownership structures
 - Naming creativity
 - Innovative work spaces
 - Millennial recognition, interaction and involvement

Concerns with innovation

- » Same concerns we have been talking about.
- » Competence – RPC 1.1
 - Understanding the technology. What you need. How to use it.
- » Confidentiality – RPC 1.6
 - How to take steps to preserve client information.
- » Communications with client – RPC 1.4
 - How to talk to each other? What are the risks?

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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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