

Oregon
State
Bar

CLE
Seminars

Nobody Told Me There'd Be Days Like These: Stress, Pressure, and Ethical Decision-Making in the Practice of Law



Friday, September 6, 2019
8:30 a.m.–11:45 a.m.

2 Ethics credits and 1 Mental Health and
Substance Use credit

**NOBODY TOLD ME THERE'D BE DAYS LIKE THESE: STRESS, PRESSURE,
AND ETHICAL DECISION-MAKING IN THE PRACTICE OF LAW**

The materials and forms in this manual are published by the Oregon State Bar exclusively for the use of attorneys. Neither the Oregon State Bar nor the contributors make either express or implied warranties in regard to the use of the materials and/or forms. Each attorney must depend on his or her own knowledge of the law and expertise in the use or modification of these materials.

Copyright © 2019
OREGON STATE BAR
16037 SW Upper Boones Ferry Road
P.O. Box 231935
Tigard, OR 97281-1935

TABLE OF CONTENTS

Schedule	v
Faculty	v
Getting (Back) on Track (and Staying There): Practical Steps to Maintaining Your Ethical Commitments—in the Face of Ordinary—and Extraordinary—Stress	1
Strive for Self-Awareness	1
Recognize the Cumulative Impact of Everyday Choices	2
Find, or Help Create, a Healthy Firm Culture	2
Maintain a Healthy Perspective	3
Take Inventory	4
Pay Attention to Your Thoughts	4
Recognize the Physical Dimension of Your Life	5
Engage More Fully and Purposefully in Positive, Healthy, Nondemanding Relationships	6
Make Regular Time for the Kinds of Things That Move You, Refresh You, or Nourish Your Soul	6
Above All, Don't Try to "Fly Solo"	7
It Takes Determination and Practice for a New Behavior to Become a Regular Habit	7
"Nobody Told Me There'd Be Days Like These!"	9
How's Your Train Running?	9
Appendix I: Selected Oregon Rules of Professional Conduct Potentially Applicable to Kirk Ellis's Conduct	11
Appendix II: Resources for Lawyers	15
Oregon	15
National	16

SCHEDULE

Presented by Michael Kahn, *ReelTime CLE, Charlotte, NC*

7:45 Registration

8:30 Nobody Told Me There'd Be Days Like These: Stress, Pressure, and Ethical Decision-Making in the Practice of Law

Most serious legal malpractice claims and state bar disciplinary actions are brought for clear breaches of obvious, well-defined ethical obligations. Using an original short film as a springboard for a roundtable discussion with Michael Kahn and local ethics experts, this engaging and interactive program provides a fresh and practical perspective on the fundamental question, “why do good lawyers go bad?” Explore ethical decision-making and the numerous sources of stress that impact an attorney’s mental health and the ability to competently practice law against a backdrop of Oregon’s legal ethics rules.

(One 15-minute break will be taken.)

11:45 Adjourn

FACULTY

Michael Kahn, *ReelTime CLE, Charlotte, NC.* Mr. Kahn holds a J.D. from Dickinson School of Law and practiced with the New Jersey Attorney General’s Office for six years. He left the practice of law in 1991 and was the Assistant Director of Career Services for Tulane University School of Law. Mr. Kahn obtained his M. Ed. in Counseling from UNC–Greensboro in 1994 and then became a Licensed Professional Counselor in North Carolina. After relocating to Oregon in 2012, he served as an Adjunct Professor at Lewis & Clark Graduate School of Education & Counseling and continued his speaking career. Mr. Kahn resides in Vancouver, BC, and presents training seminars and workshops on legal ethics, grief, wellness, diversity and inclusion, and other topics for attorneys and mental health professionals throughout the U.S. and abroad, including for the U.S. Army.



Getting (Back) on Track (and Staying There)

Practical Steps to Maintaining Your Ethical Commitments— in the Face of Ordinary--and Extraordinary--Stress

- **Strive for Self-Awareness.** Some level of stress is to be expected in the practice of law, as in most any professional job. But attorneys are especially prone to experiencing a chronically high level of stress, and doing nothing (or worse yet, extremely unhealthy things) to cope with it. The trouble is that not only does chronic stress lead to debilitating health effects, but beyond a certain level, stress impairs our higher ordered reasoning processes. When we are in “survival mode,” and “flight” or “flight” feel like the only options, we are in particular danger of making short-sighted decisions—and possibly disastrous ones. Were he not operating under tremendous financial and relational pressure, it is unlikely that Kirk would consider entering a settlement agreement against his client’s express wishes—even for a moment. It is therefore crucial for attorneys to pay attention to the sources of stress, fear, pressure, or compulsions that may affect our ethical decision-making. Towards that end, consider the following questions:
 - What are the warning signs that I am under stress, pressure, anxiety or fear? What do I do with these emotions or sensations when I realize that they are at work? Is there anyone helpful I can talk to about it?
 - Which sources of stress are legitimate, and to be expected in my practice?
 - Which sources of stress should not be allowed to exercise such control over my life or work?
 - How do I maintain my sense of ethics, integrity, and presence of mind, in the face of regular or ordinary stress? What about in the face of *extraordinary* stress?



- **Recognize the cumulative impact of everyday choices:** Grossly unethical behavior does not usually “appear” out of the blue. Indeed, Kirk Ellis did not wake up this morning and say “I think I’ll try to train wreck my entire legal career today.” Rather, the choices he has made, or is tempted to make, in the course of this day were influenced by numerous smaller decisions that he and his wife had made long before this situation arose. All too often, the road to unethical and unprofessional conduct is made up of many small, incremental decisions over time, rather than one or two monumental choices. We must remain cognizant of this fact, and committed to guarding against incremental erosion of our ethical standards. Thus, we suggest the following:
 - Be rigorously ethical with the “small things,” even when you are tempted to think “no one will know,” or “no harm, no foul.”
 - A good rule of thumb is to “DO WHAT’S HARDER WHEN IT’S EASIER!” Untangling one lie or mistake is ultimately simpler than building a house of cards--only to see it fall.

- **Find, or help create, a healthy firm culture:** Mistakes will happen in the practice of law, as in life. The culture of a firm or office is determined in part by the reactions to those mistakes, especially by those in charge—such as Kirk’s partners. We can’t address problems that we don’t know about, and we won’t know what folks are afraid to tell us, often until it is too late. Which of the following sounds more like your workplace? Which would you prefer? What can you do to bring about that climate?
 - Are errors viewed as monumental, frequently blown out of proportion, or otherwise handled in a way that is undignifying? Do folks know that they’d better “toe the line,” and fear the repercussions when they don’t?
 - Or are mistakes accepted and understood as a challenge that can be met? Are those who fail shamed, privately or publicly? Are they given support, constructive feedback, and opportunities for improvement?



- **Maintain a healthy perspective:** What we desire (or expect, or demand) from the practice of law has a big impact on how we act, and the choices that we make. One of Kirk’s most fundamental problems is that he does not seem to be very good at delivering bad news, planning ahead, or asking for help (at least, not until it is nearly too late for help to do any good). His desire to maintain his “image” as a competent lawyer and a good provider for his family is leading him down some paths that do not appear to be very well aligned with the realities of his life.

Similarly, for us, any core value that we hold stronger than our commitment to ethical integrity may end up “driving the train” of our decision-making. Thus, it is essential that we stop and evaluate our most deeply held desires and motives, and give serious thought to how they might be in play in a given situation. However, it takes determination and reflection to discern what one is really aiming for in a given situation. Consider the following questions (and if you are brave, talk through them with a trusted friend or mentor):

- What are my real “core values”? What overall goal or purpose is informing--or even dictating--my day to day professional choices? Is it getting (or saving) money? Reputational status? Comfort or ease? A sense of control? Approval in relationships? Or something else?
- What principle, or object, or goal, is so important in my life that, when I fear losing it, I am more liable to lose my ethical moorings? (Or, put another way, “What makes me angry?”)
- What am I living for? Why do I get up every morning and do what I do? Why am I in the practice of law in the first place? What do I truly need to be happy, fulfilled, or OK with myself?
- What is my definition of “success”? Of “happiness”? Are these goals defined in such a way that I can still pursue and maintain them even amidst the inevitable ups and downs of practicing law?



- **Take Inventory.** Seeking perfect balance between your personal and professional lives may be an exercise in futility. Instead, consider the idea of there being a rhythm to your life: periods of engagement, which may be intense as needed, but alternated with regular periods of reflection, recreation, and rest. Here are a few questions to consider in evaluating how well the rhythm of your professional life matches your personality, temperament, and desires:
 - Do I consistently have enough energy for things that are important to me? Where, when, or while doing what activity do I tend to run out of energy most frequently? What gives me energy and engages me? How often am I doing those things?
 - If I could have two extra hours in a day, what would I spend them on?
 - Do I have mental space to reflect on what I have been doing, and to proactively plan what I need to do next?? How often am I able to take a step back periodically and assess what's working and what is not?
 - What are the 3-5 things I need in my life to be happy and healthy (i.e. having dinner with my kids most nights, a regular "date night" with my spouse, sleeping 8 hours etc.) What can I do to ensure that these things happen?
- **Pay attention to your thoughts.** No one else talks to you more than you do. Would you continue to spend time with any other "friend" that constantly ran you down, or focused on your flaws? Watch out for negative "self-talk" that interferes with self-care.
 - What are the "should" statements that prevent you from leaving the office earlier, saying "no" to requests from colleagues, or taking a lunch break?
 - Notice when overly critical self-talk may be affecting your mood, or contributing to habits you would like to break.
 - The study and practice of law trains us to be left brained/analytical. Give yourself permission (sounds odd, doesn't it?) to feel your emotions, because they can provide valuable information.



- **Recognize the physical dimension of your life. Yes, we lawyers work primarily using our brains, but the brain is interconnected with the body, and therefore how you treat your body (proactively and reactively) has a profound impact on how well your brain functions). Consider the following simple suggestions:**
 - Exercise regularly and remain physically active throughout the day (i.e. use the stairs, park farther from the office door when weather permits), but not close to bedtime.
 - When taking up exercise, choose an activity that you truly enjoy--not just something that you think you “should” do (or see other folks doing) to keep “fit.” The more you have a healthy passion for the activity, the less you will have to “make yourself” do it.
 - Avoid high caloric foods. Instead, eat a healthy diet with fruits and vegetables, and a good source of protein—especially early in the day.
 - Take short breaks when working and/or studying.
 - Get enough sleep. If you have trouble falling asleep, make your room completely dark. Reduce brightness of lights as bedtime approaches, then brighten in a.m. Unplug or power off all screens or devices at least 20 min before you want to be asleep. Taking a hot bath or shower prior to bedtime may also help you fall asleep.
 - Minimize intake of caffeine, stimulants, and alcohol.
 - Practice the “4 x 7 x 8” exercise or any deep breathing exercise. It is physiologically impossible to stay anxious while deep breathing.



- **Engage more fully and purposefully in positive, healthy, non-demanding relationships.** Law is a service profession, and you have plenty of people who need or require of you. Look for positive ways to engage with the people in your life that you enjoy.
 - Spend time with friends. For many of us, “social time” is the first thing eliminated when under stress. Human beings simply cannot bond as well over the phone, or by texting, chatting, or emailing.
 - Avoid distractions that appear to offer a temporary escape, but provide little or no enduring value. If you notice yourself drawn into “flipping channels” or excessive internet surfing (e.g., spending hours on your iPad, or social media sites like Facebook or Twitter, or plowing through 5 or more episodes of a show on Netflix at one sitting), ask yourself if that is really how you want to allocate your time.
- **Make regular time for the kinds of things that move you, refresh you, or nourish your soul.** In *Dead Poets’ Society*, Mr. Keating said, “We read and write poetry because we are members of the human race and the human race is filled with passion.... Poetry, beauty, romance, love, these are what we stay alive for.” Would bringing more of the arts into your life improve your wellness? Consider these other quotes in that regard:
 - “Music is a basic need of human survival. Music is one of the ways we make sense of our lives, one of the ways in which we express feelings when we have no words, a way for us to understand things with our hearts when we cannot with our minds.” Karl Paulnack, Dean, Ithaca College School of Music
 - “Art enables us to find ourselves and lose ourselves at the same time.” Father Thomas Merton



- **Above all, don't try to "fly solo":** Isolation can increase stress, and robs us of valuable resources that may be available to deal with it well. As the final film vignette ends, Kirk is on the verge of possibly committing a serious breach of his ethical obligations. But notice that not once in this horrible train-wreck of a day does he consult with another attorney regarding his available options, or the potential consequences of his actions. In order to protect ourselves against rationalizing a bad course of behavior, perhaps without even realizing that we are doing so, it is imperative to have other people with good ethical moorings (and ideally not embroiled in the same situation) to speak into our lives. That's not always easy to do, and waiting until the crisis is already in front of us will often be too late. A cadre of trusted advisors takes time to develop. Consider the following suggestions:
 - Find a colleague or mentor that you can trust and ask for feedback on your situation. What are you doing, if anything, that might be making things worse? What could you be doing differently? What are you doing well?
 - If you are in a small firm or solo practice, form connections with other similarly situated practitioners, though a Bar committee or practice section.
 - It may also be helpful to talk about your practice with someone outside the legal world as well. A friend, spouse, mentor, spiritual advisor, or counselor may see relational dynamics at work that we lawyers assume are just to be expected, but in fact may be part of the problem.
- **It takes determination and practice for a new behavior to become a regular habit. In order to make lasting change, consider following these steps:**
 - Begin by choosing **one thing** to change, and then **report your plans** to another person (perhaps a loved one, friend or professional coach or therapist). Give that person permission to follow up and ask how you are doing with your commitment.
 - If you have difficulty making the change, consider what has gotten in the way. Do you really want to make the change? Was your goal too ambitious?



- You don't need to reinvent the wheel. What can you learn from times that you have successfully made life changes?



“Nobody Told Me There’d Be Days Like These!”

How’s *your* train running?

1. When I feel stress, I can tell because:

2. The situations/tasks/people that are most likely to cause me stress include:

3. The three things most important to me in life are:

How does my current allocation of time, money, and energy match up to these most important parts of my life?

4. Given my personality, current employment, and type of practice, I am most vulnerable to compromising my ethical principles for the sake of:

5. In a typical week, how often do I take time to care for my well-being (e.g., exercise, reading for pleasure, socializing, arts & entertainment, spiritual/religious activities, hobbies)? Am I satisfied with this amount? What small, simple steps can I make to move towards where I want to be?



6. One thing I may need to change about my life or my practice based on what I have learned in this program is:



APPENDIX I

Selected *Oregon Rules of Professional Conduct*
Potentially applicable to Kirk Ellis's conduct

Rule 1.1 - Competence

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

Rule 1.2 Scope of Representation and Allocation of Authority Between Client And Lawyer

(a) Subject to paragraphs (b) and (c), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Rule 1.4 - Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.



Rule 1.7 - Conflict of Interest: Current Clients

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client;
 - (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**; or
 - (3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.
- (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 obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
 - (4) each affected client gives informed consent, confirmed in writing.

Rule 8.4 - Misconduct

- (a) It is professional misconduct for a lawyer to:
 - (1) violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
 - (2) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;



- (3) **engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law;**
- (4) **engage in conduct that is prejudicial to the administration of justice;**

* * *



APPENDIX II: RESOURCES FOR LAWYERS

Oregon

Oregon Attorney Assistance Program

www.aaap.org

520 SW Yamhill Street, Suite 1050

Portland, OR 97204

Phone: (503) 226-1057

Toll Free: (800) 321-6227

A **confidential** service funded by the Professional Liability Fund (PLF) for all Oregon lawyers and judges. OAAP provides assistance with and referral for problem alcohol, drug, and/or other substance use; stress management; time management; career transition; compulsive disorders (including problem gambling); relationships; depression; anxiety; and other issues that affect the ability of a lawyer or judge to function effectively. The OAAP is also available to Oregon law students.

The OAAP is based on the philosophy of lawyers helping lawyers. All OAAP attorney counselors are lawyers and professionally trained counselors. As a result, we are able to establish a unique rapport with members of the legal community.



NATIONAL

ABA Commission on Lawyer Assistance Programs

http://www.americanbar.org/groups/lawyer_assistance.html

Provides contact info for all known state and local Lawyer Assistance programs, as well as general mental health and substance abuse awareness and recovery resources.

National Suicide Prevention Lifeline

<http://www.suicidepreventionlifeline.org/>

1-800-273-TALK (8255), National, Toll-Free, 24 Hours

National Helpline for Judges Helping Judges

800-219-6474