

ETHICAL CONDUCT AND THE PRACTICE OF LAW

REAL WORLD ADVICE FOR PRACTITIONERS
INCLUDING
RESPONDING TO A BAR COMPLAINT

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Coconino County Bar Association

SCOPE OF RESPONSIBILITY OF A LAWYER

- A LAWYER HELPS YOU TELL YOUR STORY
- ----*everything I need to know about the practice of law I learned from a kindergartener*
- ONLY WORRY WHEN YOUR CLIENT TAKES YOUR ADVICE (Bob Warden)

LESSONS OF A FORMER BAR COUNSEL

- Practice in an area that you know
- Don't jump to bankruptcy without careful and comprehensive study
- Be diligent
- Ask for help

LESSONS OF A FORMER BAR COUNSEL

- Practice in an area for which you are suited
- Don't practice domestic relations if you are conflict averse
- Don't be a plaintiff's lawyer if you are risk averse

COMMON SENSE HELPS

- Don't overpromise --balanced against-my clients wouldn't do anything if they listened to me. (Bob Warden, again)
- Don't take on too much
- Ask for help
- Say no

Life is short

- Don't take yourself too seriously
- It has to be fun as well as fulfilling
- Enjoy your colleagues

Enjoy the small joys because later on they will seem like great joys-(paraphrase of Kurt Vonnegut)

ASK FOR HELP

- From Colleagues
- Non-lawyers -is this theory as good an idea as I think it is?
- No, it is dumb, you are overthinking the issue
- The State Bar (Why would I do that?)

ETHICS QUESTIONS

- Ethics hotline **602-340-7284**
- Prospective conduct only
- Confidential
- Very helpful for conflict questions and other day to day problems confronted by lawyers

TRUST ACCOUNT QUESTIONS

- Trust account hotline **602-340-7305**
- REMEMBER:
- It is not your money
- General ledger/client ledger/admin.
Ledger/bank statement
- The rules seem counterintuitive
- *Questions limited to prospective conduct*

more information

- Ethics opinions
- [HTTP://WWW/MYAZBAR.ORG/ETHICS](http://www.myzbar.org/ethics)
- Disciplinary clerk's website
- [WWW.SUPREME.STATE.AZ.US/DC/](http://www.supreme.state.az.us/dc/)
- Contains information about discipline cases searchable by rule number
- Recent Cases under Presiding Disciplinary Judge

HELP

- Lawyers Assistance Program
602-340-7332
- Local or regional counselors
- *ALL CONFIDENTIAL-really not a great resource at the moment*

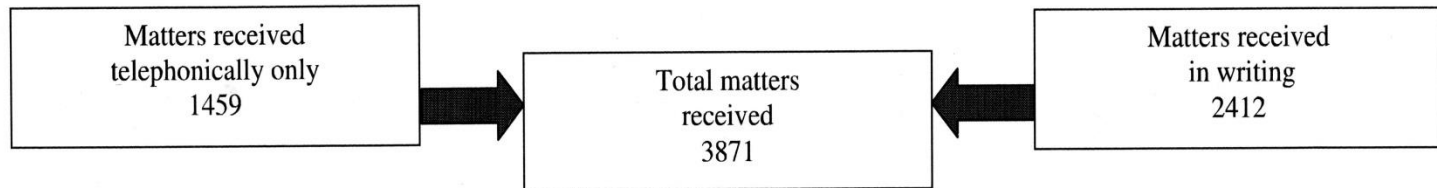
HUMILITY

- IT IS BETTER TO ASK FOR HELP BEFORE YOU GET INTO TROUBLE THEN TO BEG FOR FORGIVENESS AFTER THE FACT

-----JIMMY TINGLE (HARVARD
COMMENCEMENT ADDRESS 2010)

Conservatorships
opened in 2010 - 3

STATUS OF MATTERS RECEIVED IN 2010
As of 12/31/2010

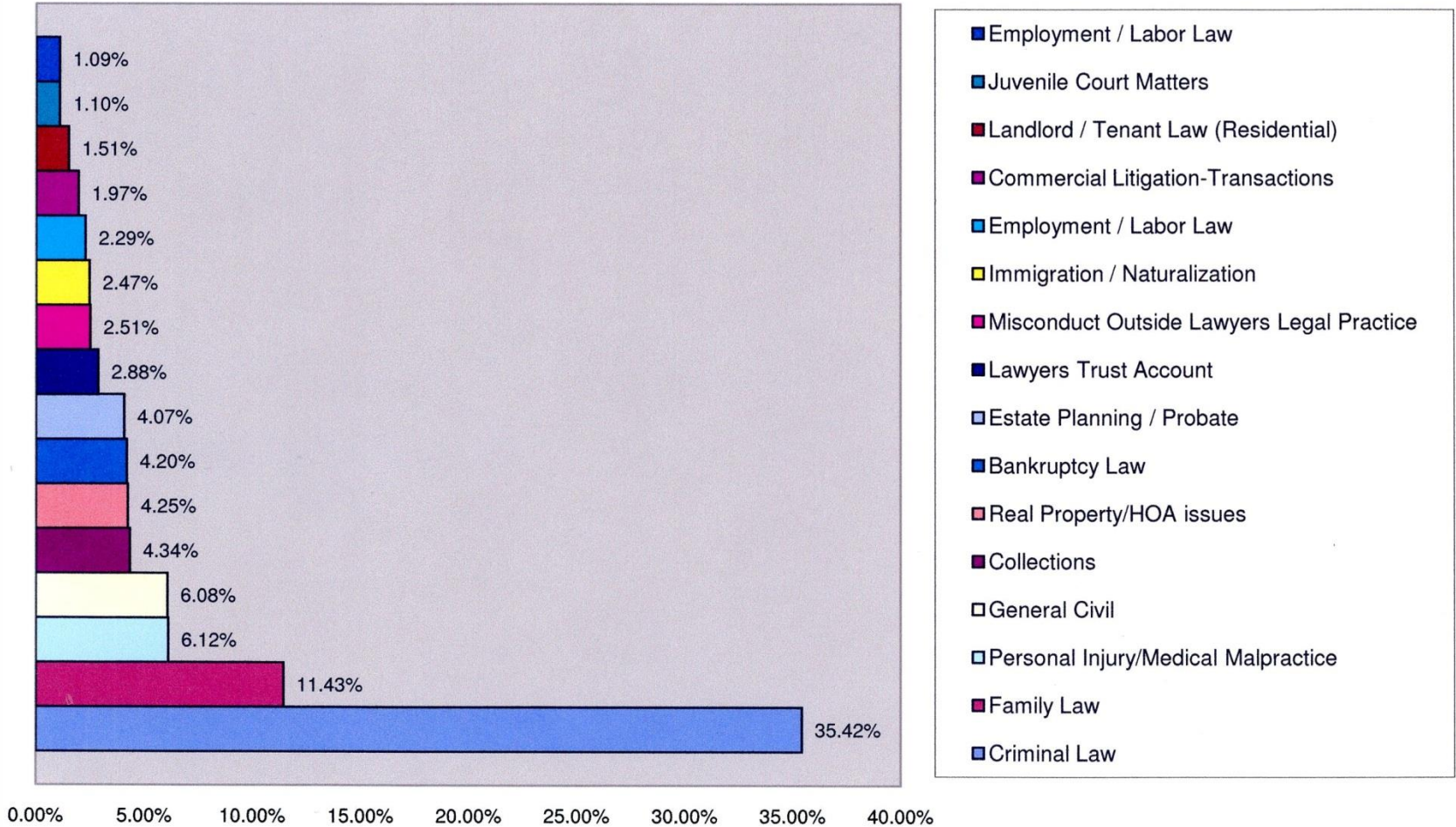


Telephone and Written charges reviewed by the Attorney/Consumer Assistance Program counsel & closed after screening, mediated, or referred to some other State Bar program such as Peer Review or Fee Arbitration 2869	Written charges pending in A/CAP 131	Written charges referred to Lawyer Regulation 871
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Written charges reviewed & dismissed or referred to some other State Bar program such as Peer Review or Fee Arbitration. 95	Written charges referred to bar counsel still pending 2	Written charges investigated (charges contain allegations which, if true, would constitute ethical misconduct or incapacity.) 774
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Charges with ongoing investigations 394	Charges dismissed by bar counsel or panelist after investigation 255	Charges resulting in Order of Diversion 34	Charges resulting in informal reprimand and/or probation &/or restitution 11	Charges resulting in probable cause/awaiting formal disciplinary proceedings 18	Charges advanced to formal disciplinary proceedings 55	Charges stayed 7
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Most Common Area of Practice

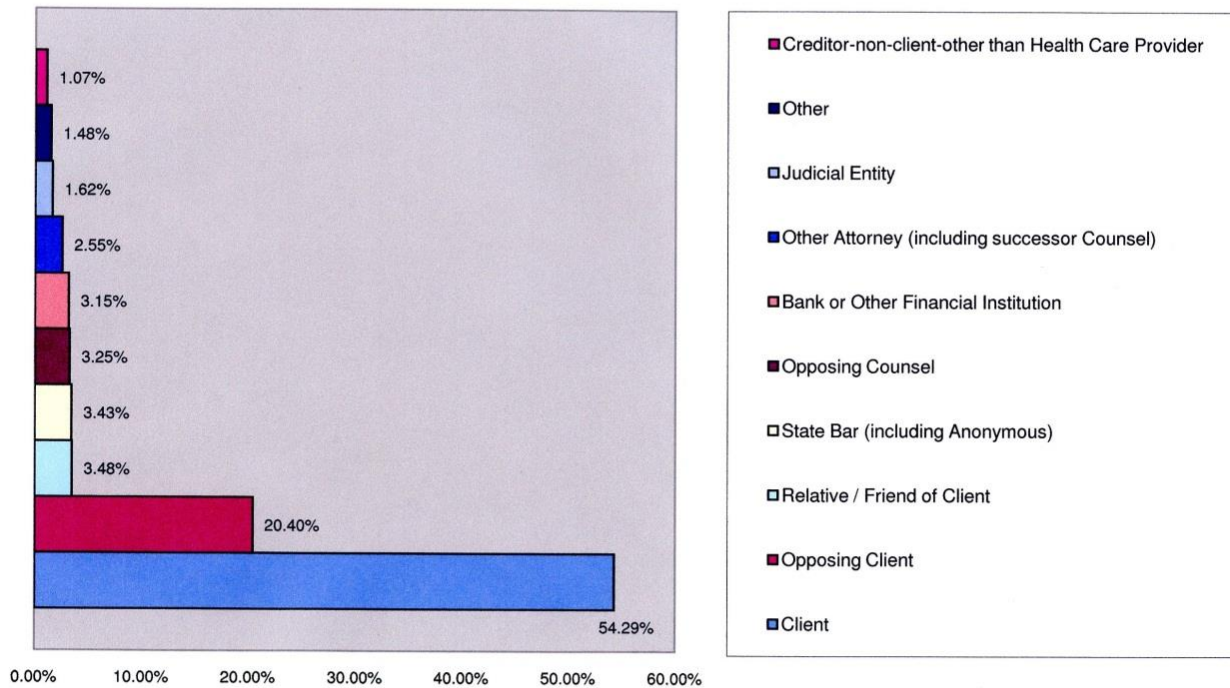


COMPLAINANT



2010 Annual Report – Office of Lawyer Regulation

Most Common Identity of Complainant

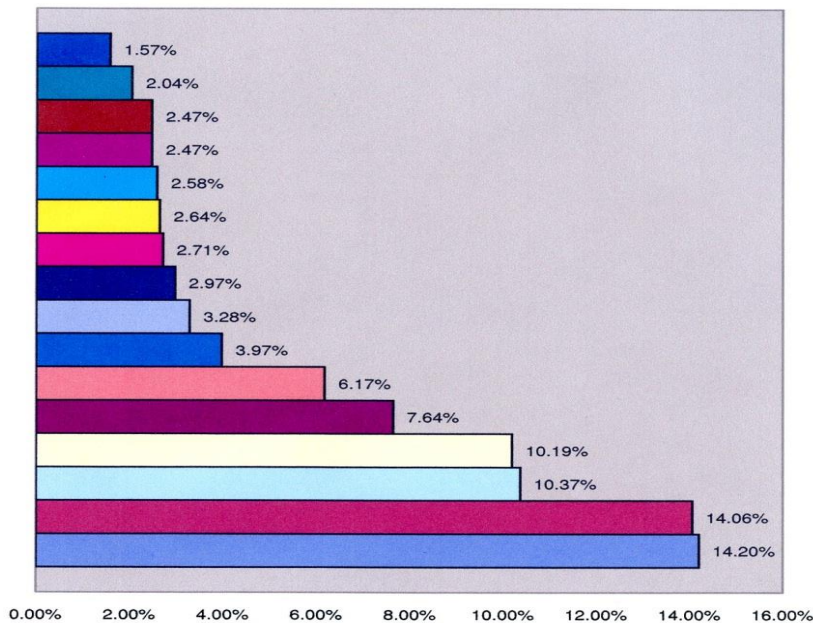


(ALLEGED) MISCONDUCT



2010 Annual Report – Office of Lawyer Regulation

Most Common Alleged Misconduct



- Failing to Expedite Litigation ER 3.2
- Truthfulness in Statements to Others ER 4.1
- Unfairness to Opposing Party ER 3.4
- Safekeeping Client Property - not TA Issues ER 1.15
- Professionalism ER 41(g)
- Non-Meritorious Contentions in Legal Proceedings ER 3.1
- Lack of Candor to Court or other Adjudicative Body ER 3.3
- Conflict of Interest ER 1.7, ER 1.8, ER 1.9
- Failing at Obligations ER 1.16
- Competence ER 1.1
- Dishonesty-Fraud-Deceit or Misrepresentation ER 8.4(c)
- Fees ER 1.5, ER 1.15, Rules 43 and 44
- Conduct Prejudicial to the Admin of Justice ER 8.4(d)
- Lack of Compliance with Client Directions ER 1.2
- Diligence in Representing a Client ER 1.3
- Communication with a Client ER 1.4

Total Trust Account Violations by Year

Year	Bank Error	Bank Error w/other violation	Bank Fees	Deposit Error	Calculation / Mathematical Error	Disbursement Error	Unauthorized Debit, Fraud	Comingling, Conversion	Other	Undetermined	Total
2006	8	9	4	4	9	26	3	5	1	19	88
2007	26	11	2	10	7	24	2	7	6	17	112
2008	28	7	5	8	8	15	3	6	6	34	120
2009	22	9	2	10	12	9	3	1	9	42	119
2010	15	10	4	12	4	24	2	4	10	15	100

- **Bank Error:** Overdraft caused by a bank error.
- **Bank Error with other rule violations:** The original overdraft was a bank error; however, when reviewing records other trust account violations were identified.
- **Bank Fees:** Overdraft occurred due to the lawyer's failure to maintain sufficient funds in the trust account to cover administrative fees.
- **Deposit Error:** Overdraft was due to a deposit error. For example, lawyer deposited funds into the wrong account by utilizing wrong deposit slip or lawyer failed to make the deposit and offsetting funds cleared the account.
- **Calculation/mathematical error:** Overdraft occurs due to a bookkeeping error.
- **Disbursement error:** Overdraft is caused by the lawyer writing a check against uncollected funds.
- **Unauthorized debit, Fraud:** Overdraft occurs due to unauthorized use by third party.
- **Commingling:** Personal funds were placed in trust account or client funds were placed in operating account.
- **Conversion:** Money belonging to a client or third party, was taken, that was not otherwise authorized to take.

SPECIFIC ETHICAL RULES

- ER 3.3 Candor to the Tribunal
- Don't lie
- Don't lie by omission
- Don't let your client lie
- If you do, correct it
- If your client does it, correct it without breaching confidentiality

BE RESPECTFUL

- ER 8.4 Misconduct
- Rule 41 (g) Unprofessional Conduct
- Unprofessional conduct is defined as substantial or repeated violations of the Oath of Admission to the Bar or the Lawyer's Creed of Professionalism of the State Bar of Arizona.
- Several new cases

CATCH ALL RULE

- 8.4 (c)
- Engage in conduct involving dishonesty, fraud, deceit or misrepresentation
- 8.4 (d)
- Engage in conduct that is prejudicial to the administration of justice

CALL/E-MAIL/TEXT

- E.R. 1.4 Communication

(a) A lawyer shall...

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

IF YOU THINK YOU HAVE A CONFLICT- YOU DO

- ER 1.7 Conflict of Interest: General Rule
- ER 1.8 Conflict of Interest: Current Clients: Specific Rules
- ER 1.9 Conflict of Interest: Duties to Former Clients
- ER 1.18 Conflict of Interest: Duties to Prospective Clients

CASES

Ranging from: 'I might have done that'
to: 'You have got to be kidding!'

In re Honchar

- 3-10-2009
- In a dissolution proceeding, Respondent engaged in over-zealous representation of a client in an area with which Respondent was not familiar. Her emotional attachment to client affected her independent judgment and strategy. Respondent further engaged in a concurrent conflict of interest and failed to maintain the respect due courts.
- ERs 1.1, 1.3, 1.7, 3.1, 4.4, 8.4(d) and Rules 41 (c) and (g)

Conflict and confidentiality

- In Re Joseph Charles

- SB-09-0029

- In a probate matter, Respondent engaged in a conflict of interest by representing two clients with adverse interests. Respondent represented both the co-personal representative and the Estate and then used information obtained from the attorney client relationship to have a co-personal representative replaced.

- ER 1.9

- Confidentiality v Privilege

Conflict; confidentiality and Don't mess with the Bar

- In Re Amack
 - 09-0027-09
 - Respondent engaged in a conflict of interest by entering into a business contract with his clients and then represented co-defendants in a criminal matter without obtaining a written waiver. Respondent also attempted to limit the former client's right to report to the state bar and failed to correct a misapprehension during the bar investigation.
 - ER's 1.7,1.8,(a)& (h), 8.1(a), 8.4(c)&(d)
 - Other case-attorney represented woman on drug charges, then represented husband against her in custody dispute where her drug use was an issue

Cannot put the genie back in the bottle; why Honesty is the bedrock principle for lawyers

- In Re Berry
 - SB-08-0023-D
- During a criminal trial as defense counsel, Respondent made a false statement of material fact during closing that she failed to correct and those statements were not justified by the evidence.
- ER's 3.3(a)(1), 3.4(c), and 8.4(d)

We are lawyers 24/7

- In Re Washington
- SB-10-0102-D
- Respondent was convicted of Possession of Marijuana and Possession of Drug Paraphenalia.
- ER's 8.4(b)&(d)
- What to do if charged (from the bar's viewpoint)-don't play lawyer

Fine line case

- In Re Whiting
 - SB-07-0189-D (2008)
 - In a divorce case, Respondent interfered with opposing party's attorney-client relationship by using his client as intermediary to communicate with opposing counsel.
 - ER's 4.2, 4.4(a), and 8.4(a)_

Common sense and Documentation

- In Re Goodman
 - SB-08-0049-D
 - Respondent represented a client in a related matter whose interests were adverse to a former client's, failed to obtain informed consent in writing, and used the information from the former client to his detriment.
 - ER's 1.9(c) and 8.4(c)

Time to do something else for a living

- In Re Medansky
- SB-04-0120
- Respondent stated to the opposing party in a child custody matter, “you won’t live to see your kid’s fifteenth birthday”.
- ER’s 8.4(d), Rule 41(g)

Say what?

- In Re Leyh
- SB-07-0198
- Respondent made false statements to witnesses in order to serve subpoenas and compel their testimony for her client's criminal trial
- She stated she represented a fictitious beer distributor introducing "Zephyr Lager" by giving away coupons.
- She conducted this ruse during 'Alcohol Awareness Night' on the Ft. McDowell Reservation.

ER's 4.1(a), 8.4(c)

RESPONDING TO A BAR COMPLAINT

- If (when) you get a bar complaint:
 - Kick inanimate objects and go to the gym
 - Do not yell at bar counsel or their assistants
 - Don't yell at your staff or family members
 - Don't yell at your client

DO

- Understand you will be terrified and furious until it is over.
 - Call an attorney-anyone-to discuss it
 - Then consult an attorney who does Respondent's work to pull you off the ceiling
 - Remember "this too shall pass"
 - The process is about a half bubble off anything you do in your day-to-day professional life.

A REGULATORY SYSTEM

- This system is not adversarial
- It is inquisitorial
 - Very counterintuitive to lawyers
 - Cannot respond as in litigation
 - Accept that it is different from anything you have ever dealt with in the law

THE HARD PART/DON'T POKE THE BEAR

- You must tell the bar counsel anything you did wrong. (prove it, you jerk state bar lawyer who has never practiced law and picks on sole practitioners, *will not help.*)
- You must provide all requested documents and reveal client confidences (subject to a protective order)
- In effect, you must prove their case-if you refuse to cooperate, it is another violation.

ATTITUDE

- Be respectful of the process.
- Be respectful of bar counsel (one reason to have someone else write the response)
- Be respectful of your client-they get your response
- It is very important to say what you did improperly and how you will correct it (i.e. a better practice would have been to ...and in the future I will...)

Humility

- State what you did improperly, how you will address and correct the specific issues
- Detail the steps you will take to make sure it doesn't happen again
- If applicable, how you will change the office policies and instruct the staff as to the improved procedures
- Beg for Diversion

OTHER DOES AND DON'T'S

- Don't respond until you have seen the videotape-your sense of reality is skewed
- Do take it seriously
- Do not blame others (It was my responsibility)
- Don't send in your first response
- Don't send the whole file (i.e. trust acct. for two years)

MORE DOES AND DON'TS

DON'T HAVE A FOOL FOR A CLIENT

- Don't confess to every error you may have made (global warming is not all your fault)
- Answer questions carefully and fully
- Focus on the bar counsel's explicit concerns
- Revise, edit and have it reviewed (or written) by experienced Respondent's counsel

TRUST ACCOUNTS

- **It is not your money**
- The client expects you to take the same care with your money as we all expect a bank teller to take with our deposits
- Would you tell your client-I'm a sloppy bookkeeper, but your money is *probably* safe in my trust account?
- Three way reconciliation
- Alternative Fees
 - Flat fees
 - Hybrid fees

Sex with Clients

NO

FEE AGREEMENTS

- Scope of representation
- Fees to be charged
- In writing
- Remember 'look back' for fees
- Opportunity for rules of conduct between you and client to be set at the beginning
 - Expectations of lawyer and client (what I will and won't do); policies like file retention; e-mails; texts

FINAL THOUGHTS

- If you get in trouble-ask for help because the brain that got you in this mess is not a reliable tool to get you out.
- Be kind to yourself. We are all doing the best we can.

More final thoughts

- Go to work as if you don't need the money
(Vonnegut)
- BE KIND
- You always have a choice
- Breathe and be grateful for what you have