



ETHICS DEPARTMENT
and
COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT
(ETHICS COMMITTEE)
2005 ANNUAL REPORT*

Introduction

The Committee on the Rules of Professional Conduct (the Ethics Committee) and the position of ethics counsel were created by the State Bar of Arizona Board of Governors to help the State Bar and its members resolve questions of professional ethics. The Ethics Committee and the ethics counsel will render informal opinions in writing and by telephone. The Ethics Committee issues formal opinions in writing. Formal opinions are limited to addressing issues of widespread interest or unusual importance. If an opinion already exists, or if the rule and its comments are clear on the issue, then the ethics counsel will provide a telephone response to a written request.

All opinions rendered, whether written or telephonic, are advisory only based on the Ethics Committee's and ethics counsel's reading and interpretation of the Rules of Professional Conduct. Advice is non-binding in any disciplinary or other legal proceedings. However, reliance on State Bar ethics advice may be considered mitigating in a disciplinary proceeding. Although non-binding, these opinions constitute an important resource for Arizona attorneys to identify and apply the ethics rules.

The ethics counsel and the Ethics Committee may decline to render opinions on professionalism matters, past conduct, conduct of another attorney or questions of law. In addition, department policies prohibit advice to be given via electronic mail or through a paralegal or other non-lawyer. Anonymous inquiries are prohibited.

Ethics Department staff and Ethics Committee members

The Ethics Department is currently staffed by the ethics counsel, the ethics paralegal, and one administrative assistant. The Ethics Committee is comprised of 31 volunteer State Bar members, as appointed by the State Bar president. Of the 31 members, 29 are attorneys and two are judges.

* This is the first annual report produced by the Ethics Department.

Written inquiries

A. Requests received and disposition

During 2005, the Ethics Department received 56 written requests for opinions. Of those, the ethics counsel responded to 32 by providing telephonic guidance. Five of those requests remain pending; 13 were issued as informal opinions; four were declined for jurisdictional issues; and two were withdrawn by the inquiring attorney.

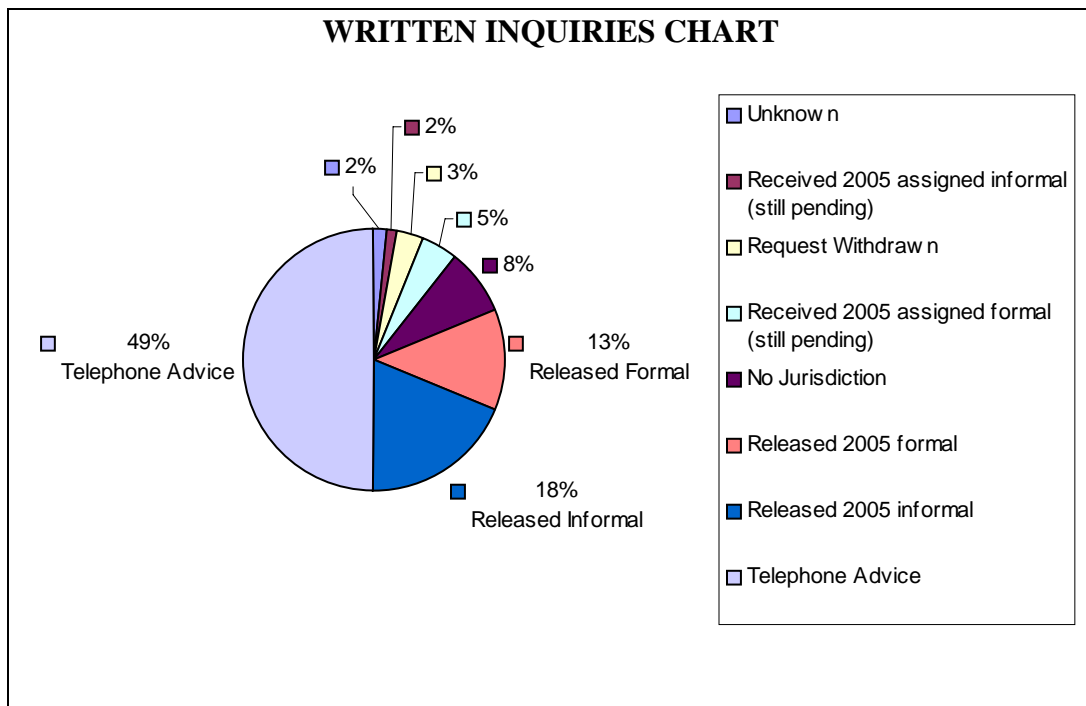
B. Opinions issued

Eight formal opinions and 12 informal opinions were issued in 2005.

C. Inquiries still pending

Seven requests for written opinions received during 2003, 2004 and 2005 are pending before the Ethics Committee.

The chart below represents the disposition of the written inquiries received in 2005.



Hotline telephone calls

The Ethics Department has been tracking ethics calls received since October 2003. Most calls arrive on the State Bar's ethics hotline, 602-340-7284. In 2004, the hotline received approximately 2,189 calls. In 2005, the hotline received approximately 2,110 calls. In addition, in 2005, the Ethics Department received 118 calls about the unauthorized practice of law from non-Arizona attorneys. Those calls were referred to the UPL Department for handling.

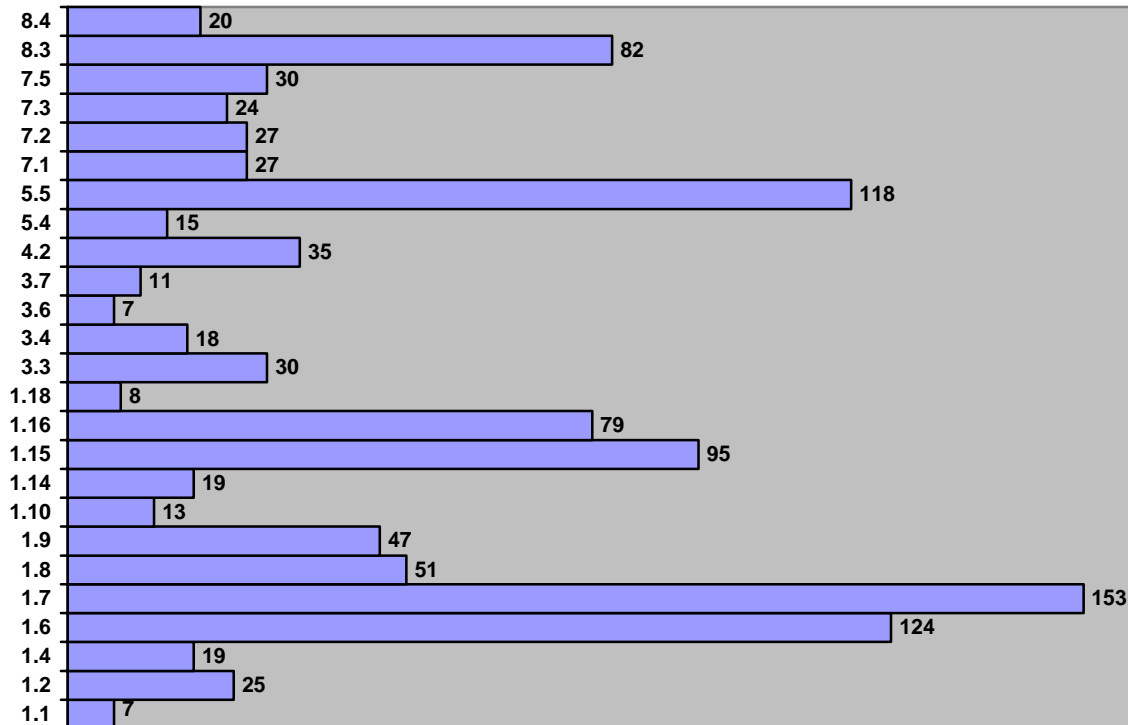
The ethics counsel normally responds to calls for ethics advice. However, when the ethics counsel is unable to respond promptly to calls, such as due to teaching at continuing legal education seminars, calls are referred to Ethics Committee members. In 2005, of the 2,110 ethics inquiries received, 358 were referred to Ethics Committee members for response.

A. Calls broken down by Ethics Rule and subject matter

The top five subjects inquired about in 2005 were:

Conflicts of Interest (ERs 1.7, 1.8, 1.9, 1.10)	264 calls
Confidentiality (ER 1.6)	124 calls
Fees (ER 1.5)	108 calls
Safekeeping Property (ER 1.15)	95 calls
Duty to Report (ER 8.3)	82 calls

The chart below reflects the number of calls received, sorted by specific Ethics Rule.*



* Ethics Rules that attracted five or fewer calls are not included.

B. Calls broken down by area of practice

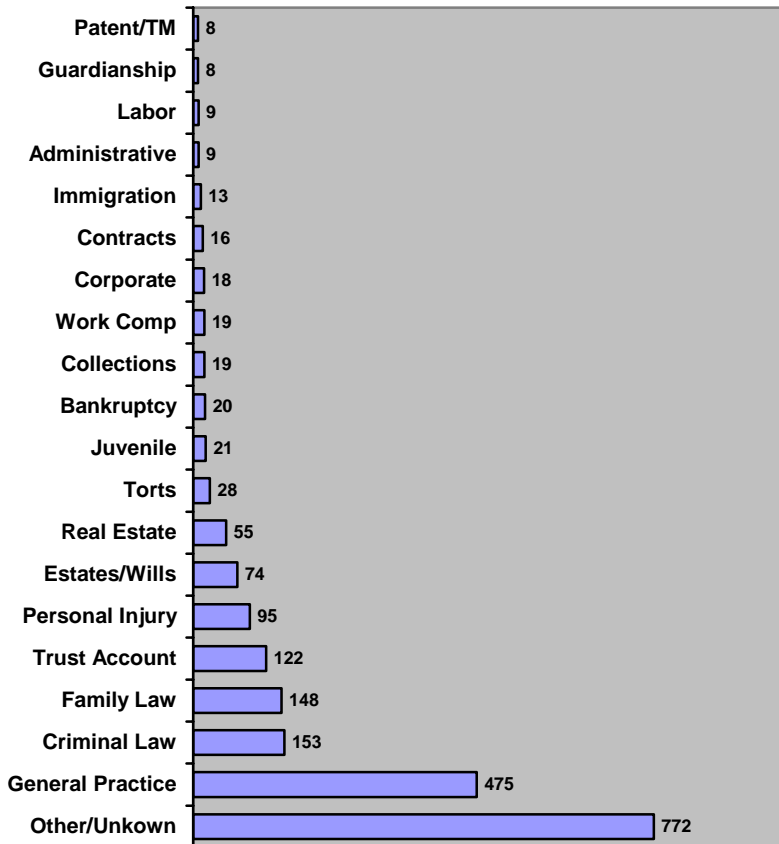
The top five practice areas related specifically to the nature of the question in 2005 were:

General Practice	475 calls
Criminal Law	153 calls
Domestic Relations	148 calls
Trust Account	122 calls
Personal Injury	95 calls

The Ethics Department logged 772 calls under the “Other/Unknown” area of practice. The most common reason for categorizing a call as “Other/Unknown” was because the inquiring attorney’s question involved an ethics rule, but related to no particular practice area. The areas of practice were recently expanded to capture more data for 2006.

“General Practice” calls include inquiries that involve firm regulations, advertising, profit sharing, fee agreement language, subpoenas for former clients, suing former clients, sharing office space, keeping client files, starting a new practice, self-reporting misconduct, and lawyers switching firms.

The chart below represents the areas of practice relative to the hotline guidance provided.*



* Areas of practice that attracted fewer than five calls are not included.

C. Calls broken down by geographical location

Finally, the following is the number of calls broken down by geographical location:

Area Code	Major Cities Therein	Number of Calls
602	Phoenix	766
480	Scottsdale, Mesa, Tempe, Chandler, Fountain Hills	510
520	Tucson, Casa Grande, Wilcox, Douglas, Florence, Bisbee	385
928	Prescott, Yuma, Kingman, Flagstaff, Wickenburg, Show Low, Bullhead City, Sedona, Camp Verde, Pinetop	208
Other	Miscellaneous locations	187
623	Glendale, Sun City, Litchfield Park, Surprise, Goodyear, Peoria, Avondale, Anthem, Tolleson	54

Brief summaries of the formal opinions issued in 2005

During 2005, the Ethics Committee issued eight formal ethics opinions, summarized below.

A. Ethics Opinion 05-01 (with dissent)

Do the Arizona Rules of Professional Conduct prohibit a lawyer from receiving a fee for referring persons to an investment advisory firm in the described circumstances?

Summary: Under ER 5.7, adopted in December 2003, a lawyer who operates a separate investment advisory business may refer non-clients to an investment advisory firm that pays a referral fee to the lawyer, so long as the lawyer takes reasonable steps to assure that the non-clients understand they are not receiving legal services and they do not have the protections of a lawyer-client relationship. A lawyer who provides such services to former clients must also comply with the confidentiality requirements and other obligations under ER 1.9, and should take particular care to assure that the former clients understand they do not have a lawyer-client relationship with respect to the investment transactions. A lawyer may not refer a current client to such a program, however, unless the lawyer meets the “heavy burden” of showing compliance with ERs 1.7 and 1.8(a). Also, a lawyer who provides investment advisory services must satisfy ERs 7.1 through 7.3 and maintain separation between the law practice and the lawyer’s investment advisory business so that they do not appear to be related.

To the extent previous Ethics Opinion 98-09 is inconsistent with ER 5.7 and the analysis in this opinion, the earlier opinion is no longer effective.

05-01 dissent: A dissent recommends a per se ban against lawyers accepting money from third-party professionals in exchange for referring law clients to those third-party payors. The dissent agreed, however, with the majority's position that a lawyer can accept a fee from a third-party professional for referring non-clients to the third party's firm, provided that the lawyer complies with ER 5.7.

B. Ethics Opinion 05-02

Do the Rules of Professional Conduct apply to attorneys on inactive status who are not engaged in the practice of law? May the inquiring attorney pay a referral fee to other attorneys and third parties who refer students to take classes at attorney's school?

Summary: An attorney who is on inactive status and not practicing law must comply with the Rules of Professional Conduct. An inactive attorney may pay a referral fee to a third party so long as the fee is not related to legal services and does not constitute sharing of legal fees. An inactive attorney may not, however, pay the referral fee to a practicing attorney.

C. Ethics Opinion 05-03

Is it unethical, under ER 7.1 for an Arizona lawyer to advertise the lawyer's listing in The Best Lawyers in America or a similar publication? Is Ethics Opinion 91-08 still viable under ER 7.1, as amended?

Summary: Under ER 7.1 as amended in 2003, it is ethical for a lawyer to advertise that the lawyer is listed in *The Best Lawyers in America* as long as the advertisement is truthful and includes the year and specialty for the listing. In light of the amendment to ER 7.1, Opinion 91-08 is no longer viable to the extent it conflicts with this opinion.

D. Ethics Opinion 05-04

How do we protect the confidentiality and integrity of client information while continuing to increase reliance on the Internet for research, filings, communication, and storage of documents?

Summary: ERs 1.6 and 1.1 require that an attorney act competently to safeguard client information and confidences. It is not unethical to store such electronic information on computer systems, regardless whether those same systems are used to connect to the Internet. However, to comply with these ethics rules as they relate to the client's electronic files or communications, an attorney or law firm is obligated to take competent and reasonable steps to assure that the client's confidences are not disclosed to third parties through theft or inadvertence. In addition, an attorney or law firm is obligated to take reasonable and competent steps to assure that the client's electronic information is not lost or destroyed. In order to do that, an attorney must be competent to evaluate the nature of the potential threat to client electronic files and to evaluate and deploy appropriate computer hardware and software to accomplish that end. An attorney

who lacks or cannot reasonably obtain that competence is ethically required to retain an expert consultant who does have such competence.

E. Ethics Opinion 05-05

Must an attorney take reasonable remedial measures upon learning of a former client's false testimony to an unemployment compensation hearing officer and, if so, what measures must be taken?

Summary: This opinion reviews the ethical dilemma posed when an attorney learns that, due to a former client's apparent perjury in a civil proceeding, the attorney has offered false material evidence to a tribunal. The Ethics Committee concluded that the Arizona Rules of Professional Conduct, under the facts of this case, require that the attorney's duty of candor to the tribunal overcomes the ethical duty of preserving the former client's confidences and that the attorney must take reasonable remedial measures effective to undo the effect of the false evidence with respect to the affected tribunal.

F. Ethics Opinion 05-06

Is it ethical for an attorney to agree in advance to provide limited scope representation to a client? Is an attorney ethically required to take any steps in addition to a written representation agreement in order to enter into an agreement with a client to provide limited scope representation? Can an attorney provide competent legal assistance to a client if the scope of representation is limited? Is an attorney ethically required to disclose to the court that the attorney has limited the scope of the attorney's representation? If not required, is such a disclosure permitted?

Summary: An attorney representing a client may enter into an agreement limiting the scope of services to a specific and discrete task. An attorney is required to have sufficient knowledge and skill to provide reliable counsel to the limited scope client as to the advisability of the action requested by the client. The attorney providing limited scope representation is not required to disclose to the court or other tribunal that the attorney is providing assistance to a client proceeding *in propria persona*.

G. Ethics Opinion 05-07

When only one spouse is retained as a personal injury client but both are asked to sign a general release by the settling defendant, does the lawyer have a duty to explain the legal implications of the release to the non-client spouse? If the lawyer does not agree to represent the spouse jointly with the client, what information, if any, must the lawyer provide the non-client concerning the release?

Summary: An attorney representing a client in settlement of a lawsuit may not give the client's spouse legal advice about waiving any right in a release unless the client and spouse both agree to joint representation and waive the potential conflict. Absent joint representation, the attorney may not provide legal advice to the spouse, even if the release requires the spouse's signature and the spouse's rights are affected by the release. If the spouse is unaware of the lawsuit or the

settlement and release, the lawyer must take care to avoid any implied false statement by the client to the spouse, as well as any failure by the client to disclose material facts to the spouse.

H. Ethics Opinion 05-08

The inquiring attorney asks whether the attorney can ethically enter into a business relationship with a for-profit Internet “matching” service. This opinion more specifically addresses if the referral service’s fee arrangement violates the prohibition against lawyers making payment to a for-profit referral service. Does participating in the service violate the lawyer’s restrictions on advertising?

Summary: A lawyer may not pay to participate in the for-profit client/attorney Internet matching service described in this opinion because the service substantially functions as, and holds itself out as, a referral service and because the information presented by the service on behalf of participating lawyers is materially misleading.

Other Ethics Department activity

Ethics web page

The Ethics Department launched several new online resources for Arizona attorneys. Recognizing that non-lawyers perform legal research just as often as lawyers do, it was important to make the Ethics page of the State Bar of Arizona website available to both non-lawyers and member lawyers (www.azbar.org for public and www.myazbar.org for members).

A. Rules of Professional Conduct (Ethics Rules)

The Ethics Rules now are available on the State Bar’s website. The Ethics Rules are compiled within Rule 42, Arizona Rules of Supreme Court. People have the ability to view the current ethics rule along with the rule comments.

B. Online indices

Until recently, the State Bar sold a paper version of indices of ethics opinions. The indices listed ethics opinions in three formats: by date issued, by keyword, and by Ethics Rule. The Ethics Department has captured all three categories in a new web page. This free online resource provides people with the opportunity to look up an opinion in different ways:

1. **Direct access by opinion number.** If the interested person knows the ethics opinion number the person can simply enter that opinion number in a box and retrieve it. Ethics opinions issued from 1985 to present are available for viewing on the Internet. Older opinions are available by calling the Ethics Department.
2. **Chronological.** If the interested person knows the year an opinion was issued, the new Web page offers a by-year drop-down menu that will

retrieve the ethics opinions for a specific year or a chronological list of all opinions. For example, a person can view just the opinions issued in 2003, or all opinions issued to date in chronological order.

3. **Keyword.** Although a keyword search has been available, the new keyword search expands the fields that are searched, resulting in more accurate hits.
4. **Ethics Rule.** When viewing the Ethics Rules at the new web page, a person is given an option to view the related opinions. Thus, by going directly to ER 8.3 on the ethics page, the person can view not only the current version of ER 8.3 but also all related ethics opinions.

C. **Email alert**

Finally, the Ethics Department released a new feature, email alert. By signing up for this new preference, members and nonmembers receive an email when the State Bar issues a new ethics opinion. The email contains the option to link to that opinion. This will help members and nonmembers stay on top of ethics issues that have been addressed by the Ethics Department.