

Reconcile your client trust account lately? Such a reconciliation should be a part of your monthly must-do list.

Since a number of our investigations reveal violations that could have been avoided by simply referring to HRPC 1.15, we again review some basic precepts. In our April 2007 article, we reviewed HRPC 1.15(a) through (e). This article reviews (g) and (h), violations of which appear frequently in these investigations.

HRPC 1.15(g) spells out the exact minimum books and records that an attorney must maintain for at least six years after the completion of the engagement to which these books and records relate. Note that a six-year retention is the ethics minimum. Attorneys may also want to consult with their financial advisors and malpractice carriers regarding a prudent retention policy. Note that these financial books and records must be maintained on a cash method. HRPC 1.15(h).

The mandatory minimum records are:

1. A cash receipts and disbursements journal for each trust account and business account. The journal must have:

- entries for receipts
- entries for disbursements
- entries for transfers
- identification of the client matter for each movement of trust funds
- the date of each movement of trust funds
- the check number for each disbursement and
- the payor or payee for each movement of trust funds.

2. A subsidiary ledger showing all receipts, disbursements, or transfers and any unexpended balance. If records are kept manually, this ledger must contain a separate page for each client. If records are computerized, there must be an equivalent computer analysis. The ledger must likewise also have:

- identification of the client or matter for each movement of trust funds
- the date of each movement of trust funds
- the check number for each disbursement and
- the payor or payee for each movement of trust funds.

3. Copies of retainer and compensation agreements with clients. (Both the attorney and the client should have a copy of the fee agreement dated and signed by all parties to the agreement.)

4. Copies of statements to clients showing disbursement of funds to or on behalf of the clients.

5. Copies of all bills rendered to clients.

6. Copies of records showing all payments to persons not in the attorney's regular employ, including other attorneys and investigators, for services rendered.

7. Checking account documents:

- checkbooks
- check stubs
- bank statements
- prenumbered cancelled checks (or access thereto) and
- deposit slips (or access thereto)

8. Copies of all monthly reconciliations.

9. Copies of all records showing at least quarterly a listing of trust accounts (names and balances), the grand total of which must equal the reconciled trust account bank balance on any given date, as well as the printed copy of the listing and reconciled trust account balance.

10. A record of specifically identified non-cash property held in trust. This requirement does not apply to routine files and documents.

The required books and records may be maintained by computer. There

are several available programs; however, copies must be able to be made on demand. These records also must be kept at the principal Hawai'i office of each attorney or firm, and be available for inspection, compliance checks, and copying at that location by this office. HRPC 1.15(h).

Please be sure to contact us, before you act, if you have any questions regarding HRPC 1.15.

Disciplinary Board Appointments and Officers

The Disciplinary Board is a 18-member body appointed by the Hawai'i Supreme Court from candidates nominated by the Supreme Court's Nominating Committee. The newest members of the Board are: Richard J. Kowen, Esq., an attorney at Alston Hunt Floyd & Ing from Honolulu, Oahu; Philip H. Lowenthal, Esq., a solo practitioner from Wailuku, Maui; and Margaret K. Masunaga, Esq., Deputy Corporation Counsel from Kealahou, Big Island. Richard A. Chamberlin, Ph.D., Charles T. Kleintop, Esq., and Lynn H. Higashi, Esq. left the Board. Their expertise, experience, and commitment will be missed.

The Honorable Clifford L. Nakea (Ret.), (Board Chairperson), Dean E. Ochiai, Esq., and Jean E. Rolles, C.P.M. were reappointed by the Supreme Court. The new and reappointed Board members will serve 3-year terms expiring June 30, 2010.

The 12 remaining members of the Board are (asterisks indicate non-attorneys): Rustam A. Barbee; Corlis J. Chang; Chief Lee D. Donohue (Ret.);* Richard A. Coons (Board Treasurer);* Gary M. Farkas, Ph.D., MBA;* Diane D. Hastert (Board Vice Chairperson); Honorable Leslie A. Hayashi (Board Secretary); Joyce Ingram-Chinn, Ph.D.;* Honorable Evelyn B. Lance

(continued on page 34)

Jury Instructions

State v. Padilla, No. 27300, July 6, 2007. Padilla was indicted on the following offenses: Count 1, first degree reckless endangering for intentionally firing a semi-automatic firearm in a manner which recklessly placed Preston Baltazar in danger of death or serious bodily injury; Count 2, first degree reckless endangering for intentionally firing a semi-automatic firearm in a manner which recklessly placed Sterling Mahelona in danger of death or serious bodily injury; Count 3, felon in possession of a firearm or ammunition; Count 4, place to keep a loaded pistol or revolver; and Count 5, promoting a dangerous drug in the second degree for possessing one-eighth ounce or more of a substance containing methamphetamine. After a jury trial, Padilla was found guilty of Counts 3 and 4, the felon-in-possession and place-to-keep counts, and was acquitted of the other counts. He was sentenced to ten years with a mandatory minimum term of two years on Counts 3 and 4. The sentences on Counts 3 and 4 were run concurrently with each other and with a five-year term of imprisonment imposed upon the revocation of Padilla's probation in another case. At trial, Padilla requested that, as to each of Counts 1 through 4, the jury be instructed on the justification defenses of choice of evils, use of force in self-protection, and use of force for the protection of others. The circuit court only partially granted Padilla's request. As to Counts 3 and 4, the circuit court instructed the jury on the choice of evils defense, but, over Padilla's objection, the court did not instruct the jury on the defenses of use of force in self-protection and for the protection of others. As to Counts 1 and 2, the court instructed the jury on the defenses of use of force in self-protection and the protection of others, but not on the choice of evils defense. On appeal, Padilla argued that: 1) the circuit court erred in denying his request that, in addition to the choice of evils defense, the jury be instructed on the justification defenses of use of force in self-protection and for the protection of others as to the felon-in-possession and place-to-keep charges; 2) the court erred in instructing the jury that the prosecution was not required to call all witnesses to the events at

issue; and 3) the court plainly erred in failing to give a merger instruction, pursuant to HRS § 701-109(1)(e), regarding the felon-in-possession and place-to-keep charges. The court concluded that the circuit court's choice of evils instruction adequately covered Padilla's justification theory and that he suffered no prejudice from the court's refusal to instruct on the defenses of use of force in self-protection and for the protection of others. As to his second point, the court held that the circuit court did not err in instructing that the prosecution was not required to call all witnesses. The court further concluded, however, that the circuit court plainly erred in failing to give a merger instruction regarding the felon-in-possession and the place-to-keep counts. The absence of the merger instruction, however, did not affect the validity of the jury's finding that the prosecution proved each of these counts. Rather, the erroneous omission of the merger instruction only precluded the entry of judgment of conviction on both counts. On remand, the State was given the option of: 1) accepting the entry of judgment on either Count 3 (felon-in-possession) or Count 4 (place-to-keep) and dismissing the other count; or 2) retrying Padilla on both Counts 3 and 4 with an appropriate merger instruction.

State v. Dilliner, No. 27905, July 9, 2007. Dilliner appealed from the judgment and sentence entered by the first circuit family court, convicting and sentencing him, pursuant to a jury verdict, of two counts of violation of a TRO, an offense prohibited by HRS § 586-4(e). His sole contention on appeal was that the family court's jury instructions were prejudicially erroneous and misleading. The court agreed and remanded. The court held that, in addition to deviating from the language of HRS § 586-4(e), they implied that, as long as Dilliner was personally served with the TROs and intentionally or knowingly engaged in conduct prohibited by the TROs, he could be found guilty of violating the TROs, even if it was not his conscious object to violate the TROs and he was not aware that his conduct violated the TROs. Therefore, the instructions were erroneous and presumptively harmful.

Ethics & Issues

(Continued from page 18)

(Ret.); Blake T. Okimoto; Bradley R. Tamm; and Thomas D. Welch, Jr.

Discipline Notice

In response to a Petition filed by the Office of Disciplinary Counsel, the Supreme Court of Hawai'i suspended former Kailua attorney JANE E. TATE from the practice of law by Order filed on July 19, 2007, effective immediately, due to Tate's failure to cooperate with the Office of Disciplinary Counsel's investigation of her professional conduct in fourteen cases.

Tate will remain suspended until further order of the Supreme Court. She will not be eligible to practice law in Hawai'i until reinstated by the Supreme Court. She cannot accept any new retainers, clients, or legal matters. Tate is supposed to return to her existing clients their papers, property, and unearned advance fee payments; however, a Trustee was appointed on May 30, 2007, as announced in last month's article. Meanwhile, the investigation of the pending complaints will continue.

Tate, 44, was admitted to the Hawai'i bar on June 12, 1996, and is a graduate of Detroit College of Law.

Lawyers' Fund Appointments and Officers

The Trustees of the Lawyers' Fund for Client Protection are a five-member body appointed by the Hawai'i Supreme Court from candidates nominated by the Supreme Court's Nominating Committee. The newest Trustee is Junell Y.K. Lee, a solo practitioner and hearing officer for the Department of Human Services, from Kaneohe, O'ahu. She will serve a five-year term expiring July 19, 2012.

The remaining Trustees are (asterisks indicate non-attorneys): Gayle J. Lau (Chairperson); Evelyn J. Black, Esq., Vice Chairperson; Michael D. Miyahira,* Secretary; and Curtis Y. Harada,* (Treasurer).