



## Disciplinary Counsel's Report

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Disciplinary Counsel

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### DISPOSITION OF CLOSED CLIENT FILES

File cabinets and storage areas bulging with closed client files? Before condensing or destroying those files, attorneys should be aware of certain ethical and practical considerations.

While the HRPC does not specifically cover retention of client files, HRPC 1.15(f)(3) does provide that books and records regarding funds, securities, and other properties of a client (or third person) coming into the possession of the attorney shall be preserved for at least six (6) years after completion of the matter. Thus, records such as books, ledgers, journals, and receipts relating to funds and property must be kept for that period of time.

Additionally, documents and property which belong to the client (or third person) must be returned. HRPC 1.15(f)(4); HRPC 1.16(d). These materials include any original document provided by or produced for the client, such as a deed, contract, stock certificate, photograph, banking records, or will.

In addition to ethical requirements, practical considerations may strongly influence the length of time closed client files should be retained. For instance, an attorney may wish to retain critical file documents in the event of a future malpractice claim or ethical complaint. Although disciplinary grievances are not barred by any statute of limitations, legal malpractice claims are subject to a six (6) year statute. Thus, if only for self-defense, it would be judicious for an attorney to retain closed client files for a period commensurate with any statute or claim accrual.

Special attention should also be paid to certain areas of practice; for example, practitioners in the areas of estate planning or real estate may wish to retain client files longer. Attorneys should also consider consulting with their malpractice insurance carriers regarding any carrier recommended period of time for retention of closed client files.

Once the decision has been made to reduce the volume of old files, the best first

step is to attempt to contact the former clients and ask their preference regarding the disposition of the files. Some clients may prefer to receive their file back, while others may no longer care. If the client requests that the file be returned, be aware that any copy kept for the attorney's own records is at the expense of the attorney, not the client.

Prior to destruction, each file should be carefully examined for those materials which might prove helpful to the former client in the future or the eradication of which might prejudice the client. Special attention should be given to material which has not previously been provided to the client or would be otherwise unavailable.

Passage of time, of course, does not abate an attorney's duty of confidentiality nor does the death of the client. HRPC 1.6(a). Thus, review, culling, and destruction of client files should only be performed by the attorney and his or her staff. Obviously, client files should not be merely tossed in the trash; steps must be taken to ensure confidentiality.

Finally, the attorney should keep a record of former clients who received their file and/or material, former clients who did not wish to receive their file or who could not be contacted, and files destroyed.

### Disciplinary Notice

The Supreme Court of Hawaii suspended Honolulu attorney **JOHN M. BURNS** from the practice of law effective February 5, 1998, due to Mr. Burns' failure to cooperate with the Office of Disciplinary Counsel's investigation of his professional conduct.

Burns will remain suspended until further order of the Supreme Court. Meanwhile, the investigation of the pending complaint will continue.

### Notice of Reinstatement

By Order entered on January 20, 1998, the Supreme Court of the State of Hawaii reinstated Honolulu attorney **DAN S. IKEHARA**.

Ikehara had been suspended for sixty (60) days, pursuant to an Order of Suspension entered on October 14, 1997.

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# Ethics & Issues

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## ODC Statistical Report For 1997

We are pleased to present our annual statistical summary for 1997.

297 ethics complaints were docketed for investigation in 1997. 671 new grievances were also received in 1997.

Of the 297 complaints docketed in 1997, 26% involved alleged neglect of client matters (the largest complaint area each year). The next largest complaint categories were misrepresentations to others (7%), incompetence (5%), conflict of interest (5%), and abandonment (5%).

Clients continue to be the largest source of complaints (45%), followed by opposing parties (16%) and other attorneys (16%).

A record number of 376 complaint matters were closed in 1997. Of those, 49 (13%) were brought to conclusion in conjunction with the imposition of discipline. In all, 28 Hawaii lawyers were subject to discipline during the year. There was a significant increase in the more serious forms of discipline.

Requests for ethics guidance also increased.

The annual statistical summary is presented below.

### I. COMPLAINTS DOCKETED BY SUBJECT CATEGORY

#### A. PERFORMANCE

|   |    |
|---|----|
| 1. Abandonment .....                                    | 14 |
| 2. Abusiveness .....                                    | 7  |
| 3. Neglect (phone calls, letters, etc.) .....           | 76 |
| 4. Incompetence .....                                   | 15 |
| 5. Misrepresentations to client .....                   | 3  |
| 6. Misrepresentations to others.....                    | 20 |
| 7. Improper withdrawal from employment.....             | 1  |
| 8. Improper disclosure of confidential information..... | 12 |
| 9. Conflict of Interest.....                            | 14 |
| 10. Improper contact with opposing party.....           | 5  |
| 11. Other.....  | 9  |

#### B. FEES

|                         |   |
|-------------------------|---|
| 1. Excessive fees ..... | 7 |
|-------------------------|---|

|   |   |
|---|---|
| 2. Failure to return unearned portion.. | 2 |
| 3. Improper referral fees .....         | 0 |
| 4. Fee dispute, no unethical conduct.   | 0 |
| 5. Other .....                          | 3 |

#### C. FUNDS AND PROPERTY

|   |   |
|---|---|
| 1. Commingling.....                                     | 0 |
| 2. Conversion .....                                     | 5 |
| 3. Failure to account.....                              | 5 |
| 4. Failure to deposit in trust account..                | 0 |
| 5. Failure to maintain records.....                     | 1 |
| 6. Failure to promptly pay out .....                    | 6 |
| 7. Withdrawal—funds in dispute.....                     | 5 |
| 8. Improper payment to client .....                     | 0 |
| 9. Improper assertion of lien on client's property..... | 1 |
| 10. Failure to promptly deliver property .....          | 3 |
| 11. Other .....   | 0 |

#### D. SOLICITATION

|                                  |   |
|----------------------------------|---|
| 1. In-Person Solicitation .....  | 0 |
| 2. Direct Mail Solicitation..... | 3 |
| 3. Other .....                   | 0 |

#### E. ADVERTISING

|   |   |
|---|---|
| 1. False, fraudulent, deceptive, or misleading..... | 0 |
| 2. Specialization .....                             | 0 |
| 3. Other .....                                      | 0 |

#### F. INTERFERENCE WITH JUSTICE

|   |    |
|---|----|
| 1. Advising violation of law.....   | 3  |
| 2. Appeal in bad faith .....  | 0  |
| 3. Advising witness to hide, suppression of evidence, bribing witness ..... | 1  |
| 4. Aiding unlawful practice of law....                                      | 4  |
| 5. Disobedience of court order .....  | 5  |
| 6. Disrespect of court .....  | 0  |
| 7. Gifts to officials .....   | 0  |
| 8. Harassment, claim not warranted  | 5  |
| 9. Misrepresentations to court .....  | 12 |
| 10. Threaten criminal prosecution ...                                       | 0  |
| 11. Abuse of process (sham or groundless lawsuits, etc.) .....              | 2  |
| 12. Prosecutorial misconduct .....  | 1  |
| 13. Improper contact with tribunal ...                                      | 4  |
| 14. Use of perjured testimony or false evidence.....                        | 1  |
| 15. Improper trial publicity .....  | 2  |
| 16. Other .....   | 15 |

#### G. FRAUD

|                            |   |
|----------------------------|---|
| 1. Scheme to defraud ..... | 0 |
| 2. Other.....              | 0 |

#### H. PERSONAL BEHAVIOR AND

#### CRIMES

|   |   |
|---|---|
| 1. Commission of crime.....   | 9 |
| 2. Failure to honor agreement or stipulation .....                      | 6 |
| 3. Offensive language or actions .....                                  | 4 |
| 4. Extortion or intimidation .....                                      | 2 |
| 5. Coercion to obtain payment/fee .....                                 | 1 |
| 6. Abusive collection practices .....                                   | 1 |
| 7. Failure to pay bills (court reporters; expert witnesses, etc.) ..... | 0 |
| 8. Other .....  | 2 |

#### TOTAL COMPLAINTS

|                        |     |
|------------------------|-----|
| DOCKETED IN 1997 ..... | 297 |
|------------------------|-----|

### II. COMPLAINT SOURCES

|   |     |
|---|-----|
| 1. Clients .....                        | 135 |
| 2. Attorneys .....                      | 48  |
| 3. Judges .....                         | 9   |
| 4. Court Reporters .....                | 0   |
| 5. Bar Association .....                | 2   |
| 6. Office of Disciplinary Counsel ..... | 10  |
| 7. Attorney General .....               | 0   |
| 8. Other Governmental Agencies .....    | 2   |
| 9. Opposing Party .....                 | 49  |
| 10. Anonymous .....                     | 0   |
| 11. Member of the Public .....          | 33  |
| 12. Other .....                         | 9   |

|                        |     |
|------------------------|-----|
| TOTAL COMPLAINTS ..... | 297 |
|------------------------|-----|

### III. NUMBER OF ATTORNEYS COMPLAINED AGAINST BY NUMBER OF YEARS IN PRACTICE

| Number of Years In Practice | Number of Attorneys |
|-----------------------------|---------------------|
| Less than 1 - 5 years.....  | 44                  |
| 6 - 10 years .....          | 62                  |
| 11 - 15 years .....         | 57                  |
| 16 - 20 years .....         | 56                  |
| 21 - 25 years .....         | 41                  |
| 26 - 31+ years.....         | 37                  |

|             |     |
|-------------|-----|
| TOTAL ..... | 297 |
|-------------|-----|

### IV. NUMBER OF ATTORNEYS COMPLAINED AGAINST BY NUMBER OF COMPLAINTS PER ATTORNEY

|                                     |     |
|-------------------------------------|-----|
| No. of Attorneys with 1 complaint:  | 183 |
| No. of Attorneys with 2 complaints: | 30  |
| No. of Attorneys with 3 complaints: | 12  |
| No. of Attorneys with 4 complaints: | 2   |
| No. of Attorneys with 5 complaints: | 2   |

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## Ethics & Issues

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### V. COMPLAINT DISPOSITION

|   | No. of Attorneys | No. of Complaints Involved |
|---|------------------|----------------------------|
| Disbarment  | 5                | 7                          |
| Order Allowing Resignation from the Bar in Lieu of Discipline | 3                | 20                         |
| Suspension  | 5                | 7                          |
| Public Censure  | 1                | 1                          |
| Public Reprimand  | 2                | 2                          |
| Informal Admonition   | 9                | 9                          |
| Minor Misconduct Program                                      | 3                | 3                          |
| Dismissed or Dismissed with Caution.....                      |                  | 327                        |

### COMPLAINTS CLOSED

IN 1997: 376

COMPLAINTS PENDING AS OF 12/31/97: 277

### VI. ETHICS GUIDANCE

|   | 1996         | 1997         |
|---|--------------|--------------|
| Letter Opinions   | 70           | 82           |
| Telephone Opinions  | 994          | 1,124        |
| Written reference information provided (no opinion necessary) | 46           | 36           |
| <b>TOTAL</b>  | <b>1,110</b> | <b>1,242</b> |

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*in Good Standing* - "Within ten (10) days after the petition is filed Disciplinary Counsel [shall] may file [either (i)] objections thereto [(ii) a notice of no objection].

*Rule 2.8: Immunity* - gives absolute privilege and immunity to trustee proceedings conducted pursuant to Rule 2.20.

*Rule 2.20: Grounds for Appointment of Trustee* - adds "other good cause exhibiting an attorney's inability to protect the interests of the attorney's clients" as grounds for appointment of a trustee, and sets forth the procedure for appointment of a volunteer attorney as trustee. *Confidentiality* - specifies exception in cooperating with Lawyers' Fund for Client Protection investigations. *Duties* - specifies duties of appointed trustee. *Disposition of Unclaimed Files* - specifies procedure for storing unclaimed files after discharge of trustee.

The full text of the proposed amendments is available at the HSBA office and on the HSBA website (<http://hsba.org>). Bar members having an opinion on these proposals should send their comments in writing by June 1, 1998 to the HSBA Board of Directors, 1136 Union Mall PH-1, Honolulu, Hawaii 96813 or by fax 521-7936.

## Sarah Weddington

### speaks for Family Planning

Sunday, May 17, 1998



She made history 25 years ago. As the youngest woman ever to argue before the United States Supreme Court, Sarah Weddington won *Roe v. Wade*, the landmark case guaranteeing a woman's constitutional right to continue

or terminate her pregnancy.

Family Planning Centers of Hawaii, formerly known as Planned Parenthood of Hawaii, is honored to have Sarah Weddington speak at its 25th anniversary celebration of *Roe v. Wade*.

#### Brunch buffet

Waikiki Prince Hotel 11:00 a.m.

#### Lieutenant Governor Mazie Hirono

Opening remarks

#### Sarah Weddington

speaks at 12:00 Noon

Tickets \$75 (\$45 tax deductible)

For information and tickets, contact Dani at Family Planning Centers of Hawaii

Call 234-6888, fax 234-6885, or e-mail [dtomiyasu@MCIONE.com](mailto:dtomiyasu@MCIONE.com)

## FAMILY PLANNING CENTERS OF HAWAII

### 32 YEARS OF EXCELLENCE IN REPRODUCTIVE HEALTH SERVICES