Professional Responsibility in Paradise:  
Selected Issues from the Bishop Estate Controversy

By

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Background:

The trust known as Bishop Estate began in 1884 when Princess Bernice Pauahi Bishop, the last acknowledged descendant of the Hawaiian monarch Kamehameha I, placed the bulk of her estate in charitable trust to establish and maintain two schools, “one for boys and one for girls…called the Kamehameha Schools.” The trust corpus has been described by The New York Times as “a feudal empire so vast that it could never be assembled in the modern world,”¹ and by The Wall Street Journal as “the nation’s wealthiest charity.”²

The so-called Bishop Estate controversy erupted in 1997, when four kupuna (Native Hawaiian honored elders) and I alleged serious trust abuse by some the state’s most powerful people.³ Our 6,400-word statement, published in the Honolulu Star-Bulletin, became known as the Broken Trust Essay. One of the authors, federal district court judge Samuel P. King, later joined me in writing a book about the controversy, Broken Trust: Greed, Mismanagement & Political Manipulation at America’s Largest Charitable Trust. The book’s subtitle is Greed, Mismanagement & Political Manipulation at America’s Largest Charitable Trust--seemingly audacious to one who picks up the book for the first time, but if anything, seen as understated by the reader who plunges into the narrative. The events exposed in the book are real. They not only could happen, they somehow did happen, which is bound to get the attention and sharpen the focus of any reader, especially a professional whose practice has anything to do with tax-exempt organizations and charitable giving.⁴

Under pressure from the IRS, the probate court forced all five Bishop Estate trustees to resign; the Supreme Court justices, citing public pressure, announced that they would no longer involve themselves in the selection of Bishop Estate trustees (which justices had been doing for more than 120 years acting in an “unofficial” capacity); the state Attorney General indicted two of the trustees; a third trustee attempted suicide a few days after the suicide of a Bishop Estate lawyer; a fourth trustee was convicted of an unrelated crime and sentenced to federal prison; several legislators with close ties to Bishop Estate were convicted of crimes and sentenced to federal prisons; and wide-ranging reforms were implemented, including a rule against employing, reimbursing, or otherwise compensating any member of the legislative, judicial, or executive branch of government, and to exclude politicians from the trustee-selection process.

The controversy included allegations of misconduct by Bishop Estate trustees and some of their lawyers, Supreme Court justices, and dozens of other government officials. But because key documents were sealed or otherwise made unavailable to the public, and the parties agreed to a confidential global settlement, relatively few of the many factual allegations and legal disputes were resolved in a court of law.

**Selected PR Issues:**

**Criticizing Judges.** A lawyer is not supposed to make a statement that he knows to be false or with reckless disregard as to its truth concerning the qualifications or integrity of any judge. Hawaii’s Supreme Court justices wrote in a newspaper commentary that the authors of the Broken Trust essay had “expressly and impliedly impugned the integrity, honesty, ethics, intelligence, qualifications, competence, and professionalism not only of the five members of the Hawaii Supreme Court as individuals, but also of the court as an institution.” Although these same justices were the ultimate authority on matters of lawyer discipline in Hawaii, they never took formal action against the lawyers who signed the Broken Trust essay. Is it ever appropriate to criticize a judge?

**Judicial Ethics.** Judicial ethics require judges to conduct their personal and extrajudicial activities in ways that minimize the risk of conflict with the obligations of the judicial office. Accordingly, judges usually avoid personal involvement in public controversies that could require them to recuse themselves from cases that might reasonably be expected to show up in the judge’s court. Within hours of publication of the Broken Trust essay, Bishop Estate lawyers were looking into the ethical propriety of Judge Samuel King’s participation. Judge King felt comfortable with his involvement because (1) as a senior-status federal judge, he was allowed to decide the number and type of cases over which they would preside, which meant that he could easily avoid any case where his involvement in the Broken Trust essay could create any degree of doubt about his ability to rule impartially, (2) he had checked with several experts on judicial ethics, both of whom concluded that his involvement would not be ethically improper. Even so, substantial Bishop Estate funds were paid to a local law firm to research the issue. The firm immediately spent several days researching and drafting a memo entitled “Limits on freedom of federal judge regarding public statements on social issues and conclusions of law.” Years later, a court-appointed master concluded that this was part of an effort to discredit Judge King and other contributors to the Broken Trust essay. The master described the action as “chilling,” and said the use of charitable funds was “wholly inappropriate,” because the Broken Trust essay had criticized only the trustees—not the trust—and, in fact, had done so in an obvious effort to protect the trust. The master recommended that the judge order the trustees and/or their lawyers to reimburse the trust for the money spent on the above-described effort.

**Trust Counsel or Personal Counsel.** According to the Restatement (Third) of Trusts, trustees can properly hire legal counsel for personal protection in the course, or in anticipation, of litigation, such as for surcharge or removal. This is a perfect example of personal counsel, and

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5 See generally Samuel P. King & Randall W. Roth, Broken Trust: Greed, Mismanagement & Political Manipulation at America’s Largest Charitable Trust, (University of Hawaii Press 2006); See also, Samuel P. King and Randall W. Roth, Erosion of Trust, 93 A.B.A. J. 48 (2007), and www.brokentrustbook.com.
should be distinguished from “trust counsel,” whose role is to assist trustees in carrying out their fiduciary duties. Trustees are not required to disclose legal opinions obtained from “personal counsel,” but communications between trustees and trust counsel in Hawaii and many other states are subject to the general principle entitling a beneficiary to “all information reasonably necessary for the prevention or redress of a breach of trust or otherwise for enforcement of rights under the trust.” The Attorney General and a court-appointed master criticized the Bishop Estate trustees and some of their trust-paid lawyers for not being clearer about each lawyer’s intended role. The master recommended that some of the trustees’ lawyers be denied additional fees and ordered to reimburse the trust for millions in legal fees already paid, primarily because he believed those lawyers had been retained as trust counsel but acted like personal counsel.

**Identifying the Client(s).** Lawyers paid with Bishop Estate funds sometimes claimed to be representing the five individual trustees; at other times the same lawyers said they had one client, Bishop Estate, treating the trust as a separate entity; and on a few occasions they said they owed allegiance only to the majority faction of the board of trustees as their client. The Attorney General complained about this lack of clarity and argued that trust counsel sometimes acted as though they had been retained as personal counsel for the individual trustees (e.g., by working to prevent the enactment of a law that would require trustees to reimburse the trust for excessive compensation). Two courts ruled that lawyers being paid with Bishop Estate funds were Trust Counsel who had five clients—the trustees—acting in their fiduciary capacity.

**Conflicting Duties.** When the interests of multiple clients begin to diverge, problems arise for lawyers who claim to be representing them all. The duty of confidentiality owed to each trustee became impossible to reconcile with the duty to communicate with other trustees when the Bishop Estate trustees accused each other of serious wrongdoing and trust counsel were caught in the middle of it all.

**Attorney-Client Privilege.** A court-appointed master said investigating Bishop Estate was like investigating the CIA. The culture of secrecy in the boardroom was furthered by unconventional theories about attorney-client privilege. For example, Bishop Estate trustees contended that anything said or done in the presence of their chief counsel was automatically protected by attorney-client privilege, as was any document stamped “Confidential—Attorney-Client Privileged.” When their chief counsel was ordered to appear in court with minutes of trustee meetings, he brought them in a briefcase handcuffed to his wrist.

**Discovery Abuse.** When engaged in litigation, it is unethical for a lawyer to make frivolous demands for documents or fail to make reasonable efforts to comply with proper requests from an opposing counsel. Yet studies show that some lawyers routinely seek more documents than they reasonably need, go to great lengths to avoid turning over embarrassing or damning documents that the opposing party has requested, or provide requested documents hidden among a disorganized mountain of irrelevant documents. Hawaii’s Attorney General complained that the Bishop Estate trustees’ lawyers produced an “avalanche” of unimportant documents, yet failed to produce selected key documents.

**Fee-Splitting and Solicitation.** Mrs. Bishop’s will does not limit school admission to Native Hawaiians, but it does authorize the trustees to set the admissions policy. With minor
exceptions, Bishop Estate trustees have always reserved admission to Kamehameha Schools for children who have some quantum of Hawaiian blood. In 2002, a non-Native Hawaiian child challenged the Hawaiians-only admissions policy in federal court, arguing that a Hawaiians-only admissions policy violated his statutory civil rights. The plaintiff initially won (2-1) at the 9th Circuit, then lost in an en banc rehearing (8-7). Before the matter could be taken up by the U.S. Supreme Court, however, the trustees reached a confidential settlement with the anonymous youngster. The amount paid—$7 million—became known only because of a subsequent controversy among the plaintiff’s lawyers over the splitting of legal fees. Shortly thereafter, a Honolulu lawyer sent out an email that some observers viewed as an attempt to recruit new plaintiffs. Direct contact with a prospective client with “whom the lawyer has no family or prior professional relationship,” can be unethical “when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.”

**Lawyer Whistleblowing.** Lawyers for the trustees arguably witnessed serious breaches of trust. Did they have a duty to alert an outside authority? This is an area where the state ethics codes tend to vary. For example, when the lawyer’s services are used in furthering a fraud or crime, some states prohibit disclosure, some require it, and most allow (but do not require) it. The Hawaii Rules of Professional Conduct require it when the wrongdoing “has resulted in substantial injury to the financial interests or property of another.” Additionally, Hawaii’s Probate Rule 42 requires trust counsel to report a trustee’s “nonfeasance” to the probate court and any “illegal” action to trust beneficiaries, which presumably means the attorney general in the case of a charitable trust like Bishop Estate. Despite what some have called a “world record” for breaches of trust, I know of no evidence or heard it suggested that any lawyer ever attempted to report misconduct by a Bishop Estate trustee.

**Sex with a Client.** Rule 1.8(j) of the Model Rules of Professional Conduct provides that “a lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.” Yet a lawyer for one of Bishop Estate’s wholly owned businesses reportedly had a sexual relationship with one of the trustees. Was that trustee a “client” for purposes of this rule?

**Trial Publicity.** Ethical rules limit what a lawyer can say to the media about matters that are being litigated. With this in mind, lawyers for the Bishop Estate trustees complained to the probate judge that media outlets regularly quoted me on specific issues about to be decided in court. They argued that my statements were an improper influence on the court. Presumably because the ethical rule applies only to lawyers participating in the litigation, the probate judge took no action.

**Prosecutorial Misconduct.** Separate grand juries indicted, and twice re-indicted, two of the Bishop Estate trustees. Each time, the trial judge threw out the indictments on procedural grounds, and each time the Attorney General appealed that judge’s decision. Five substitute Supreme Court justices not only upheld the trial judge’s decisions, but also accused the Attorney General’s office of prosecutorial misconduct and prohibited any further attempt to re-indict the trustees. The specific problem was that a deputy attorney general had sought testimony from the trust’s chief counsel without first getting the court’s permission. The substitute justices declined
to rule on the question of whether the replacement trustees could waive the privilege with respect to communications between Bishop Estate lawyers and trustees who have since been replaced.

**Sealed Documents.** The Hawaii Supreme Court claims to have a policy of openness, with the following underlying rationale: “Because of our natural suspicion and traditional aversion as a people to secret proceedings, suggestions of unfairness, discrimination, undue leniency, favoritism, and incompetence are more easily entertained when access by the public to judicial proceedings are unduly restricted. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges. Thus, the openness which serves as a safeguard against attempts to employ our courts as instruments of persecution also serves to enhance public trust and confidence in the integrity of the judicial process. Such trust and confidence is a vital ingredient in the administration of justice under our system of jurisprudence.” Despite this stated policy of openness, some of the key documents in the Bishop Estate controversy were sealed or otherwise made unavailable to the public. The replacement trustees and new Attorney General, who also claimed to have a policy of openness, also refused to make key documents available to the public.

**Appeal to Racial Prejudice.** Lawyers are ethically prohibited from attempting to appeal to racial prejudice when such actions would be prejudicial to the administration of justice. Yet an attorney for the replacement Bishop Estate trustees made courtroom arguments that deputy attorneys general perceived as “playing the race card.” He seemed to be arguing that non-Native Hawaiians—like the deputy attorneys general—could not be trusted to act in the best interest of a trust that had special meaning for native Hawaiians—like him.

**Simultaneous Investigations.** The Attorney General simultaneously directed civil and criminal investigations of the Bishop Estate trustees. She instructed members of the criminal team not to communicate about the case with members of the civil team, and vice versa, but she oversaw both. The criminal team secured a series of grand jury indictments, which the civil team offered as evidence in the civil action.

**Attorney General Conflicts.** Bishop Estate trustees also argued in court that the Attorney General’s responsibility to protect charities as parens patriae conflicted with her tax-collecting duties (i.e., the Attorney General in Hawaii serves as in-house counsel for the state Department of Taxation). The trustees’ lawyers asked the judge to disqualify the Attorney General because of this “conflict.” The court did not do so.

**Recusal.** The Code of Judicial Conduct directs judges to disqualify themselves when their impartiality might reasonably be questioned. A probate judge whose husband was a partner in the law firm that represented the trustees recused herself when a lawyer requested it in open court. The five Supreme Court justices, who had selected the trustees while acting unofficially and therefore arguably without the benefit of judicial immunity, refused to recuse themselves until the attorney general formally requested that they do so.

**Judicial Accountability.** When lawyers allege serious misconduct by judges, as the Broken Trust authors did, one would normally expect some official body either to come to the defense of those judges (if the criticism was unwarranted) or to seek accountability from the judges (if the
criticism was warranted). One would certainly not expect serious allegations simply to be ignored. In Hawaii, a Judicial Conduct Commission is responsible for reviewing alleged misconduct by judges, and a Judicial Selection Commission has the power to deny a judge another term on the bench. Yet neither of these bodies (nor any of several other judicial watchdog groups) investigated any of the Broken Trust authors’ allegations of judicial misconduct.

**Judicial Ethics in the Bishop Estate Controversy:**

[The following excerpt is from *Broken Trust: Greed, Mismanagement and Political Manipulation at America’s Largest Charitable Trust* (University of Hawaii Press 2006)]

HAWAII’S Supreme Court justices insisted for years that there was nothing wrong with selecting Bishop Estate trustees while acting as private citizens and then putting on their robes and deciding cases involving the very same trustees. ... However, because the justices claimed to be acting unofficially, they could be sued personally (arguably without the benefit of judicial immunity) if trustees they negligently selected went on to harm the trust. Such exposure gave the justices a personal stake in any legal controversy involving Bishop Estate trustees. It was a classic conflict of interest.

Over the years, bar association leaders never said anything about this, at least not publicly. One former bar president said it was a simple oversight: "I had lost sight of the obvious -- the Supreme Court was ruling on all these cases involving the trustees they appointed. That was a real problem.” Another former president admitted he had recognized the issue but did not want to be the one to point out that the justices were violating their code of judicial ethics.

WHEN CAYETANO instructed Attorney General Margery Bronster to investigate allegations made by the "Broken Trust" authors, he specifically said he wanted her to look into the way trustees were being selected. But when she met with the justices to discuss how best to proceed with this inquiry, they said that they would meet with lawyers from the attorney general's office only as a group. Otherwise, said the justices, the questioners might try to "trick us" into telling different stories.

Bronster said she was prepared to subpoena the justices, if necessary, to hear their individual accounts. Justice Steven Levinson took particular offense at this. He argued ardently that although the justices had acted unofficially in selecting trustees, they were still justices; it would not be proper to force them to cooperate in an investigation; the integrity of the judiciary was at stake -- case law said so. By the time he finished, he had gone red in the face.

According to Bronster, the justices' message to her was clear: "We'll just see whether your subpoena power goes so far. If we're the ones to decide it (which we probably will be), we don't think so.” After weighing all the pros and cons, including the possible impact this fight would have on other important cases her office had pending before the Supreme Court, Bronster decided not to subpoena the justices.
The justices had won the standoff. It left them above the fray, which was where they wanted to be. But in the process of getting their way, the justices had engaged in a private, *ex parte* (without the other side present) discussion with the attorney general about her subpoena power in the Bishop Estate investigation. Judicial ethics are very clear in this situation: Any justice who participates in such an *ex parte* discussion has no choice but to step aside and let substitute justices decide cases related to that issue. But these five Supreme Court justices appeared to have every intention of continuing to preside over Bishop Estate cases, including the many appeals that were already stacking up from Bronster's investigation.

Bronster described the situation delicately, from her point of view:

*I thought perhaps they would realize that they didn't want to rule on something related to a discussion they had already had with one of the participants, so I wrote them a letter suggesting that they might want to recuse themselves from hearing that particular issue. They answered, 'You want us to recuse ourselves, you make a motion.' They probably thought I'd wise up and go away, but I did make that motion. They sat on it for a couple of months, and finally they sent it off to the judicial conduct commission with a suggestion that the 'appearance of impropriety' justified or necessitated recusal. The commission agreed; but nobody seemed to mention the fact that these conversations had occurred.*

Sure enough, when the justices announced that they would not personally decide cases arising out of the Bishop Estate investigation, they said nothing about the *ex parte* communication that had forced them to step aside. Instead, they cited "overheated circumstances." The justices also said nothing about their refusal to cooperate with the state’s top law enforcement officer in an official investigation of a matter in which they had participated—as they had earlier insisted, over and over, they had done—as private citizens. ...

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[The following excerpt is from an article I wrote, *Politics in Hawaii: Is Something Broken? HONOLULU MAGAZINE* (May 2008)]

In Hawaii, when a judge’s term in office is about to end, the Judicial Selection Commission decides whether to grant another term to that judge. In the case of a State Supreme Court justice, each term is 10 years. The first retention decision after the Bishop Estate controversy occurred in early 2002. It involved only Associate Justice Steven Levinson, but would soon be followed by positive retention decisions for the other two justices who had appointed Bishop Estate trustees, Chief Justice Ronald Moon and Associate Justice Paula Nakayama—justices Robert Klein and Mario Ramil had since resigned from the court.

Three of the authors of the original “Broken Trust” essay wanted to provide input into the
retention-decision process. We believed that those justices had impaired public confidence by turning the appointment of trustees into a political patronage system. Compounding the problem, they had decided legal disputes involving their handpicked trustees—an egregious conflict of interest. As the Star-Bulletin editorialized in 1997, “Trustee selections made by the justices have been lamentable because political motivation was evident.” At the same time, The Honolulu Advertiser asserted that this political motivation was, in fact, [intentional], writing, “The late Gov. John Burns and his army of loyalists … made no secret of their agenda … In order to pursue their goals … they needed to exert control over the key institutions. Influence over Bishop Estate was part of that plan.”

To the “Broken Trust” essay authors, it was inconceivable that the Judicial Selection Commission would give any of those justices another 10-year term in office. We were told by the Commission that oral testimony would not be permitted, but that we could submit our thoughts in writing. We did so, submitting a 10-page, single-spaced memo that detailed the many ways in which the justices’ actions had weakened the public’s trust in the justice system. We submitted nine copies to the Commission’s office. And then we waited. The Commission eventually announced that the justice in question had been given another 10-year term.

Sometime later, I happened to bump into a member of the Judicial Selection Commission at the airport. I tried to be pleasant, but made it clear that the “Broken Trust” essay authors could not have been more disappointed with the decision to give that justice another 10 years. The Commission member was apologetic, saying that it had been a very difficult decision, and that the outcome had been decided by a single vote. I said, “Look, if you think you’re going to make me feel better by telling me that the vote was close, you just don’t get it. I don’t see how any intelligent, well-intentioned person could read our memo and vote to give that justice another 10 years.”

He looked at me kind of funny, and said, “What memo?”

I said, “You know, the memo that the ‘Broken Trust’ authors submitted.”

His eyes widened as he said, “I never saw that; nobody said anything about a memo like that.”

If he was telling me the truth, and, based on the spontaneity of his response I think he was, it suggests that Commission members made their decision without even considering the very troubling information that can now be found in the Broken Trust book.

How is it that a system of justice is able to operate this way? A key part of the problem is that Chief Justice Moon’s control over the judiciary’s resources, calendar and staffing is virtually absolute. For example, when the long-time staff person at the Judicial Selection Commission decided to retire, Moon insisted on naming her replacement. Commission members objected, but Moon refused to back down: the new staff person would be of his choosing, or there would be no new staff person.

You may recall that, following publication of the “Broken Trust” essay, the justices agreed to step aside and let substitute justices decide Bishop Estate matters. Yet, Moon insisted on
handpicking the substitutes. I wish someone would explain to me how a person can be too personally involved to decide the matter himself, yet not too personally involved to handpick those who will decide it. I know of no other state where the chief justice maintains so much control over so many aspects of the judiciary as in Hawaii. ….

I’ve described the lack of accountability for the Bishop Estate trustees, their lawyers and the many legislators and hangers-on who abused Princess Pauahi’s trust, and the way the Judicial Selection Commission managed to extend three of the justices’ terms in office without apparently discussing the “Broken Trust” authors’ memo. One might wonder if those justices were ever held accountable by other oversight organizations such as the Judicial Conduct Commission (an appointed, governmental body that is supposed to take action when a judge in Hawaii acts unethically), American Judicature Society (a nonpartisan, nongovernmental organization whose mission includes building public confidence in the system of justice) and Hawaii State Bar Association (the state’s licensed lawyers).

So far, none of these “watchdog” organizations has said anything about the many allegations of serious judicial misconduct. For example, investigators with the attorney general’s office found numerous instances in which justices kept in touch with trustees through private conversations—even in the days when Kamehameha Schools alumni were marching to protest the trustees’ leadership. Or consider also the Bishop Estate internal memo, discovered by law enforcement personnel in a secret wall safe at Kawaiahao Plaza, that detailed how “CJ Moon” ought to handle the trustee-selection process, at a time when insiders were seen as angling for a way to get former Gov. John Waihee named as a trustee. However, it was as if, once the trustees who brought so much attention to the estate were removed in 1999, any thought of holding the justices accountable for their role ended.

Last year, when I learned that the Hawaii chapter of the American Judicature Society had formed a committee on judicial accountability, I asked to appear before them and made the following statement:

*Something is wrong with the system of judicial accountability when serious questions can be raised about the conduct of a state’s entire Supreme Court without an official body either coming to the defense of those justices or taking steps to hold those justices accountable. Given the seriousness and specificity of the allegations in the Broken Trust essay and book, one would expect some kind of response. Thus far, the silence has been deafening.*

I suppose it was predictable that the Judicial Conduct Commission would do nothing; after all, Moon selected its members. And he did not just select them; he held them over when their terms expired.

Maybe you’re wondering why more people don’t know about such cozy relationships. Perhaps it’s because the workings of the Judicial Conduct Commission, like those of the Judicial Selection Commission and, now, the Regent Selection Panel are cloaked in secrecy.
During my appearance before the American Judicature Society committee on judicial accountability, I invited its members to ask me anything about what Judge King and I had written in *Broken Trust*. I mention this because when that committee later met with Moon, one of its members asked him a question about something from the book. The chief justice’s response was that he would not be answering any questions about anything contained in *Broken Trust*. Nobody objected, and nothing of this was reported to the public. The Hawaii State Bar Association also chose not to press for answers. …