

# Comment on Professor Roth's Reply

James R. McCall\*

In his Reply<sup>1</sup> to the criticisms of the probate court rulings I sought to make in my Article,<sup>2</sup> Professor Roth argues from two premises. Neither premise is mentioned in the probate court rulings, nor does either premise have any logical connection with those rulings. In my opinion, both premises are invalid, and, with due respect to Professor Roth and appreciation for his efforts, I believe the points in my Article stand unrefuted.

Professor Roth's first premise is that trustees do not need and should not enjoy the benefits of the attorney-client privilege.<sup>3</sup> The second premise of the Roth Reply is that removal of allegedly unfit trustees from supervising extremely important activities of a trust is so crucial that a court may properly announce and rely upon any ground for such removal.<sup>4</sup>

*Premise #1: "Trustees should not be allowed to invoke the attorney-client privilege."*

Professor Roth states:

Trustees seeking advice from their Personal Counsel need the assurance of confidentiality provided by the [attorney-client] privilege. In the case of trustees seeking legal advice from Trust Counsel, however, there is no need to encourage candid communications.<sup>5</sup>

Of course, the law of Hawai'i, and every other American jurisdiction, recognizes that a trustee is generally entitled to the protection of the attorney-

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<sup>1</sup> Randall W. Roth, *Understanding the Attorney-Client and Trustee-Beneficiary Relationships in the Kamehameha Schools Bishop Estate Litigation: A Reply to Professor McCall*, 21 U. HAW. L. REV. 511 (1999).

<sup>2</sup> James R. McCall, *Endangering Individual Autonomy in Choice of Lawyers and Trustees—Misconceived Conflict of Interest Claims in the Kamehameha Schools Bishop Estate Litigation*, 21 U. HAW. L. REV. 487 (1999).

<sup>3</sup> Thus, Professor Roth concludes I am in error in arguing that the probate court erred in holding that KSBE could not invoke the attorney-client privilege. It should be recalled that the probate court ruled as it did on the privilege elimination claim solely because it determined that each individual member of the KSBE Board of Trustees ("Board") was a separate client of the Board attorney, and that a dispute between several individual Board members now existed.

<sup>4</sup> This premise, according to Professor Roth, invalidates my argument that the probate court erred in holding that the old Board had a conflict of interest in supervising the KSBE response to IRS claims that past tax law judgments of the Board were incorrect and could eventually subject Board members to personal liability.

<sup>5</sup> See Roth, *supra* note 1, at 513.

client privilege when communicating with the attorney for the trust about the trust's legal concerns.<sup>6</sup> Without the privilege, it would be impossible for a trustee to direct litigation or receive legal counsel on trust matters under the trustee's supervision. Although Professor Roth vehemently denies it in his Reply, the universally accepted theoretical basis for applying the attorney-client privilege to these communications is the "entity theory."<sup>7</sup>

Claiming that the trial court correctly eliminated the trust attorney-trustee attorney-client privilege, Professor Roth alternatively argues for less than a total negation of the privilege:

The attorney-client privilege has no place in a lawsuit by beneficiaries, or by a co-trustee on behalf of beneficiaries, where the attorney in question was retained as Trust Counsel.<sup>8</sup>

The concept that the attorney-client privilege should not be available to a trustee in a breach of trust action brought by a beneficiary is a tenable proposition.<sup>9</sup> However, the concept is immaterial to consideration of the probate court's ruling on the privilege elimination claim for three reasons. First, the privilege elimination claim was made in an action brought to remove a trustee for alleged unfitness, not to establish a breach of trust. Second, the action was brought by two trustees who disagreed with decisions made by a

<sup>6</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 134A cmt. a (Proposed Final Draft No. 1, 1996).

<sup>7</sup> *Id.* and § 123 cmt. c. Directly on point is Formal Opinion 380, issued by the American Bar Association's Committee on Ethics and Professional Responsibility. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 380 (1994). As pointed out in my Article, the Hawai'i Supreme Court explicitly adopted the entity theory in opinions dealing with KSBE. See McCall, *supra* note 2, at 499, 501.

The point is truly beyond controversy. However, Professor Roth devotes a lengthy footnote to refute his mischaracterization of my point that the entity theory is the guiding concept for attorneys representing organizations. See Roth, *supra* note 1, at 519 n.39. His authorities are either misleadingly selective or flatly miscited.

These are not the only miscited or flatly incorrect statements in the Reply. Professor Roth states that I "argued . . . against the minority trustees' attempt to disqualify Trust Counsel" in the trustee removal action. Roth, *supra* note 1, at 516. I made no argument of any type in that proceeding, and Professor Roth is flatly in error on the point. Rather than tediously refute a number of such errors on the Professor's part, I will rest with the general observation that in legal argumentation, mistakes can occur.

<sup>8</sup> Roth, *supra* note 1, at 522.

<sup>9</sup> Section 134A of the Restatement (Third) of the Law Governing Lawyers sets out the proposition that the attorney-client privilege should not shield communications between the trustee and the trust attorney concerning the trust's legal affairs when a beneficiary alleges a breach of trust in a suit against the trustee. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 134A (Proposed Final Draft No. 1 1996). Professor Roth expands the concept, as he must, to apply to suits brought by co-trustees. The Restatement section is clear in limiting the concept to suits brought only by beneficiaries.

majority of the Board, not by a beneficiary of the trust. Third, the probate court did not mention the concept in its ruling and was prohibited from considering it by Hawai'i Rule of Evidence ("HRE") 501.<sup>10</sup> That rule prohibits the courts of Hawai'i from altering the privileges contained in the HRE.<sup>11</sup>

The well-known prohibition of HRE 501 means that policy arguments for either eliminating the trustee-trust attorney privilege or creating a new exception to the privilege in breach of trust actions brought by a beneficiary are immaterial to any discussion of the probate court ruling. Unfortunately, Professor Roth never informs the reader that it was, and is, legally impossible for any court in Hawai'i to adopt his views. He does inform the reader in a form of magical incantation that: "A trust is a relationship between trustees and beneficiaries, not a separate entity."<sup>12</sup> The proposition is incontestable, but it is completely beside the point that an organization, which happens to be a trustee, must enjoy the benefits of the attorney-client privilege to function in a complex economy.<sup>13</sup>

*Premise #2: "Disqualification of allegedly unfit trustees from supervising extremely important trust matters is a crucial goal that justifies judicial reliance on any ground for removal."*

The only ground on which the probate court disqualified the old Board from supervising KSBE's response to the IRS claims was that it had a conflict of interest with the beneficiaries of the trust. The conflict claim grew out of the IRS's allegation that the old Board had authorized excessive compensation to itself and other KSBE officials and employees.<sup>14</sup> In his Reply, Professor Roth

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<sup>10</sup> See HAW. R. EVID. 501

<sup>11</sup> The drafters of HRE 501 expressly intended that the Rule to have the same effect as California Evidence Code section 911, which prohibits California courts from adding to, or altering the scope of, the privileges established in the California Evidence Code. See HAW. R. EVID. 501 commentary. In *Wells Fargo Bank, N.A. v. Superior Court*, 990 P.2d 591 (Cal. 2000), the California Supreme Court held that California Evidence Code section 911 precluded California courts from altering the attorney-client privilege contained in California Evidence Code section 954 by adopting the exception applicable to beneficiaries suing a trustee for breach of trust, which Professor Roth proposes.

<sup>12</sup> Roth, *supra* note 1, at 512.

<sup>13</sup> At page 512, Professor Roth illustrates his "a trust is a relationship" concept and, apparently, its relevance to the argument, as follows:

To illustrate: \$6 billion of trust corpus, including stock in Goldman Sachs and approximately 370,000 acres of land in Hawai'i, is not owned by KSBE . . . it is KSBE. Roth, *supra* note, at 512. The statement is beyond my powers of comprehension and, in my view, is a classic example of obscure formalistic argumentation.

<sup>14</sup> See my discussion of the probate court's Minute Order in the text accompanying notes

never identifies the conflict of interest the members of the old Board allegedly had. He simply states that a "serious conflict" existed,<sup>15</sup> but it is axiomatic that if it is impossible to explain the nature of an alleged conflict of interest, there is no conflict.

The only proposition Professor Roth could have had in mind is that public allegations of the trustees' unfitness somehow produced a conflict of interest between the trustees and the trust beneficiaries.<sup>16</sup> He certainly mentions no other possibility, and the proposition is clearly implicit in numerous passages in his Reply:

It is also relevant that a master had already had found dozens of serious breaches of trust<sup>17</sup> . . . . In fact, this particular court had the power and responsibility to remove the trustees permanently on the basis of the master's report . . . .<sup>18</sup> Trustees should not automatically be removed simply because someone has accused them of wrongdoing. When, however, the stakes are high and trustees have a serious conflict of interest, a court of competent jurisdiction should do whatever it determines to be in the best interests of the trust and trust beneficiaries.<sup>19</sup>

Elementary notions of fairness in the administration of laws require that courts truthfully set out the reasons for their rulings, and I have no doubt that the probate court did just that. In my opinion, the court was seriously mistaken, but I have no doubt it was not simply acting upon what appears to be Professor Roth's "just get rid of allegedly unfit trustees" concept. If there was a case to be made that the old Board was unfit, *that* case should have been presented to the court. Instead of requiring proof of such a case, however, the court was unfortunately persuaded to adopt an incorrect, extremely vague, and highly mischievous concept of "conflict of interest."

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93 and 94 of my Article. In my Article, I argued that no conflict of interest exists between a trustee and a beneficiary simply because a third party alleges that the trust acted unlawfully and it is possible to conceive of facts under which the trustee is personally liable to the trust for the consequences of the unlawful act. *See* McCall, *supra* note 2, at 505-06. I pointed out that such a conflict of interest theory would eliminate the ability of a trustee to supervise the defense of the trustee to most, if not all, liability claims. *See id.* It is possible to conceive of a trustee's ultimate personal liability for virtually any unlawful conduct since a trustee is liable to the trust for any unlawful or negligent conduct on the trustee's part that injures the trust.

<sup>15</sup> The phrase, never defined, specified, or explained in any way, appears at Roth, *supra* note 1, at 525.

<sup>16</sup> Professor Roth also states that a special panel had reviewed various documents and concluded that the old Board had "an 'apparent, adverse and material' conflict [of interest.]" Roth, *supra* note 1, at 522. However, neither Professor Roth nor his quotations from the special panel's report identify what the conflict of interest actually was.

<sup>17</sup> *Id.* at 524.

<sup>18</sup> *Id.* at 525.

<sup>19</sup> *Id.*

### CONCLUSION

My aim in writing my Article was to stimulate debate over the probate court rulings and, eventually, rejection of the concepts they embrace. I wish to thank the editors of the *University of Hawai'i Law Review* for giving me the chance to voice my thoughts, and to thank Professor Roth for expressing his views in the type of debate I had in mind.

