

# Understanding the Attorney-Client and Trustee-Beneficiary Relationships in the Kamehameha Schools Bishop Estate Litigation: A Reply to Professor McCall

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Professor McCall contends that two particular trial court decisions in the Kamehameha Schools Bishop Estate (“KSBE”) controversy “play havoc with attorney-client and trustee-beneficiary relationships. . . .”<sup>1</sup> The two decisions that concern Professor McCall so greatly were rendered by different judges in separate actions. One has to do with the attorney-client privilege,<sup>2</sup> the other with conflicts of interest.<sup>3</sup> Each of these two decisions reflects basic trust law principles and was properly made.

This Reply begins with a brief overview of relevant trust law principles in Part I. Part II then describes the decisions that trouble Professor McCall and the context of each. Part III critiques Professor McCall’s analysis and conclusions. The Reply then suggests, in Part IV, a framework for resolving the underlying issues.

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<sup>1</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, 489 (1999).

<sup>2</sup> See *id.* at 492-94; see also Findings of Fact, Conclusions of Law, and Trial Court Order (Stayed) Following Hearing by Order of Hawaii Supreme Court, In re *Estate of Bishop*, Equity No. 2048, at 10-12 (Haw. Prob. Ct. Jan. 11, 1999)(stating in Conclusion of Law No. 7 that the “attorney employed by a fiduciary for an estate . . . represents the fiduciary as client as defined in Rule 503(a) of the Hawaii Rules of Evidence.” (quoting HAW. PROB. R. 42(a))(internal quotation marks omitted)).

<sup>3</sup> See McCall, *supra* note 1, at 494-95; see also Minute Order Regarding Trustees Oswald Stender and Gerard Jervis’ Petition for Approval of Voluntary Recusal with Respect to Pending Tax Audit and for Appointment of a Panel of Special Administrators with Respect to Pending Tax Audit and Trustees’ Petition for Instructions and Approval of Appointment of IRS Dispute Advisory Panel, In re *Estate of Bishop*, Equity No. 2048 (Haw. Prob. Ct. Feb. 4, 1999) [hereinafter Minute Order].

## I. SELECTED TRUST LAW PRINCIPLES

A trust is a relationship between trustees and beneficiaries, not a separate entity.<sup>4</sup> Unlike a corporation, for example, a trust cannot own assets, conduct business or hire lawyers.

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. What sometimes is called trust corpus, or the trust estate, is owned by trustees.

Trustees have the power (though not the right) to do just about anything they want to do with the trust estate.<sup>5</sup> The potential for abuse is obvious and is the reason why trust law imposes strict fiduciary duties on trustees, including a duty of undivided loyalty to the interests of the beneficiaries.<sup>6</sup> Trustees' use of trust funds to serve their own personal interests is strictly forbidden.<sup>7</sup>

Trustees, acting in their fiduciary capacity, often hire lawyers to assist in the administration of the trust estate. It is both logical and appropriate for these lawyers to be paid with funds from the trust estate and that they be called "Trust Counsel," meaning simply that they do legal work that is directly related to the administration of the trust and that is intended to serve the best interests of the trust beneficiaries. The clients are the trustees, but the trustees' duty of undivided loyalty prevents them from using such lawyers in any way that would put their personal interests ahead of those of the beneficiaries. Trust Counsel, so defined, are said to represent trustees in the trustees' "representative" or "fiduciary" capacity.

It also is possible for trustees to retain counsel primarily to further the trustees' personal interests ("Personal Counsel"). This sometimes happens in reaction to, or anticipation of, an action against trustees by, or on behalf of,

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<sup>4</sup> See RESTATEMENT (SECOND) OF TRUSTS § 2 (1959)(stating that "a trust is a fiduciary relationship with respect to property, subjecting the person by whom the title to property is held to equitable duties to deal with the property for the benefit of [others.];" see also 1 AUSTIN W. SCOTT & FRATCHER, THE LAW OF TRUSTS § 2.3 (4th ed. 1987); Ronald C. Link, *Developments Regarding the Professional Responsibility of the Estate Administration Lawyer: The Effect of the Model Rules of Professional Conduct*, 26 REAL PROP. PROB. & TR. J. 1, 60 (1991)("[A] trust . . . is not generally regarded in law as a separate juristic entity."); *Ziegler v. Nickel*, 75 Cal. Rptr. 2d 312 (Ct. App. 1998)(holding that a trust is not an entity separate from its trustees).

<sup>5</sup> See UNIF. TRUSTEES' POWERS ACT § 3(c) (1964), 7B U.L.A. 764 (1985); HAW. REV. STAT. § 554A-3(c) (1993).

<sup>6</sup> See GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 543 (2d rev. ed. 1991); see also *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928)("[T]he punctilio of an honor the most sensitive . . . is . . . the standard of behavior [of the trustee]."); *Ahuna v. Department of Hawaiian Homelands*, 64 Haw. 327, 340, 640 P.2d 1161, 1169 (1982).

<sup>7</sup> See BOGERT & BOGERT, *supra* note 6, § 95.

trust beneficiaries. Such lawyers may or may not be paid out of trust funds initially. The cost of a trustee's Personal Counsel in the context of a dispute involving the trust ultimately should be borne by the losing party (i.e., a trustee who initially uses personal funds to pay such a lawyer is entitled to full reimbursement upon prevailing; a trustee who initially uses trust funds to pay such a lawyer must fully reimburse the trust estate upon failing to prevail). A trustee's Personal Counsel is said to represent trustees in their "personal," "individual," or "nonrepresentative" capacity.<sup>8</sup>

Attorney-client privilege generally applies to communications between attorneys and their clients, including when the clients are trustees or other fiduciaries.<sup>9</sup> But because the privilege frustrates the search for truth, its use "must be strictly limited to the purpose for which it exists."<sup>10</sup> That purpose is to encourage candid communications. Trustees seeking advice from their Personal Counsel need the assurance of confidentiality provided by the privilege. In the case of trustees seeking legal advice from Trust Counsel, however, there is no need to encourage candid communications. Trustees have a duty to be fully forthcoming when discussing trust administration with such lawyers, and also when responding to beneficiaries who want information reasonably needed to hold trustees accountable.<sup>11</sup> In short, trustees

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<sup>8</sup> Whether a lawyer is representing a trustee in that trustee's representative or individual capacity should be made clear by the lawyer. In the absence of an explicit agreement to the contrary, a lawyer initially paid with trust funds generally is presumed to be representing the trustee in the trustee's representative capacity. Lawyers initially paid from the trustee's own funds generally are presumed to be representing that trustee in that trustee's individual capacity. See generally ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT (3d ed. 1999) [hereinafter ACTEC COMMENTARIES].

<sup>9</sup> See HAW. R. EVID. 503

<sup>10</sup> *DiCenzo v. Izawa*, 68 Haw. 528, 535, 723 P.2d 171, 175 (1986)(quoting *Dike v. Dike*, 448 P.2d 490, 496 (Wash. 1968)).

<sup>11</sup> See, e.g., *United States v. Mett*, 178 F.3d 1058, 1064 (9th Cir. 1999)(holding that a trustee may invoke the federal common-law attorney-client privilege against beneficiaries when the trustee "retains counsel in order to defend herself against the . . . beneficiaries," but not when the "trustee seeks an attorney's advice on a matter of [trust] administration and where the advice clearly does not implicate the trustee in any personal capacity . . ."); *Comegys v. Glassell*, 839 F. Supp. 447, 449 (E.D. Tex. 1993)("[T]he Court holds that no independent attorney-client privilege exists between a trustee and its attorney to the exclusion of the beneficiaries when the alleged privileged documents relate to the administration of the trust or the trusts' res."); *Martin v. Valley Nat'l Bank*, 140 F.R.D. 291, 322 (S.D.N.Y. 1991)("Insofar as the trustee is consulting an attorney to assist him in providing adequate service to the trust, and hence to its beneficiaries, the trustee cannot shield those communications from the beneficiaries."); *Wells Fargo Bank, N.A. v. Superior Court*, 990 P.2d 591, 595 (Cal. 2000)("In most of the other jurisdictions in which this question has arisen, courts have given the trustee's reporting duties precedence over the attorney-client privilege."); *Lasky, Haas, Cohler & Munter v. Superior Court*, 218 Cal. Rptr. 205, 214 (Ct. App. 1985)("[D]ecisions in California and in other states, as well as commentators, have adopted the rule that the trustee's fiduciary duty of

"cannot subordinate the fiduciary obligations owed to the beneficiaries to their own private interests under the guise of attorney-client privilege."<sup>12</sup>

Trustees are required to avoid conflicts of interest.<sup>13</sup> When conflicts develop, trustees must act in the best interests of the beneficiaries.<sup>14</sup> If the conflict is great, trustees may be required to step aside temporarily or even permanently.<sup>15</sup> Should they not do so voluntarily, a court of competent jurisdiction can order them to step aside.<sup>16</sup> Any such decision should be based on the best interests of the beneficiaries, not the personal interests of the trustees.<sup>17</sup>

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full disclosure to the trust beneficiaries extends to all contents of the trustee's file concerning trust administration matters affecting the trust interests of the beneficiaries."); *In re Estate of Baker*, 528 N.Y.S.2d 470, 473 (N.Y. Sur. Ct. 1988) ("This court is of the opinion that a fiduciary has an obligation to disclose [to beneficiaries] the advice of counsel with respect to matters affecting the administration of the estate . . ."); RESTATEMENT (SECOND) TRUSTS § 173 & cmt. b (stating that a trustee generally must furnish "complete and accurate information[,] but the trustee is "privileged to refrain from communicating to the beneficiary opinions of counsel obtained by him at his own expense and for his own protection."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 134A cmt. b (Proposed Final Draft No. 1 1996) ("In litigation between a trustee of an express trust and beneficiaries of the trust charging breach of the trustee's fiduciary duties, the trustee cannot invoke the attorney-client privilege to prevent beneficiaries from introducing evidence of the trustee's communications with a lawyer retained to advise the trustee in carrying out the trustee's fiduciary duties."); BOGERT & BOGERT, *supra* note 6, § 961 ("The beneficiary . . . has a right to obtain and review legal opinions given the trustee to enable the trustee to carry out the trust, except for such opinions as the trustee has obtained on his own account to protect himself against charges of misconduct."); 2A SCOTT & FRATCHER, *supra* note 4, § 173 ("A beneficiary is entitled to inspect opinions of counsel procured by the trustee to guide him in the administration of the trust"); Rust E. Reid et al., *Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary*, 30 REAL PROP. PROB. & TR. J. 541, 560 (1996) ("[T]he general trend is for courts to permit, at a minimum, discovery [by beneficiaries] of attorney-client communications generated in the ordinary course of administering the trust."); Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 ILL. L. REV. 889, 940 (1994) ("As a number of courts have found, when counsel is employed at the trust's expense, communications between a trustee and counsel are not privileged against discovery by the trust beneficiaries.").

<sup>12</sup> *Riggs Nat'l Bank v. Zimmer*, 355 A.2d 709, 714 (Del. Ch. 1976).

<sup>13</sup> See BOGERT & BOGERT, *supra* note 6, §§ 394, 541, 543.

<sup>14</sup> See *id.* § 543.

<sup>15</sup> See *id.*

<sup>16</sup> See *id.* § 527

<sup>17</sup> See *In re Estate of Holt*, 33 Haw. 352, 355-57 (1935). The Hawai'i Supreme Court in *Holt* stated:

A court of equity may and will remove a trustee who has been guilty of some breach of trust or violation of duty. The exercise of this function by a court of equity belongs to what is called its sound judicial discretion and is not controlled by positive rules except that the discretion must not be abused.

*Id.* at 357 (quoting *Gaston v. Hayden*, 73 S.W. 938, 941 (Mo. Ct. App. 1903)). In *Holt*, the court permanently removed a trustee on the basis of the master's report, for lack of stewardship

## II. THE KSBE DECISIONS CRITICIZED BY PROFESSOR MCCALL

### A. *The Attorney-Client Privilege Decision*

Following the publication of the "Broken Trust" essay, the five KSBE trustees individually retained separate Personal Counsel to represent their respective individual interests. Together, the five trustees unanimously agreed to retain various Trust Counsel to assist them in their capacity as trustees in dealing with the Attorney General's investigation, master's inquiry, Internal Revenue Service ("IRS" or "Service") audit, and related matters. Whereas Trust Counsel conferred with all five trustees from time to time and were paid with trust funds,<sup>18</sup> Personal Counsel conferred only with each one's respective

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and lack of mutual confidence between trustees.

It is evident that the relations between the trustees were not amicable and that there was a lack of mutual confidence. This should not be overlooked in determining whether the court below abused its discretion in removing [the trustee]. There is nothing in the record which reflects on his honesty or impugns his integrity. There is much, however, from which the court could reasonably have inferred that [the trustee] was not sufficiently careful and diligent in the performance of his duties to meet the requirements of good stewardship.

*Id.* at 362.

<sup>18</sup> Trust Counsel sometimes described their client(s) by naming the individual trustees or by referring collectively to "the trustees," but at other times they said they represented "KSBE," "the trust" or "the trust estate." For example, Trust Counsel William McCorriston in various pleadings claimed to be attorney for the "Estate of Bernice Pauahi Bishop, Richard S.H. Wong, Marion Mae Lokelani Lindsey, Henry Peters, Gerard Jervis and Oswald Stender," "the trustees in their capacity as trustees of KSBE," and "the Board of Trustees of the Kamehameha Schools Bernice Pauahi Bishop Estate." Memorandum in Opposition to Motion of Attorney General to Compel Obedience to Subpoena 97-83 (the Lindsey Subpoena), *Bronster v. Wong*, S.P. 97-0520, at 4, 5 (Haw. Cir. Ct., 1st Cir. Oct. 20, 1997); Defendants' Reply Memorandum in Support of Motion to Dismiss First Amended Complaint Filed January 29, 1998, Filed March 12, 1998, *Burgert v. Estate of Bishop*, Civ. No. 97-01637 HG, at cover page (D. Haw. Apr. 30, 1998); Stipulation to Stay All Trial and Discovery Proceedings, *Medeiros v. Estate of Bishop*, Civ. No. 98-00082 HG, at 1 (D. Haw. Oct. 9, 1998). In a single 1999 petition, this same attorney characterized his representation three different ways: "Attorney[] for Trustees under the Will and of the Estate of Bernice Pauahi Bishop"; and attorney for Trustees Wong, Peters, and Lindsey "acting as a majority of the Board of Trustees"; and "counsel for the Board of Trustees." Trustees' Emergency Ex Parte Petition for Stay of Order Re: IRS Audit Pending Disposition of Appeal and/or Petition for Writ of Mandamus, In re *Estate of Bishop*, Equity No. 2048, at 1 (Haw. Prob. Ct. Feb. 18, 1999); Declaration of William C. McCorriston of 2/17/99, In re *Estate of Bishop*, Equity No. 2048, at 1 (Haw. Prob. Ct. Feb. 18, 1999).

A different Trust Counsel, Robert Bruce Graham, repeatedly indicated that his clients were the five trustees and that there is no such thing as a trust entity. The following is a typical example: "[Outside Counsel] MR. GRAHAM: There is no entity as KSBE. It's a trust estate, Your Honor. I represent the trustees." Partial Transcript of Proceedings before the Honorable

individual client. Personal Counsel were paid by either their respective client or KSBE's errors and omissions insurance carrier. Two of the trustees (the minority trustees) instructed Trust Counsel to cooperate fully with the various investigations, but the other three (the majority trustees) directed Trust Counsel not to cooperate fully. From that point forward, Trust Counsel followed instructions from the majority trustees.<sup>19</sup> In-house attorneys for KSBE (General Counsel) also took orders from the majority trustees during this period of time.

In the context of an action by the minority trustees to remove one of the majority trustees, the minority trustees asked the trial court to disqualify Trust Counsel, arguing that these lawyers had clients (i.e., various trustees) on opposite sides of the controversy.<sup>20</sup> The minority trustees also asked that the majority trustees not be allowed to use attorney-client privilege to prevent Trust Counsel and General Counsel from testifying about matters relating to trust administration.<sup>21</sup> Professor McCall at that time argued as an expert witness against the minority trustees' attempt to disqualify Trust Counsel, and against the minority trustees' efforts to elicit testimony from Trust Counsel and General Counsel.<sup>22</sup> Professor McCall consistently has stressed that Trust Counsel and General Counsel had but one client, an entity known as "the

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Bambi Weil, Judge, Presiding, on December 21, 1998, In re *Estate of Bishop*, Equity No. 2048, at 2 (Haw. Prob. Ct. Dec. 21, 1998).

<sup>19</sup> According to Trustee Oswald Stender, Trust Counsel sometimes ignored his requests and failed to communicate with him even though Stender considered himself a client of Trust Counsel. See Declaration of Oswald Kofoad Stender of 2/22/99, In re *Estate of Bishop*, Equity No. 2048, at 1-2 (Haw. Prob. Ct. Feb. 23, 1999). The existence of an attorney-client relationship generally is based on the reasonable beliefs of the client, not on the basis of what the attorney thinks. See *Otaka, Inc. v. Klein*, 71 Haw. 376, 383, 791 P.2d 713, 717 (1990); *Butler v. State Bar*, 721 P.2d 585, 589 (Cal. 1986); *In re McGlothlen*, 663 P.2d 1330, 1334 (Wash. 1983). The Hawai'i Supreme Court stated in *Otaka*: "Legal consultation occurs when the client believes that he is approaching an attorney in a professional capacity with a manifest intent to seek professional legal advice. Thus, the deciding factor is what the prospective client thought when he made the disclosure, not what the lawyer thought." *Otaka*, 71 Haw. at 383, 791 P.2d at 717 (internal quotation marks omitted)(quoting *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1322 (1981)).

<sup>20</sup> See, e.g., Petitioner-Defendant Oswald Kofoad Stender's Motion to Compel Respondent-Plaintiff Marion Mae Lokelani Lindsey to Produce Documents and to Appear for Her Disposition, In re *Estate of Bishop*, Equity No. 2048, at 8 (Haw. Prob. Ct. May 12, 1998).

<sup>21</sup> See Discovery Master's Order Granting Motion to Compel Deposition of Nathan Aipa, In re *Estate of Bishop*, Equity No. 2048, at 2 (Haw. Prob. Ct. Oct. 15, 1998).

<sup>22</sup> See Declaration of James R. McCall in Support of Trustees' Supplemental Memorandum in Opposition to Petition of Trustees Oswald Kofoad Stender and Gerard Aulama Jervis' Petition to Disqualify William C. McCorriston, Darolyn Lendio and the Law Firm of McCorriston Miho Miller Mukai Filed on March 4, 1999, In re *Estate of Bishop*, Equity No. 2048 (Haw. Prob. Ct. March 8, 1999).

trust."<sup>23</sup> Two trial courts disagreed. Citing basic principles of trust law, both courts ruled that the trustees as fiduciaries were the clients.<sup>24</sup> Since trustees effectively were suing each other, a joint-client exception to the attorney-client privilege rule applied.<sup>25</sup>

### B. *The Conflict of Interest Decision*

The minority trustees argued in a separate action that all five trustees had a conflict of interest in dealing with the IRS.<sup>26</sup> The IRS had been auditing KSBE for some years, and it generally was believed that KSBE's tax-exempt status was in jeopardy, especially if the trustees continued in office.<sup>27</sup> Also, the five trustees faced exposure to intermediate sanctions imposed by the Service.<sup>28</sup> Such action by the IRS would result in the trustees not only having

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<sup>23</sup> Professor McCall's arguments are detailed in his article herein. See McCall, *supra* note 1, at 497-501. Attorneys of record for the Majority Trustees principally relied on two cases to support their use of the entity theory: *Greate Bay Hotel & Casino Inc. v. City of Atlantic City*, 624 A.2d 102 (N.J. 1993), and *United States v. De Lillo*, 448 F. Supp. 840 (E.D.N.Y. 1978). See, e.g., *Objection to Trustees Oswald Kofoad Stender and Gerald Aulama Jervis' Petition to Disqualify William C. McCorriston, Darolyn Lendio and the Law Firm of McCorriston Miho Miller Mukai*, In re *Estate of Bishop*, Equity No. 2048, at 11, 12-15 (Haw. Prob. Ct. Feb. 23, 1999). The attorneys cited *Greate Bay* for the proposition that a trust may be considered an "entity" under MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13, and *De Lillo* as "the only case truly on point." See *id.* But the trust at issue in *Greate Bay* was a "business trust," which is "not a trust in the ordinary sense of holding and conserving property but rather is a device for the conduct of a business." *Greate Bay*, 624 A.2d at 104. Indeed, that Court noted that business trusts are expressly excluded from the scope of the Restatement of the Law of Trusts. See *id.* at 105.

*De Lillo* concerns the criminal prosecution of the former chairman of a union pension fund. See *De Lillo*, 448 F. Supp. at 841. *De Lillo* cites absolutely no authority for its blanket statement that "there is no logical or policy reason for treating a Board of Trustees any differently than a corporation[.]" see *id.* at 842, even though such a statement flies in the face of the Restatement of the Law of Trusts. See, e.g., RESTATEMENT (SECOND) OF TRUSTS, §§ 2-16 (1959)(defining trusts, and see particularly section 16A, distinguishing charitable corporations from trusts). *De Lillo* then transposes, word for word, the holding of a corporation case into the trust law context. See *De Lillo*, 448 F. Supp. at 842-43 (quoting *In Re Grand Jury Proceedings*, Detroit, Mich., Aug. 1977, 434 F. Supp. 648, 650 (E.D. Mich. 1977)).

<sup>24</sup> See *supra* notes 2 and 3 and accompanying text.

<sup>25</sup> See HAW. R. EVID. 503(d)(6).

<sup>26</sup> See *Minute Order*, *supra* note 3, at 5.

<sup>27</sup> See *Order Regarding Order to Show Cause Regarding Special Purpose Trustees' Report and Order to Show Cause Regarding New CEO Based Management System*, In re *Estate of Bishop*, Equity No. 2048 (Haw. Prob. Ct. May 7, 1999), available at <<http://starbulletin.com/1999/05/07/news/removal.html>>.

<sup>28</sup> See Stephen G. Greene, *Trustees of Hawaii's Wealthiest Charity Make Changes to Quell Criticism*, CHRON. PHILANTHROPY, Jan. 15, 1998, at 39; Stephen G. Greene, *Bishop Estate to Pay IRS \$9-Million but Retain Its Tax-Exempt Status*, CHRON. PHILANTHROPY, Dec. 16, 1999, at 32.

to pay a substantial penalty to the IRS, but also being forced to reimburse the trust estate for any "excess benefits," such as trustee compensation that might be determined by the IRS to have been unreasonably high.<sup>29</sup>

After reviewing 2,500 pages of relevant materials and considering the recommendation of a three-person panel, the trial judge found that the five incumbent trustees had a conflict of interest that was "actual, apparent, adverse and material."<sup>30</sup> He then appointed five special-purpose trustees to represent KSBE interests in the IRS audit.<sup>31</sup>

### III. PROFESSOR MCCALL'S FLAWED ANALYSIS AND CONCLUSIONS

#### A. *The Attorney-Client Privilege Decision*

Professor McCall cites Rule 1.13 of the Hawai'i Rules of Professional Conduct for the proposition that attorneys retained by trustees to represent them in their fiduciary capacity really have but one client, the trust entity.<sup>32</sup>

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<sup>29</sup> See I.R.C. § 4958 (Supp. II 1996), effective with respect to excess benefit transactions occurring on or after September 14, 1995. Prior to the enactment of section 4958 ("intermediate sanction" law), upon discovering trustee abuse at a public charitable trust, the IRS could revoke the charity's tax exempt status, or do nothing. See D. Alexander Ritchie, *Intermediate Sanctions: Controlling the Tax-Exempt Organization Manager*, 18 VA. TAX REV. 875, 881 (1999). The only available sanction—revocation—harmed blameless beneficiaries of the charity and not the trustees who had abused their position of trust. See *id.* at 876. The intermediate sanction law, which was passed unanimously in both the House and in the Senate, empowers the IRS to sanction insiders who have abused the trust. With this option available to it, the IRS is highly unlikely to revoke the tax-exempt status of any viable public charity, at least not so long as it has reason to believe that the abuse will not continue. See H.R. REP. No. 104-506, at 59 n.15 (1996), reprinted in 1996 U.S.C.C.A.N. 1143, 1182 n.15.

The intermediate sanctions law empowers the IRS to assess a 25% penalty on trustees who receive an "excess benefit," such as excessive compensation. See I.R.C. § 4958 (Supp. II 1996). The charitable trust benefits by not losing its tax-exempt status and because any such "excess benefit" must be repaid to the trust. For example, if a trustee received compensation of \$900,000 for a year when reasonable compensation to that trustee would have been only \$100,000, that trustee will have to pay an intermediate sanction of \$200,000 to the IRS (25% of the \$800,000 excess benefit) and pay back the entire \$800,000 excess benefit to the trust estate.

The KSBE trustees reportedly spent nearly \$1 million of trust funds unsuccessfully fighting the enactment of intermediate sanctions law and attempting to lessen its potential impact on them. See Petition of the Attorney General on Behalf of Trust Beneficiaries to Remove and Surcharge Trustees, for Accounting, and for Other Equitable Relief, In re *Estate of Bishop*, Equity No. 2048 (Haw. Prob. Ct. Sept. 10, 1998), available at <<http://starbulletin.com/98/09/11/news/removal.html>>.

<sup>30</sup> Minute Order, *supra* note 3, at 6.

<sup>31</sup> See *id.* at 8.

<sup>32</sup> See McCall, *supra* note 1, at 498-99.



His position is that only the trust (and not individual trustees) can waive the privilege, and that such decisions are properly made by majority vote of the trustees. The rule he cites basically says that attorneys hired by agents of an organization to represent interests of the organization have but one client, the organization.<sup>33</sup> But neither Rule 1.13 nor its companion comments mention trusts, much less suggest that they are "organizations." As big a departure from the common law as it would be to start treating trusts as organizations rather than relationships, one would expect the question to be addressed. That it is not suggests that Professor McCall's interpretation was not intended or even anticipated when the rule was adopted.

Professor McCall then states that Rule 503 of the Hawai'i Rules of Evidence "explicitly adopts the entity theory."<sup>34</sup> But this rule simply defines a client as "a person . . . or . . . organization or entity . . . who is rendered professional legal services by a lawyer . . . ."<sup>35</sup> Nowhere in the rule or companion comments is it even suggested that a trust is a person, organization or entity.

Professor McCall then quotes Hawai'i Probate Rule 42(a): "An attorney employed by a fiduciary for [a] . . . trust represents the fiduciary as client as defined in Rule 503(a) of the Hawaii Rules of Evidence and shall have all the rights, privileges, and obligations of the attorney-client relationship with the fiduciary[,]" and suggests that the word fiduciary in this context refers to a trust entity, rather than trustees.<sup>36</sup> A close look at the comments to Rule 42, however, demonstrates that the drafting committee used the word fiduciary to describe a natural or juridical person responsible for the administration of a trust estate, not the trust estate itself.<sup>37</sup>

Professor McCall also incorrectly states that commentators and modern appellate opinions "uniformly adopt" the entity theory.<sup>38</sup> The theory has other proponents, and at least one court has adopted it, but Professor McCall is simply wrong when he suggests it currently is the favored approach,<sup>39</sup> and that

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<sup>33</sup> See HAW. RULES OF PROFESSIONAL CONDUCT Rule 1.13.

<sup>34</sup> McCall, *supra* note 1, at 499.

<sup>35</sup> HAW. R. EVID. 503(a)(1).

<sup>36</sup> McCall, *supra* note 1, at 499.

<sup>37</sup> HAW. PROB. R. 42 commentary ("The fiduciary must be conscious of the difference between personal actions and fiduciary actions. For example, an attorney could not represent a fiduciary with respect to the administration of a trust and also represent that same individual . . . [if it] would present a conflict of interest.").

<sup>38</sup> See McCall, *supra* note 1, at 498.

<sup>39</sup> An overwhelming majority of authorities conclude that the fiduciary is the attorney's client. See, e.g., *Coverdell v. Mid-South Farm Equip. Ass'n*, 335 F.2d 9, 12-15 (6th Cir. 1964)(holding that a trust cannot sue or be sued, but rather, legal proceedings are properly directed at the trustee); *Wells Fargo Bank, N.A. v. Superior Court*, 990 P.2d 591, 595 (Cal. 2000)(noting that the "suggestion that the trustee `is not the real client' of the attorney retained

his interpretation and application of the theory have been embraced by many others.<sup>40</sup> Professor McCall also is mistaken in thinking that a Hawai'i Supreme Court opinion has adopted and applied the entity theory.<sup>41</sup>

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by the trustee directly contradicts California law . . . ." (citation and internal quotation marks omitted)(quoting *United States v. Mett*, 178 F.3d 1058, 1063 (9th Cir. 1999)); *Ziegler v. Nickel*, 75 Cal. Rptr. 2d 312, 314 (Ct. App. 1998)(stating that a trust "is not an entity separate from its trustees." (internal quotation marks omitted)); *In re Estate of Gory*, 570 So. 2d 1381, 1383 (Fla. Dist. Ct. App. 1990)(noting that "in Florida, the personal representative is the client rather than the estate or beneficiaries." (internal quotation marks omitted)); *Wagner v. Lamme*, 386 N.W.2d 448, 450 (Neb. 1986)("Attorneys represent people. There is no such position known as 'attorney of an estate.'"); *Roberts v. Fearey*, 986 P.2d 690, 694 & n.3 (Or. Ct. App. 1999)("[W]e hold that, when an attorney undertakes to represent a fiduciary, he or she represents only the fiduciary . . . We have found only one case holding that an attorney hired by the trustee represents the estate and not the trustee."); *Thompson v. Vinson & Elkins*, 859 S.W.2d 617, 623 (Tex. Ct. App. 1993)(finding "considerable authority" that an estate or trust cannot be represented, as it is "not a legal entity that can sue or be sued."); RESTATEMENT (SECOND) OF TRUSTS § 2 (1959) (stating that a trust is a "relationship"); ACTEC COMMENTARIES, *supra* note 8, at 211 ("[A] minority of cases and ethics opinions have adopted the so-called entity approach under which the fiduciary estate is characterized as the lawyer's client. However, most cases and ethics opinions treat the fiduciary as the lawyer's client . . ."); John R. Price, *Duties of Estate Planners to Non-Clients: Identifying, Anticipating and Avoiding the Problems*, 37 S. TEX. L. REV. 1063, 1081 (1996)(noting that "a majority of the cases and ethics opinions all consider the fiduciary to be the lawyer's client—not the fiduciary estate or its beneficiaries."); Tuttle, *The Fiduciary's Fiduciary*, *supra* note 11, at 927 (observing that "[t]he entity theory represents a novel departure from the law in nearly all jurisdictions . . ."); *but see Steinway v. Bolden*, 460 N.W.2d 306, 307 (Mich. Ct. App. 1990)(concluding that, under the Revised Probate Code of Michigan, "although the personal representative retains the attorney, the attorney's client is the estate, rather than the personal representative.").

<sup>40</sup> Professor Jeffrey N. Pennell, an advocate of the entity approach, has acknowledged that it has "little direct precedential support[.]" and that it was specifically rejected by an ABA Study Committee "as lacking sufficient support in the law." Jeffrey N. Pennell, *Representation Involving Fiduciary Entities: Who Is the Client*, 62 FORDHAM L. REV. 1319, 1334, 1355 (1994). Unlike Professor McCall, Professor Pennell's conception of an entity approach generally expands rather than limits the level of protection afforded trust beneficiaries.

Under the entity approach, each trust entity acts through an "agent" . . . but the attorney ultimately is responsible to the entity and its constituents . . . rather than to the agent who hired the attorney. Moreover, the attorney is authorized to disclose otherwise confidential information to constituents of the entity [i.e., beneficiaries] on an "as needed" basis. This alternative has not been considered by many courts--probably because of the historical notion that . . . a trust has no legal existence . . . . This approach . . . is somewhat novel

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*Id.* at 1334. "As perceived in this manner, the fiduciary who hired the attorney . . . is merely another agent of the true client (the entity) and could not, for example, dismiss the attorney in an effort to cover up any wrongdoing." *Id.* at 1336.

<sup>41</sup> See McCall, *supra* note 1, at 499-501. In *Richards v. Midkiff*, 48 Haw. 32, 40-41, 396 P.2d 49, 55 (1964), the Hawai'i Supreme Court merely adopted the universal rule "that multiple trustees can only act as a unit . . ." Specifically, the court stated that "the determination of whether the trust estate should maintain a legal action requires the requisite concurrence of the

Though it does not go to his central point, Professor McCall's mischaracterization of another Hawai'i authority should not go unchallenged. Specifically, he asserts that "HPR Rule 42(c) provides that the attorney for a trust . . . has an independent duty to inform the probate court if the attorney 'knows' of the commission or possible commission of a crime that could injure the trust."<sup>42</sup> That is his characterization of the rule. Here is the language of the rule itself:

An attorney for an estate, guardianship, or trust is an officer of the court and shall assist the court in securing the efficient and effective management of the estate. The attorney . . . shall have an obligation to bring to the attention of the court the nonfeasance of the fiduciary.<sup>43</sup>

There is a world of difference between the "nonfeasance of the fiduciary," as stated in the rule, and the "commission of a crime," as the rule is described by Professor McCall. And one can only wonder why he would emphasize that the attorney must actually *know* about wrongdoing. The rule itself does not use that word. In fact, attorneys are required by Rule 42(c) "to monitor . . . and to ensure that required actions [are taken]."<sup>44</sup>

Professor McCall expresses concern that the trial court's decision effectively eliminates the attorney-client privilege whenever trustees sue one another, and that this will prevent effective representation of trustees: "Unless rejected, the trial court ruling will force fiduciaries to avoid any type of confidential communications with [Trust Counsel]."<sup>45</sup> But this ignores that individual trustees always are free to retain Personal Counsel with their own funds (and sometimes with funds from the trust estate) to watch out for their personal interests. Each of the five KSBE trustees did exactly that.<sup>46</sup>

Unsurprisingly, Personal Counsel were never called upon to testify about communications with their respective clients. Presumably, each individual

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trustees, just as the exercise of any other power." *Id.* at 41, 396 P.2d at 55 (citations omitted). On March 8, 1999, the Hawai'i Supreme Court denied a writ of mandamus filed on behalf of the majority trustees following Judge Weil's ruling that Trust Counsel represented five trustees rather than one entity. See Order Denying Petition, In re *Estate of Bishop*, Equity No. 2048 (Haw. S. Ct. Mar. 8, 1999).

<sup>42</sup> McCall, *supra* note 1, at 502 (emphasis added).

<sup>43</sup> HAW. PROB. R. 42(c).

<sup>44</sup> *Id.* Perhaps Professor McCall confused Rule 42(c) with Rule 42(b), which imposes a duty on trust counsel "to notify . . . beneficiaries . . . of activities of the fiduciary actually known by the attorney to be illegal . . ." *Id.* 42(b) (emphasis added).

<sup>45</sup> McCall, *supra* note 1, at 504.

<sup>46</sup> Personal Counsel were not paid directly from the trust estate. However, much of their fees were paid by KSBE's insurance carrier pursuant to a "cannibalizing" policy (amounts paid to lawyers reduced coverage protection to KSBE).

trustee was candid when conferring with his or her respective Personal Counsel.

Trust Counsel are supposed to be working for the ultimate benefit of beneficiaries, not the personal interests of trustees. 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.

### B. *The Conflict of Interest Decision*

Professor McCall claims that a judge found conflicts of interest requiring the appointment of special-purpose trustees despite "no evidence relevant" to the conflict claim.<sup>47</sup> The judge's order in that matter indicates otherwise.<sup>48</sup> Furthermore, Professor McCall neglects to mention the implications of a Hawai'i statute and rule that enables the court to appoint special-purpose trustees once a conflict has been found. Hawai'i Revised Statutes section 554A-5(b) states, "If the duty of the trustee and the trustee's individual interest . . . conflict in the exercise of a trust power, the power may be exercised only by court authorization . . ."<sup>49</sup> This means that the court must get involved once a conflict of interest has been established. A panel composed of a master, General Counsel, and KSBE's long-time tax counsel, after reviewing 2,500 pages of relevant materials and conferring with senior IRS personnel, unanimously found an "actual, apparent, adverse and material" conflict, and recommended the appointment of special-purpose trustees to represent KSBE interests in the IRS audit.<sup>50</sup> Hawai'i Probate Rule 56(e) provides for appointment of special administrators, such as the special-purpose trustees, where a conflict of interest arises or a fiduciary cannot or should not act for any other reason.<sup>51</sup>

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<sup>47</sup> McCall, *supra* note 1, at 504.

<sup>48</sup> See Minute Order, *supra* note 3. The Minute Order stated: "*Based on the IRS Forms 5701 . . . the Court finds . . . that actual, adverse and material conflicts of interest exist between the individual interests of Trustees of the Trust Estate . . . and the interests of the Trust Estate with respect to the claims and issues raised in the IRS Forms 5701*" *Id.* at 6 (emphasis added). The court also relied on the findings and recommendations of the master.

<sup>49</sup> HAW. REV. STAT. § 554A-5(b) (1993).

<sup>50</sup> Report of the Master Pursuant to the Order Adopting Recommendation No. 18 of the Master's Consolidated Report on the 109th, 110th, and 111th Annual Accounts of the Trustees Filed on October 21, 1998, and the Order Adopting Amended Recommendation No. 22 of the Master's Second Supplemental Report on the One Hundred Ninth, One Hundred Tenth, and One Hundred Eleventh Annual Accounts of the Trustees, *In re Estate of Bishop*, Equity No. 2048, at 6 (Haw. Prob. Ct. Jan. 21, 1999).

<sup>51</sup> See HAW. PROB. R. 56(e).

There also is case-law support in Hawai'i for appointing additional trustees. In the case of *In re Estate of Ikuta*,<sup>52</sup> the Hawai'i Supreme Court appointed an additional trustee over the objection of the sole incumbent trustee. The Supreme Court noted that there was a conflict between the sole trustee and the beneficiaries, and held: "[W]e find that the lower court was empowered to 'appoint additional trustees, and not merely fill vacancies by appointment, when the circumstances are such that the appointment of such additional trustees would be conducive to the better administration of the trust.'"<sup>53</sup> It should be remembered that the special-purpose trustees were appointed to represent KSBE interests in the IRS audit at a time when the Attorney General, acting as *parens patriae*, was calling for the permanent removal of incumbent trustees who appeared to have lost the trust of many key parties, including the IRS.<sup>54</sup>

Professor McCall has overreacted to a fact-driven decision. According to him, this particular conflict of interest ruling means that any trustee now can be forced to the sidelines by any third party who "asserts that the trustee, acting on behalf of the trust, committed a mistake or wrongful act for which the trust or the trustee could be held liable."<sup>55</sup> As if this possibility is not shocking enough, he then extends it to *every* claim against a trust, whether or not a trustee is personally implicated: "[A]ny assertion of a claim against a trust by a third party would result in the limited removal of the trustees, as long as it is possible to imagine a theory on which the trustees might have

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<sup>52</sup> 64 Haw. 236, 639 P.2d 400 (1981).

<sup>53</sup> *Id.* at 248, 639 P.2d at 408 (quoting RESTATEMENT (SECOND) OF TRUSTS § 108 cmt. e (1959)).

<sup>54</sup> See, e.g., Letter from Terry Franklin, Chief, EP/EO Division Western Key District and Marcus Owens, Director, Exempt Organizations Division of the IRS, to Interim Trustee Robert K.U. Kihune, Aug. 19, 1999 (copy on file with author). This letter states:

Due to fundamental concerns about whether the Incumbent Trustees would effectively implement any agreement that would be entered into between the Service and Kamehameha Schools Bishop Estate (KSBE), the Service required, as a precondition to entering into Closing Agreement negotiations with KSBE and as an alternative to continuing with administrative revocation procedures, that steps be taken to permanently remove the Incumbent Trustees from their positions as Trustees of KSBE. In coming to this decision, we have relied upon evidence in our administrative files that indicates that the Incumbent Trustees have a history of ignoring Probate Court Orders, Master Report recommendations, Probate Court Stipulations, and the advice of independent experts whose opinions were sought out by KSBE at great expense to KSBE, relating to activities which impact KSBE's exempt status. In addition, we have relied upon evidence that indicates the Incumbent Trustees have a history of pursuing activities which are inconsistent with furthering KSBE's exempt purpose.

*Id.*

<sup>55</sup> McCall, *supra* note 1, at 505.

ultimate liability to the trust for the claim.”<sup>56</sup> According to Professor McCall, a trustee would be prevented from defending a lawsuit where “a trust employee allegedly operates an automobile in a negligent manner while on trust business, thereby causing an accident that injures a third party.”<sup>57</sup>

This radical departure from current law, according to Professor McCall, is the logical consequence of the court in this KSBE case finding a conflict of interest and appointing special-purpose trustees. But, the court did not act simply because a claim of wrongdoing had been asserted. The court’s decision reflected its evaluation of specific claims, including the potential impact on the interests of the trust beneficiaries. It should be remembered that the IRS was at that time contemplating the revocation of KSBE’s tax-exempt status, a move that would have reduced the trust estate by \$750 million, or more. It also is relevant that a master had already found dozens of serious breaches of trust,<sup>58</sup> and that in Hawai’i, a master’s report has the weight of a jury’s verdict.<sup>59</sup>

It is difficult to take seriously Professor McCall’s statement that the interests of the trustees and the trust beneficiaries were “actually identical, rather than conflicting.”<sup>60</sup> Perhaps he has not considered the implications of the federal intermediate sanctions law. That 1996 legislation was not mentioned in his declaration that was submitted to the court by the majority trustees, nor was it cited in his article. For example, by arguing that they had not paid themselves unreasonably high compensation, the trustees would be arguing against reimbursement to KSBE of an “excess benefit.”

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<sup>56</sup> *Id.* at 506.

<sup>57</sup> *Id.* at 506 n.98.

<sup>58</sup> See Master’s Consolidated Report on the One Hundred Ninth, One Hundred Tenth, and the One Hundred Eleventh Annual Accounts of the Trustees, *In re Estate of Bishop*, Equity No. 2048 (Haw. Prob. Ct. Aug. 7, 1998), available at <<http://starbulletin.com/98/08/07/news/masters2/masters2.html>>.

<sup>59</sup> *In Monting v. Leong Kau*, 7 Haw. 486 (1888), the Hawai’i Supreme Court stated:

The settled practice of courts of equity is to regard the report of a Master upon questions of fact referred to him as having substantially the weight of the verdict of a jury, and his conclusions are not to be set aside or modified without clear proof of error or mistake on his part.

*Id.* at 487; see also *In re Estate of Baker*, 34 Haw. 263, 267-68 (1937)(holding that a master’s report on questions of fact will not be set aside or modified absent clear proof of error).

<sup>60</sup> McCall, *supra* note 1, at 508.

#### IV. A BETTER WAY TO FRAME THE ISSUES

##### A. *The Conflict Decision*

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. In short, a judgment call must be made.

Trustees with a conflict of interest are not legally entitled to continue to act on behalf of the trust without regard to the nature of the claim or the seriousness of the conflict. Common sense alone suggests that some conflicts are simply too great. For example, if a trust is owed money by a trustee who recently put his assets in his spouse's name, should that trustee be the one to decide on behalf of the trust whether to accuse himself of a fraudulent transfer? This extreme example of a conflict simply points out that a line has to be drawn somewhere, by someone. The judge is the best person in such cases to draw the line, and the judge in the KSBE situation made what appears to be a reasonable decision, especially in light of the three-person panel's findings and recommendation. Even if Hawai'i did not have a statute explicitly calling for court involvement once a conflict of interest has been determined, and a rule authorizing the appointment of special purpose trustees, the court would have been justified in responding as it did to the minority trustees' petition. In fact, this particular court had the power and responsibility to remove the trustees permanently on the basis of the master's report or conflict among the trustees, and to take such action *sua sponte*.<sup>61</sup>

##### B. *The Privilege Decision*

Trust Counsel in the KSBE controversy were determined by two separate trial court judges to have multiple clients (the five trustees), rather than a single client (the trust entity).<sup>62</sup> As a result, the joint-client exception to the applicable attorney-client privilege rule prevented three of the joint clients from using the privilege to withhold attorney-client communications from the other two joint clients of those attorneys. If the judges instead had adopted Professor McCall's entity approach, the three-trustee majority would have been able to assert the privilege. In Professor McCall's words, this is because the trust entity "must be directed by the majority of the Board [of trustees]."<sup>63</sup>

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<sup>61</sup> See *In re Estate of Holt*, 33 Haw. 352, 355-57 (1935).

<sup>62</sup> See *supra* notes 2 and 3 and accompanying text.

<sup>63</sup> McCall, *supra* note 1, at 498.

Under this thinking, the trust entity remains constant as individual trustees come and go and the makeup of the controlling majority changes. This suggests that no trustee, not even one who currently is part of the controlling majority of a multi-trusteed trust, can safely rely on the privilege being available when it is "needed."

If a trustee wants to know that the privilege will be his or hers individually to assert, that trustee must retain Personal Counsel, not Trust Counsel. If a trustee uses personal funds and clearly documents that the representation is to be of the trustee in the trustee's individual capacity, and if the attorney is not involved in the administration of the trust, then the privilege clearly will be available. If one or more of these factors is missing, there will be some degree of doubt. In such cases, trustees should give serious thought to petitioning the court for instructions.

What this suggests is that any debate about the trust as a relationship or an entity misses the main point. When a lawyer is hired by a trustee, the important question is "what role is this lawyer playing?"<sup>64</sup> If the lawyer is to be paid out of trust funds, that suggests (but does not finally determine) that

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<sup>64</sup> ACTEC COMMENTARIES, *supra* note 8, at 55-56. The Commentaries provide: *Representation of Fiduciary in Representative Not Individual Capacity.* If a lawyer is retained to represent a fiduciary generally with respect to the fiduciary estate, the lawyer represents the fiduciary in a representative and not an individual capacity—the ultimate objective of which is to administer the fiduciary estate for the benefit of the beneficiaries. Giving recognition to the representative capacity in which the lawyer represents the fiduciary is appropriate because in such cases the lawyer is retained to perform services that benefit the fiduciary estate and, derivatively, the beneficiaries—not to perform services that benefit the fiduciary individually. The nature of the relationship is also suggested by the fact that the fiduciary and the lawyer for the fiduciary are both compensated from the fiduciary estate. . . .

*General and Individual Representation Distinguished.* A lawyer represents the fiduciary generally (i.e., in a representative capacity) when the lawyer is retained to advise the fiduciary regarding the administration of the fiduciary estate or matters affecting the estate. On the other hand, a lawyer represents a fiduciary individually when the lawyer is retained for the limited purpose of advancing the interests of the fiduciary and not necessarily the interests of the fiduciary estate or the persons beneficially interested in the estate. For example, a lawyer represents a fiduciary individually when the lawyer, who may or may not have previously represented the fiduciary generally with respect to the fiduciary estate, is retained to negotiate with the beneficiaries regarding the compensation of the fiduciary or to defend the fiduciary against charges or threatened charges of maladministration of the fiduciary estate.

*Id.*; see also *Hoopes v. Carota*, 531 N.Y.S.2d 407, 410 (N.Y. App. Div. 1988), *aff'd*, 543 N.E.2d 73 (N.Y. 1989). The court distinguished representation in the trustee's representative capacity from representation in his individual capacity and stated that disclosure might not have been required had the trustee established "that he solicited advice from counsel solely in an individual capacity and at his own expense, as a defensive measure regarding potential litigation over his disputes with the trust beneficiaries." *Id.* at 410 (citations omitted).



the lawyer will be involved in the administration of the trust and therefore is representing the trustee in the trustee's representative capacity. If the lawyer is paid out of the trustee's personal funds, that suggests (but does not finally determine) that the lawyer will be watching out for the personal interests of the trustee, not involved in the administration of the trust, and is therefore representing the trustee in the trustee's individual capacity. Lawyers should not accept an assignment from a trustee without first making sure that all key parties understand the nature of the relationship and the implications. In some cases, this will include notification to the beneficiaries. Such relationships do not need to be of the "one-size-fits-all" variety. So, for example, if the lawyer and the trustees want to create a relationship more or less patterned after a corporate or entity model, that clearly can be done.

The traditional treatment of a trust as a relationship rather than an entity can lead to some hair-pulling situations in the case of a multi-trusteed, wheeling and dealing trust like KSBE. For example, any one trustee effectively can disqualify or waive the attorney-client privilege with respect to Trust Counsel, even when the majority disagrees. That can be chaotic. But rather than contend that the law of corporations applies to trusts, or even to argue that it should apply (i.e., that the entity approach should be embraced), lawyers and commentators should recognize that traditional trust law and typical codes of ethics make possible the crafting of customized relationships that fit perfectly the parties' needs and expectations. This fact and its implications is stated beautifully by Professor John Price in the Reporter's Note to the ACTEC Commentaries:

*Anticipating and Avoiding Conflicts.* This edition . . . continues to emphasize the advantages to clients and lawyers of anticipating and attempting to avoid potential problems . . . . Estate planners not infrequently encounter difficult problems of professional responsibility, particularly ones involving confidentiality and conflicts of interest. Serious problems can often be reduced or eliminated by advance discussion and planning. In particular, in many instances uncertainties regarding the lawyer's duty of confidentiality can be eliminated with sufficient advance planning and consent. Disclosure and agreement may also allow the same lawyer to represent the interests of multiple parties who have somewhat conflicting interests, but not clients whose interests are seriously adverse, such as adverse parties in litigation.<sup>65</sup>

## V. CONCLUSION

In the following "Comment on Professor Roth's Reply," Professor McCall states that positions expressed in this Reply are based on two premises: (1)

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<sup>65</sup> ACTEC COMMENTARIES, *supra* note 8, at 7-8.

“that trustees do not need and should not enjoy the benefits of the attorney-client privilege,” and (2) “that a court may properly announce and rely upon any ground” to remove an allegedly unfit trustee.<sup>66</sup> This is misleading. As stated herein, trustees do sometimes need the protection of, and may properly rely upon, the attorney-client privilege. The point made and emphasized herein, is that trustees in such situations should retain Personal Counsel, not Trust Counsel.<sup>67</sup> This Reply is equally clear that no trustee ever should be removed simply on the basis of an allegation of wrongdoing.<sup>68</sup>

In addition to distinguishing positions actually taken from ones alleged to have been taken, readers might consider the roles played by many lawyers and jurists in the KSBE controversy. For example, the now-former KSBE trustees were selected by state supreme court justices, seemingly on the basis of politics rather than merit. That is troubling. The selection of justices themselves seems to have been inextricably intertwined with the selection of trustees,<sup>69</sup> and justices who picked trustees regularly decided cases in which those same trustees were parties.<sup>70</sup> That it took so many years even to *begin* to hold wayward trustees accountable suggests something less-than-complimentary about Hawai'i's probate judges and attorneys general, especially when one realizes that many of the most egregious breaches of trust had been public knowledge for years. That justices of the Hawai'i Supreme Court could seemingly ignore judicial ethics and their own fiduciary duties for so long, and then avoid completely any measure of accountability, also makes

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<sup>66</sup> James R. McCall, *Comment on Professor Roth's Reply*, 21 U. HAW. L. REV. 531 (1999).

<sup>67</sup> See *supra* note 46 and accompanying text.

<sup>68</sup> See *supra* p. 525.

<sup>69</sup> Members of Hawai'i's Judicial Selection Commission are appointed by the President of the Senate, Speaker of the House, Chief Justice of the Hawai'i Supreme Court, and the Governor. Recent appointments to the KSBE Board of Trustees include a President of the Senate, Speaker of the House, Chief Justice of the Hawai'i Supreme Court, and a Governor's closest advisor (who also happened to be a chairman of the Judicial Selection Commission just prior to his KSBE appointment). See Samuel King, Msgr. Charles Kekumano, Walter Heen, Gladys Brandt & Randall Roth, *Broken Trust*, HONOLULU STAR-BULLETIN, Aug. 9, 1997, at B-1, reprinted in Appendix C to this issue of the *University of Hawai'i Law Review*. Another former chairman of the Commission admitted to having asked candidates for the supreme court how they might go about appointing a KSBE trustee if a vacancy were to occur while they were a sitting justice. See *id.* The law firm of that former chairman, incidentally, received more than \$15 million in legal fees from KSBE over the years following his service on the Commission. The law firm of the former Governor who appointed all five of the current justices also received millions in legal fees. See *id.*

<sup>70</sup> See Hazel Beh, *Why the Justices Should Stop Appointing Bishop Estate Trustees*, 21 U. HAW. L. REV. 659, 661 (1999). KSBE trustees have been parties in litigation in front of the supreme court on the average of nearly once per year. Eventually, the justices agreed to stop deciding cases involving the trustees they selected. See Ian Lind & Harold Morse, *5 Justices Step Aside in Estate Inquiry*, HONOLULU STAR-BULLETIN, Mar. 12, 1998, at A-1.

one wonder about Hawai'i's political milieu and its impact on the state system of justice.

In short, readers might appropriately wonder how the situation could get so bad, and go on for so long, despite a theoretically sound system of accountability.