

## **Outline of Randy Roth's Comments to AJS Committee on Judicial Independence and Accountability (March 13, 2007):**

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:

- Commission on Judicial Conduct
- Judicial Selection Commission
- The Judiciary—Rule 19 Judicial Evaluations
- Hawaii State Bar Association
- American Judicature Society—Hawaii Chapter
- AJS Committee on Judicial Independence and Accountability

Nearly 10 years have passed since publication of the Broken Trust essay. Why has none of these organizations done anything? Are they assuming that the allegations have no merit? Or, are they assuming the existence of meritorious explanations for what appears to be unethical behavior? Why assume anything?

Why has "everyone" stuck his, her, or its head in the sand over a matter of such monumental importance? Doesn't the deafening silence and lack of action indicate to you that something is wrong with the system of judicial accountability in Hawaii?

My goal is not to see anyone embarrassed or treated unfairly. If too much time has passed for there to be individual accountability, so be it. That's one question.

A completely separate question is the one that has me here today: Did the judicial accountability system work or not work properly in the days, months and years following the publication of the Broken Trust essay? What about over the past year in response to new revelations in the Broken Trust book?

If this body does not attempt to answer such questions, who will? As corny as it sounds: If not you, who? If not now, when?

My perception is that the system did not work. My further perception is that the individuals running the various organizations are in denial.

If this body were serious about its assigned task, step one would be to acknowledge that the judicial accountability system failed in this instance. Step two would be to acknowledge that it failed intentionally. The people and issues involved here are simply too important for the total absence of accountability to have been inadvertent.

How can this body expect to deal with its task responsibly—and credibly—if it does not first acknowledge such obvious facts?

I apologize if my words offend anyone. According to Kate, you invited me here today to tell you what I think you should do. So that's what I'm doing.

I also have some specific suggestions, but I don't want to waste your time—or mine—going over them if you are not ready to acknowledge that the system failed miserably in this instance, and that the failure was not inadvertent.

\* \* \* \* \*

Here are some specific suggestions that I hope the committee will consider along with the suggestions of others:

- **Analyze what went wrong, and explain it to the public.**
- **Abolish the Judicial Selection Commission.** Although originally touted as a way to de-politicize judicial selection, the JSC simply moved the politics to behind a closed door. Limiting the governor to names on a short list that the JSC develops in secret makes it difficult, if not impossible, to hold anyone accountable for a bad selection decision. Similarly, because judicial evaluations are not made public and the JSC makes all retention decisions in secret, it is virtually impossible to hold the JSC accountable for its retention decisions. Hawaii should put the process of appointing and re-appointing judges back into the hands of the governor. If the governor wants to appoint a panel to produce a short list of candidates, that would be fine. Either way, the governor should be expected to explain publicly the reasons for each appointment and re-appointment decision. All such decisions should be subject to Senate confirmation. If the Senate or the public perceives an appointment to be other than merit-based, the governor would not have the excuse of having been limited to someone else's short list. These proposed changes would increase significantly the current low levels of transparency and accountability, and for that reason alone would tend to increase public confidence in the judiciary (i.e., even if the quality of the judiciary were to remain the same).
- **Abolish the Commission on Judicial Conduct.** The Commission on Judicial Conduct is supposed to hold accountable the justices who select the members of the Commission, and the Commission operates totally in secret. These attributes do not instill confidence and trust in the judiciary. To the contrary, they promote distrust and cynicism. An independent party who operates more openly could better accomplish the Commission's work. (See below)
- **Create an Office of the Inspector General.** This person would be appointed by the governor and confirmed by the Senate. He or she would have investigatory but not enforcement powers, and would render written advisory decisions on

matters of alleged or apparent improper behavior by judges. The governor would be expected to address the substance of any such decision when announcing a decision to re-appoint, or not to re-appoint, a judge whose behavior had been considered by the inspector general. In the event of serious misconduct, a judge could, and presumably would, be removed from office by majority vote of the Senate. In addition to taking over the work of the Commission on Judicial Conduct, the inspector general could administer the judicial evaluation process. (See below)

- **Revise the Judicial Evaluation Program.** To increase the level of confidence and trust in the judiciary, a party other than the judiciary should administer the judicial evaluation program. The inspector general could oversee the program and share detailed results with a small committee of judges whose function would be to help individual judges use that feedback as a tool for improvement. Each year the inspector general would provide to the public a bottom-line evaluation of each judge (e.g., satisfactory or unsatisfactory). This bottom-line public evaluation would begin only after an appropriate grace period of at least several years to give a new judge an opportunity to grow into the job.

Of course good people are the most important ingredient in achieving judicial independence and accountability. They will generally find a way to make even a flawed system work reasonably well. Unfortunately, the converse is equally true: bad people will usually find a way to manipulate to some degree even the best of systems. That reality should be kept in mind.

What I have proposed would not be perfect. The important question is whether these changes would be a significant improvement over the current system. As I stated earlier, I believe the current system of judicial accountability is not working.

These proposals would increase significantly the current levels of transparency and accountability in the judiciary. Transparency and accountability are critically important in establishing and maintaining confidence and trust in the system of justice, in my opinion.

Thank you for this opportunity to share these thoughts with you. Aloha.