

November 21, 2019

To: OHA Board of Trustees

From: Randall Roth

Re: PIG Report and Alleged Breach of Trust by Keli'i Akina

Aloha Members of the OHA Board,

I am a professor emeritus at the William S. Richardson School of Law, but I am not representing it or speaking on its behalf. My testimony today is mine alone.

My interest in OHA is longstanding and has included public commentary. For example, former OHA trustee Walter Heen and I co-authored op-eds about OHA's legal status and several of the implications in "What is OHA?" (Dec. 20, 2015 at <http://www.staradvertiser.com/2015/12/20/editorial/insight/what-is-oha/>) and "OHA Should Allow Trustee to Speak Out" (June 30, 2019 at <https://www.staradvertiser.com/2019/06/30/editorial/island-voices/column-oha-should-allow-trustee-to-speak-out/>).

A majority of OHA's governing board voted on June 20, 2019 to form a Permitted Interaction Group (PIG) to investigate allegations that fellow board member Keli'i Akina violated a trustee's duty of care and loyalty when he criticized the board's decision to delay a pending forensic audit.

Members of the PIG met on September 27, 2019 and concluded that "Akina made misleading and untrue statements" regarding the audit. The PIG added that the OHA board "has no further recourse for disciplinary action ... at this time," and that "the PIG considers this matter closed." The PIG report does not explain the basis for the finding that Akina was untruthful, nor does it explain why members of the PIG would disparage Akina without first giving him an opportunity to address the allegations.

I believe it is patently unfair for members of this PIG essentially to declare Akina a liar without giving him an opportunity to respond to the allegation, and without bothering to explain or defend their findings.

Furthermore, I believe OHA's rule prohibiting public criticism by a dissenting board member to be fatally flawed for all the following reasons:

First, it is premised on assumptions that OHA is a trust governed by a board of trustees—neither of which is true. OHA is a non-autonomous state agency overseen by elected public officials.

Second, the rule in question violates a dissenting board member's constitutionally protected freedom of speech.

Third, the rule interferes with a dissenting board member's responsibility as an elected public official to keep constituents reasonably informed.

Finally, the rule in question is bad policy because it reduces the level of transparency and accountability in a non-autonomous state agency.

Because this testimony relies on my understanding of trust law, I will end with a brief summary of my trust-law credentials:

1. I taught trust law (among other subjects) at the University of Hawaii William S. Richardson School of Law for many years and at several other law schools.
2. Dozens of other law schools have invited me to make presentations on trust law, including Harvard, Berkeley, Columbia, UCLA, Duke, and NYU; and the University of Chicago Law School hired me to teach its trust law course as a visiting professor. At that time, I was the only visiting professor on an exceptionally distinguished faculty, several of whom eventually left academia for higher callings, including Supreme Court Justice Elena Kagan and President Barrack Obama.
3. I have been an Academic Fellow in the American College of Trust & Estate Counsel for many years and have made hundreds of presentations at conferences and continuing legal education programs sponsored by numerous state bar associations and groups such as the National College of Probate Judges.
4. Between 2003 and 2012, I served as one of two Associate Reporters for the American Law Institute's Restatement of the Law of Trusts, a decade-long effort by the nation's preeminent trust-law experts to determine, explain, and publish the common law of trusts in this country.

I would welcome any questions you might have regarding this testimony.

Mahalo,

Randall W. Roth