



Supreme Court — Commission on Judicial Conduct — THE JUDICIARY • STATE OF HAWAII
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FORMAL ADVISORY OPINION #01-99
FEBRUARY 11, 1999

QUESTION PRESENTED

In Bronster v. Town, Case No. 22212, the Attorney General seeks relief by Petition for a Writ. The five Justices of the Hawaii Supreme Court seek an advisory opinion from this Commission on whether or not they "must recuse in Case. No. 22212".

CONCLUSION

It is this Commission's opinion that although there is no legal or ethical requirement that disqualifies the Justices or requires them to recuse from hearing the limited issues raised in Case No. 22212, they should recuse themselves from appellate involvement related to Cr. No. 98-2467 in the Circuit Court of the First Circuit, which includes Case No. 22212.

DISCUSSION

We earlier issued an Advisory Opinion related to Bronster v. Wong, et. al., Consolidated Appeal No. 21150 in the Supreme Court of the State of Hawaii (1998). The Commission has evaluated again all of the points that were then raised, considered, and relied upon, and has considered the additional factors that are raised in the present request.

The Commission is informed that the points which distinguish the present request from the circumstances related to Formal Advisory Opinion #02-98 (1998) (F.A.O. #02-98) are:

1. The subpoena which is the subject of the Petition, was issued in Criminal No. 98-2467, which is a case that involves criminal indictments against three individuals: Leighton Mau, Jeffrey R. Stone, and Bishop Estate Trustee Henry Peters. Trustee Henry Peters was selected by previous members of the Hawaii Supreme Court. None of the present Justices were involved with the selection of Trustee Henry Peters.
2. That subpoena was served by Jeffrey R. Stone, who is not a Bishop Estate Trustee. Mr. Stone has no relationship whatsoever to any of the Justices of the Hawaii Supreme Court.

Neither of these factors are particularly relevant to the conclusion we reach that advises the Justices to voluntarily recuse in Case No. 22212.

When considering recusal in this case, the specific Trustee involved and which Justices selected that Trustee is not important if that Trustee's conduct is a material part of the underlying case. As we said earlier:

The Commission notes that all of the present Justices, acting as individuals, have been involved in the selection process of one or more of the current Trustees. Because these Justices or their predecessors appointed the Trustees, some may believe that the Justices would be inclined to rule in the Trustees' favor to affirm confidence in them. On the other hand, because the Justices are represented by the AG in other litigation, some may believe that the Justices would be inclined to rule in favor of the AG to get better representation or to otherwise curry favor. [Emphasis supplied].

Appearance and perception, well-founded or not, focus on the process of selection by members of the Supreme Court, and not on which Justices may or may not have selected which Trustee.

The fact that only specific limited issues unrelated to Trustee selection are presented in the Petition in this Case No. 22212 is also insignificant. We considered a similar situation when issuing F.A.O. #02-98:

In this case, since no direct, immediate, or clear-cut self-interest is involved in any way with the subpoenas that are the subject of the appeal, a feasible alternative might seem to be for the Justices to hear this appeal now and then recuse themselves at some later stage in the case should a basis for disqualification or recusal materialize.

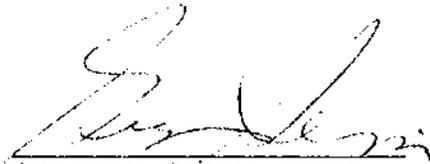
The characteristics of the case from which the Petition arises (Criminal No. 98-2467) are of greater significance than the limited scope of the issue being presented for review. This case involves a Trustee who was selected by previous members of the Hawaii Supreme Court, acting as individuals.

For purposes of this advisory, Criminal No. 98-2467 is very much interwoven with Consolidated Appeal No. 21150 and the other Bishop Estate cases in which the Justices have already voluntarily recused. At minimum, public perception views the cases as inseparable, however unjustified that perception may be, as they relate to the principles set forth earlier in F.A.O. #02-98:

The present circumstances however, are extremely exceptional, and we cannot ignore the current atmosphere nor the intensity of the discussions surrounding recent events that are, in part, the subject of Appeal No. 21150. Therefore, the main focus of our concern in addressing the question presented to us is the potential effect on the public's confidence in the judiciary if the Justices were to remain on the case.

The circumstances continue which existed when F.A.O. #02-98 was issued. Accordingly, although they are not required to, we recommend that the Justices voluntarily recuse themselves from Case No. 22212. This does not mean that automatic recusal on any and every

appellate involvement in these cases is appropriate. Because ethical or legal requirements do not necessarily mandate disqualification, there may well be situations where the circumstances outweigh recusal. Factors such as time constraints and the nature of the matter presented to the Court might weigh against recusal. The obvious example is a request for a stay while appellate consideration is being sought, which normally presents a need for immediate consideration. In such a situation, the action generally involves procedural action rather than the merits of the review being sought. Common sense dictates that the Court balance practical considerations and the prejudices affecting the parties involved.



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(Members Anton C. Krucky,
Darolyn H. Lendio and
Benjamin M. Matsubara
recused from participation
in this advisory opinion)