

LAWS AND RULES REVIEW COMMITTEE
Professional and Vocational Licensing Division
Department of Commerce and Consumer Affairs
State of Hawaii
www.hawaii.gov/hirec

MINUTES OF MEETING

The agenda for this meeting was filed with the Office of the Lieutenant Governor, as required by Section 92-7(b), Hawaii Revised Statutes.

Date: Wednesday, April 13, 2005

Time: 9:00 a.m.

Place: Queen Liliuokalani Conference Room
King Kalakaua Building
335 Merchant Street, First Floor
Honolulu, Hawaii

Present: Iris Okawa, Chair, Public/Honolulu Commissioner
Louis Abrams, Vice Chair, Broker/Kauai Commissioner
Mitchell Imanaka, Broker/Honolulu Commissioner
Kathleen Kagawa, Broker/Honolulu Commissioner (Late Arrival)
Michele Sunahara Loudermilk, Public/Honolulu Commissioner
Trudy Nishihara, Broker/Honolulu Commissioner
John Ohama, Broker/Honolulu Commissioner

Calvin Kimura, Supervising Executive Officer
Neil Fujitani, Executive Officer
Diane Choy Fujimura, Senior Real Estate Specialist
Cynthia Yee, Senior Condominium Specialist
Lorene Kimura, Real Estate Specialist
Ryan Yamashiro, Real Estate Specialist
Cheryl Leong, Condominium Specialist
David Grupen, Condominium Specialist
Shari Wong, Deputy Attorney General
Irene Kotaka, Secretary

Others: Janice Lind, RE3LLC
Tracy Stice, Hawaii Association of REALTORS®
Karen Iwamoto, Hawaii Association of REALTORS®
Tom Gill, Hawaii Association of REALTORS®
Nicki Ann Thompson, Hawaii Association of REALTORS®
Craig Hirai, Esq.
Jerry Bangerter, Hawaii Association of REALTORS®
James S. Dixon, Esq.

Absent: Carol Ball, Broker/Maui Commissioner
Vern Yamanaka, Broker/Hawaii Island Commissioner

Call to Order: The Chair called the meeting to order at 9:02 a.m., at which time quorum was established.

Chair's Report: The Chair reported that there were four attendees from Hawaii at the ARELLO Midyear meetings and the District IV Meetings two weeks ago.

She thanked Commissioner Imanaka who attended the meeting at his own expense. The Chair noted that time share and resort development are becoming larger items for discussion at ARELLO.

The Chair also announced that Commissioner Abrams was nominated to be a member of ARELLO's Board of Directors for District IV, which consists of the Western states. The membership will vote on the nominees at the Annual Meeting. Hawaii is well represented at ARELLO. The SEO serves on ARELLO's Nominating Committee and continues to be actively involved in ARELLO at various levels.

SEO's Report:

Announcements, Introduction, Correspondence, and Additional Distribution

The SEO informed the Commissioners that the May Commission meeting has been rescheduled from Friday, May 27, 2005 to **Tuesday, May 24, 2005**, due to a possible lack of quorum.

Additions to the Agenda

Upon a motion by Commissioner Abrams, seconded by Commissioner Nishihara, it was voted on and unanimously carried to add the following item to the agenda:

6. Special Issues
 - c. Multiple Real Estate Corporations

Additional Distribution

The following material was distributed to the Commissioners prior to the start of the meeting:

4. Program of Work, FY05
 - b. Licensing, Registration and Certification Administration – Geographic Report
 - f. Legislative and Government Participation Report – Legislative Report No. 5
 - v. Subcommittee on Agency
 - 1) Chair's Report
 - a) U.S. Department of Justice Lawsuit on Kentucky Rebate Prohibition
 - b) U. S. Department of Justice Against Oklahoma Minimum Service Bill
 - c) Julie Garton-Good on Minimum Services Legislation

Minutes of Previous Meetings

Upon a motion by Commissioner Nishihara, seconded by Commissioner Imanaka, it was voted on and unanimously carried to accept the minutes of the March 9, 2005 Laws and Rules Review Committee meeting.

Chair's Report:

Chair Okawa also thanked Tracy Stice for attending the ARELLO Midyear and District IV Meetings.

Program of Work, FY05:

Licensing, Registration and Certification Administration

Excerpts from the latest Geographic Report, dated April 7, 2005, were distributed to the Commissioners for their information. As of April 7, 2005, there are 16,877 real estate licensees. Real estate is the second largest licensing area.

Legislative and Government Participation Report

Legislative Report No. 5 was distributed to the Commissioners for their information. The SEO reported on the bills affecting Chapters 467, 514A, 436B, Hawaii Revised Statutes, and other related issues.

The Chair thanked the Commissioners and staff for monitoring the bills closely.

The SEO announced that Brian J. Forrest was submitted to fill Commissioner Imanaka's position. Mr. Forrest has been licensed as a mortgage solicitor since 2003. The Commissioners and staff are looking forward to meeting Mr. Forrest.

Ms. Thompson stated that although she does not know Mr. Forrest personally, she has been informed that he is aware of the duties and responsibilities involved in being appointed to the Commission.

On behalf of the Commission, the Chair informed those present that although their appointment on the Commission will be expiring shortly, the Commission still values Commissioners Ohama and Imanaka's participation and presence. She thanked them for being present and for attending to their duties.

Neighbor Island Outreach

The next neighbor island outreach is scheduled Tuesday, June 14, 2005, on the island of Hawaii. The meetings will be held in the Conference Rooms of the Natural Energy Laboratory of Hawaii Authority offices, located at 73-4460 Queen Kaahumanu Highway, #101, Kailua-Kona, Hawaii.

Subcommittee on Agency

Subcommittee Chair Abrams informed those present that he had found the ARELLO Midyear and District IV meetings to be very informative, particularly the meeting with the Canadian Regulators' Task Force ("CRTF").

Subcommittee Chair Abrams thanked Mr. Stice for taking the time from his busy schedule to listen to the presentation.

Subcommittee Chair Abrams mentioned that the meetings had provided him with an opportunity to meet with the regulators from the other states to see how they are addressing the issues of concern to Hawaii.

Subcommittee Chair Abrams noted that the CRTF did not support a prohibition to dual agency but proposed alternatives to dual agency. The bill proposed by the Hawaii Association of REALTORS® proposes to do away with common law and dual agency. Subcommittee Chair Abrams suggested inviting some of the featured speakers to meet with the Commission, the public, and the industry to see if laws on agency disclosure can be crafted.

Commissioner Kagawa arrived.

Subcommittee Chair Abrams has been speaking with staff in determining how such a meeting could be coordinated. He suggested taking the meeting to each county and that licensees and the public be invited so that they may obtain feedback on how agency disclosures could be made clearer to the licensees and to the consumers. Subcommittee Chair Abrams suggested inviting Professor Foster, Bob Myroniuk, John Reilly and representatives from the Colorado Real Estate Commission. It would be very helpful to have individuals who are familiar with the issues aiding the Commission as it moves forward.

Subcommittee Chair Abrams and the SEO met with representatives from the California Department of Real Estate ("CA DRE") to see how they handle issues relating to agency since California is a common law state similar to Hawaii. The State of California has a big industry presence. The CA DRE is not an umbrella agency, which makes it possible for them to handle a lot of things in house. The Commissioners on the California Real Estate Commission play advisory roles. When asked why the CA DRE has not addressed the issue of agency, they were informed that the industry has not asked them to. The CA DRE has prepared its own disclosure abstract that is given to the consumers that addresses the agency issues. The booklet is 47 pages in length. They reported that the industry is handling it well and has not come back to them to request any changes. The State of California has 500,000 real estate licensees. It was suggested that John Liberator be included as part of the panel.

Commission Imanaka moved that the Commission extend a formal invitation to those designated by the Chair of the Subcommittee on Agency to engage in dialogue and discussion. Commissioner Kagawa seconded the motion.

Commissioner Imanaka moved to amend his motion to include subsidizing the proposed program subject to the approval of the REC Chair. Commissioner Kagawa amended her second.

Mr. Stice informed the Commissioners that it was enlightening for him to attend the ARELLO meetings to see how the other states handle regulatory issues. He noted that there were common themes coming through. At the real estate salesperson's level, there is a limited understanding or awareness about the agency issues.

Mr. Stice stated that limited service agencies are a model that is coming forward. This is not addressed in HAR's bill, and it could be incorporated into the bill. Many licensees are complaining about discount brokerages. HAR could talk about limited service brokerages as a third layer of the bill. They could address the thought process that there may be a variable fee structure based on the models. Speaking for himself, Mr. Stice said that this may be difficult to do but if it would help to move HAR's bill forward, they would consider that.

It was suggested that the Commission follow the model proposed by the Canadian Task Force relating to designated agency. They can make a designated agent a transaction agent rather than appointing them as agents. Rules could be drafted to address the passing along of knowledge from one brokerage to another. HAR may have to address or change a portion of the bill.

Mr. Stice stated that when they reviewed the dual agency agreements, most of them took out the fiduciary duties. As part of the education process, HAR would like to enter a partnership with the Commission. Special meetings could be held with the local boards and information could be disseminated to their members and to licensees. HAR could provide assistance in securing bigger meeting rooms. Members of the local boards and also non-member licensees could be encouraged to attend the meetings to discuss their concerns. The goal would be come up with a consensus bill. HAR would like to work together with the Commission at the next legislative session to successfully pass the bill.

Commissioner Ohama noted that it seemed like the agency and limited service issues were more of an education issue. If adequate education could be provided, it would not be a problem. There may not be problems with limited service agencies if full disclosure is made so the consumers are aware of what services they can expect.

Chair Okawa stated that it was not just an agency issue. She reported that different states are struggling with agency issues and have been

struggling with them for a long time. Chair Okawa suggested that the consumers needs to be educated, perhaps beginning in high school. This may help them to obtain life skills so that they are aware of what to expect from a real estate licensee and also so that they can have the assurance that they can trust the licensee who is representing them.

Commissioner Nishihara commended HAR for their upcoming outreach program. The program will be discussing agency and how it exists today.

Mr. Stice asked if HAR would be able to work with the Commission on presenting/gathering information from the public and licensees. Subcommittee Chair Abrams informed Mr. Stice that he could not imagine the Commission not working with HAR. He stated that once direction is given, the first call would be to HAR to see what can be done to produce a session that would be successful in informing the licensees and obtaining feedback from them.

Mr. Stice stated that he would like to work with the Commission in either amending their proposed bill or replacing it with something that could be passed during the next legislative session.

The SEO stated that the area that needs to be addressed is consumer relationships as a whole, not just the agency issue. California addresses this as a consumer relationship issue. The CA DRE looks at the licensing law in its entirety, how it is regulated, the interrelationships and the interdependency of each parts of the law, and how the industry conducts itself in addressing the consumer relationship issue. The CA DRE dictates the forms and language used in the forms on consumer relationships and agency as well as a number of other forms. Hawaii does not. The CA DRE does it because the California Association of REALTORS wanted it and they believe it will be more consistent in usage, which is better for consumers, especially with all licensees, whether members of CAR or not..

In Canada, 90% of the real estate licensees are REALTORS. Bob Myroniuk's salary is paid by the Council, not the licensing agency. It was noted that a lot of the states dictate the forms and the language that are used in real estate transactions including agency. The Commission, REALTORS, and members of the Bar Association participate in drafting the forms. Canada also involved the insurance industry in their discussions.

The SEO stated that in discussions with members of Canadian Agency Task Force, Colorado, Alaska, California, Texas, Oregon, Nevada, etc., it is a consensus that laws on consumer relationships and agency, including transactional/designated agency, cannot be compared from state to state unless the entire law and other related laws and how real estate transactions are conducted in the state are also compared. It would be problematic if Hawaii would pass a new law on consumer

relationship and agency without examining and considering the entire law, other related laws, and how transactions are handled. Some of requirements of other states that have a tremendous influence on their consumer relationships, agency law, and why a particular agency law may work better, are as follows:

1. The real estate commission and/or law dictate the language and forms for real estate transactions versus an industry prerogative.
2. Tort laws.
3. Single licensing versus status quo.
4. Canada Association of Realtors has almost 90% of all licensees as members, where the States are well below CAR's percentage.
5. Mandatory E & O insurance.
6. Higher requirements to be a real estate licensee and higher requirement to maintain the license versus a state with nominal requirements. The licensees are more educated, more professional, more dedicated, and with FBI criminal background checks are found to be more professional.
7. Strict laws and rules on ethical conduct that is assertively enforced
8. Type of brokerage firms and its organization
9. Assertive enforcement, assertive professional standards, mandatory auditing of each brokerage firm which includes review of trust account/transaction documents/policy procedures manual
10. Very define disclosure law and rules, including forms and language dictated by law or Commission versus general law with industry forms.
11. Define disclosures and other provisions on compensation/commissions/fees that consumer pays as well as between brokerage

The SEO recommends that the Commission and HAR consider the "big picture" of the real estate licensing law before any decisions and that they do not do "piece meal" amendments.

There was discussion on ways to obtain optimum attendance at the seminars, such as offering a rebate on their licensing fees or granting continuing education credit for attending the symposium. The insurance industry, Hawaii State Bar Association and consumer groups would be invited to participate to obtain the greatest amount of feedback possible.

Commissioner Ohama reported that the Commission's Education Evaluation Task Force was discussing suggestions on how to increase the number of hours for the real estate salesperson's curriculum. This ties in with the Commission's goal to educate the licensees and the public.

Chair Okawa thanked HAR for sending a delegate to attend the ARELLO meeting.

The amended motion was voted on and unanimously carried.

Subcommittee Chair Abrams suggested that the Commission consider engaging a consultant to review Hawaii's laws, HAR's proposed legislation, and the laws of other jurisdictions and to submit its recommendations to the Commission. Subcommittee Chair Abrams suggested contacting Professor Foster to see if he would be interested in this.

Commissioner Imanaka asked if Professor Foster was an attorney and was informed that he is an attorney.

Subcommittee Chair Abrams said that if the Commission held a symposium, he would like to have the review done in advance by the consultant to show where Hawaii stands in this.

Subcommittee Chair Abrams mentioned that there is a movement to require the licensing of home inspectors and then mortgage brokers. The Commission will be asking industry in the future if those are issues that need to be taken up.

The following articles were distributed to the Commissioners for their information prior to the start of the meeting:

- U. S. Department of Justice Lawsuit on Kentucky Rebate Prohibition
- U. S. Department of Justice Against Oklahoma Minimum Service Bill
- Julie Garton-Good on Minimum Services Legislation

Mr. Bangerter mentioned that the licensing of home inspectors and mortgage brokers will be placed on HAR's Legislative Committee agenda for discussion and they will get back to the Commission on this. Subcommittee Chair Abrams stated that he would provide the information to HAR's Legislative Action Committee for their review.

Subcommittee on Applicants with Criminal and Other Legal Background Issues

At the September 8, 2004 Laws and Rules Review Committee meeting, a subcommittee was formed to study and create guidelines for the review of applicants with prior criminal convictions and/or other legal background issues. Commissioner Kagawa was appointed the Chair of the Subcommittee and is requesting assistance from the Commissioners to serve on the subcommittee.

Commissioners Loudermilk and Abrams volunteered to sit on the subcommittee and it was recommended that they be appointed to the subcommittee to assist Subcommittee Chair Kagawa.

Real Estate
Recovery Fund:

James S. Dixon, Recovery Fund Counsel, was present to request the Commission's authorization to expend \$2,100 to search for former licensees who have had payments made out from the Real Estate Recovery Fund. They would search the public and private databases to see if the former licensees are maintaining an address in the U. S. If the licensees have any investments, they are likely to maintain an U. S. address.

Commissioner Imanaka moved to recommend approval to authorize the expense of \$2,100 from the Real Estate Recovery Fund for the Recovery Fund Counsel to run initial searches for former licensees with outstanding judgments. Commissioner Nishihara seconded the motion.

Commissioner Ohama was excused from the meeting.

Mr. Dixon stated that many of the former licensees leave the State before the judgments are rendered and default judgments are obtained. The judgment is assigned to the Real Estate Recovery Fund for up to \$25,000 or if there are multiple claimants it can exceed \$50,000. The judgment is assigned to the Commission and it is up to the Commission to decide whether or not they want to attempt to collect the judgment.

The motion was voted on and unanimously carried.

Commissioner Ohama returned to the meeting.

Special Issues:

Request by the Hawaii Association of REALTORS Regarding the Definition of "Contractor"

Craig Hirai, attorney for HAR, was present to request the Commission's assistance in obtaining an opinion from the Attorney General's Office on the definition of "Contractor."

Hawaii Revised Statutes §672E-1 defines a contractor as "any person, firm, partnership, corporation, association or other organization that is engaged in the business of designing, manufacturing, supplying products, developing, constructing, or selling a dwelling."

The word "contractor" as defined in the statute could refer to a licensee. HAR submitted letters to the Attorney General's Office and the Commission requesting clarification that it was not intended to include licensees. The Attorney General's Office responded that they do not provide legal opinions to non-governmental agencies. HAR is asking for guidance from the Commission.

Commissioner Imanaka moved that the Commission request that the Attorney General's office determine whether or not the definition of contractors includes real estate licensees. Commissioner Kagawa seconded the motion.

Executive
Session:

Upon a motion by Commissioner Nishihara, seconded by Commissioner Imanaka, it was voted on and unanimously carried to enter into executive session pursuant to Section 92-5(a)(4), HRS, "To consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities;"

Upon a motion by Commissioner Imanaka, seconded by Commissioner Ohama, it was voted on and unanimously carried to move out of executive session.

Special Issues:

Request by the Hawaii Association of REALTORS Regarding the Definition of "Contractor"

Commissioner Imanaka withdrew his motion. Commissioner Kagawa withdrew her second.

Upon a motion by Commissioner Imanaka, seconded by Commissioner Kagawa, it was voted on and unanimously carried to recommend that the Hawaii Association of REALTORS submit a petition for declaratory relief to the Contractors License Board.

Commissioner Ohama was excused from the meeting.

A sample copy of the Petition for Declaratory Relief with the Contractors' License Board was given to Mr. Hirai.

ARELLO, Other
Organizations and
Jurisdictions:

Latest Court Decisions

A copy of ARELLO's latest court decisions for 2003 to 2004 was distributed to the Commissioners for their information. A copy was given to Mr. Stice at the meeting.

Oklahoma – Minimum Services

A copy of an article entitled, "Oklahoma Senate passes minimum-service bill for real estate", which appeared in the March 21, 2005 issue of Inman News, was distributed to the Commissioners for their information.

Ohio – Flat Fee Listing and Limited Agencies

A copy of the article, "More on Flat Fee Listings and Limited Agencies: Fiduciary Duties," which appeared in the Winter 2004/2005 issue of the Ohio Department of Commerce's Real Estate and Professional Licensing Newsletter, was distributed to the Commissioners for their information.

California – Real Estate Bulletin Online Only

A copy of the notice from the California Department of Real Estate was distributed to the Commissioners for their information. The

California Department of Real Estate's Real Estate Bulletin will only be available online at www.dre.ca.gov/rebltn.htm.

British Columbia – Real Estate Services Act Special Report and 2nd Special Report

A copy of the Real Estate Council of British Columbia's Report from Council, dated December 2004 and February 2005 were distributed to the Commissioners for their information. Both issues discuss the Real Estate Services Act, which became effective on January 1, 2005.

Commissioner Ohama returned to the meeting.

Special Issues:

Multiple Real Estate Corporations

The Commission received a request from Roger Fonseca, Esq., dated March 21, 2005, requesting an informal non-binding opinion. In the situation outlined in Mr. Fonseca's letter, his client is associated with a large Hawaii real estate corporation as an independent contractor. For tax-planning purposes, his client would like to separately incorporate his sole proprietorship. He would withdraw his license from the main corporation and transfer it to his new one-man corporation, in which he would become the principal broker, is the sole owner and sole employee.

In this situation, there are two independent corporations, each having its own principal broker. His client would like to continue to sell real estate in conjunction with the main corporation. Mr. Fonseca stated that his normal practice is to have the two companies enter into a written cooperating brokers' agreement, under which they will undertake to market and sell real estate together. All listings and advertising will clearly show the names of both real estate corporations. The one-man corporation would be entitled to take commissions directly out of escrow, the written agreement will (in order to disturb their current relationship as little as possible) permit the main corporation to receive the entire commission on the understanding that it is collecting the one-man corporation's share as its agent and will promptly distribute that share to the one-man corporation. Mr. Fonseca stated that his client requested written confirmation that this is acceptable.

Upon a motion by Commissioner Imanaka, seconded by Commissioner Kagawa, it was voted on and unanimously carried to recommend that staff respond to Roger W. Fonseca's request and to issue an informal, non-binding opinion that based upon the facts represented in Mr. Fonseca's letter, it does not appear to conflict with the real estate licensing laws and rules.

Open Forum:

None.

Next Meeting: Wednesday, May 11, 2005
9:00 a.m.
Queen Liliuokalani Conference Room
King Kalakaua Building
335 Merchant Street, First Floor
Honolulu, Hawaii

Adjournment: With no further business to discuss, the Chair adjourned the meeting at 10:20 a.m.

Reviewed and approved by:

/s/ Calvin Kimura
Calvin Kimura
Supervising Executive Officer

May 11, 2005
Date

[] Approved as is.
[] Approved with amendments. See minutes of _____ meeting.

CK/isk/050503