

JAN 28 2009

A BILL FOR AN ACT

RELATING TO REAL ESTATE BROKERS AND SALESPERSONS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Section 467-7, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "~~§467-7~~ Licenses required to act as real estate broker and
4 salesperson. No person within the purview of this chapter shall
5 act, assume to act, or advertise as a real estate broker or real
6 estate salesperson [~~, or shall advertise, or assume to act as~~
7 ~~real estate broker or real estate salesperson~~] without a license
8 previously obtained under and in compliance with this chapter
9 and the rules [~~and regulations~~] of the real estate
10 commission [~~-~~]; provided that any licensed real estate broker or
11 real estate salesperson in good standing under this chapter and
12 applicable real estate commission rules shall not be deemed to
13 be engaged in the practice of law when providing services for
14 which a license is required under this chapter."

15 SECTION 2. This Act does not affect rights and duties that
16 matured, penalties that were incurred, and proceedings that were
17 begun, before its effective date.



S.B. NO. 1219

1 SECTION 3. Statutory material to be repealed is bracketed
2 and stricken. New statutory material is underscored.

3 SECTION 4. This Act shall take effect upon its approval.

4

INTRODUCED BY: *Rosalyn H. Park*
Ash M.
Noman Sakonjo
Amid Y. Ije



Report Title:

Real Estate Licenses

Description:

Specifies that acting as a real estate broker and salesperson pursuant to a real estate license does not constitute the practice of law.



**PRESENTATION OF THE
REAL ESTATE COMMISSION**

**TO THE SENATE COMMITTEE ON
COMMERCE AND CONSUMER PROTECTION**

**TWENTY-FIFTH LEGISLATURE
Regular Session of 2009**

**Wednesday, February 11, 2009
8:30 a.m.**

WRITTEN TESTIMONY ONLY

**TESTIMONY ON SENATE BILL NO. 1219 – RELATING TO REAL ESTATE
BROKERS AND SALESPERSONS.**

**TO THE HONORABLE ROSALYN H. BAKER, CHAIR, AND
MEMBERS OF THE COMMITTEE:**

My name is Trudy Nishihara and I am the Chairperson of the Hawaii Real Estate Commission ("Commission"). The Commission appreciates the opportunity to provide testimony on Senate Bill No. 1219, which proposes to specify that providing services as a real estate broker and salesperson pursuant to being licensed as a real estate broker and salesperson, is not deemed to be engaged in the practice of law. **The Commission is in support of this measure in concept.**

Thank you for the opportunity to present written testimony.

February 9, 2009

The Honorable Rosalyn H. Baker, Chair

Senate Committee on Commerce and Consumer Protection
State Capitol, Room 229
Honolulu, Hawaii 96813

RE: S.B. 1219 Relating to Real Estate Brokers and Salespersons
Hearing date: February 11, 2009 @ 8:30 a.m.

Aloha Chair Baker and Members of the Committee on Consumer Protection and Commerce:

I am Robert G. Klein, an attorney with McCorriston Miller Mukai & MacKinnon, here to testify on behalf of the Hawai'i Association of REALTORS® (HAR) and its 9,600 members. HAR **strongly supports S.B. 1219**, which clarifies that real estate brokers and/or salespersons who act within the scope of their real estate license are not practicing law.

In 2007, a proposed unauthorized practice of law rule was submitted by the Hawaii State Bar Association (HSBA) and circulated for consideration by the Hawai'i Supreme Court. The draft rule put every licensed real estate professional in jeopardy of practicing law without a license, which is a criminal violation. Fortunately, the Hawai'i Supreme Court asked the HSBA to rewrite and resubmit the Rule.

The real estate industry is highly regulated by statutes and administrative rules. The Real Estate Commission oversees the education, licensure and discipline of real estate licensed professionals. Real estate professionals who have fiduciary duties to their clients do not hold themselves out to the public as qualified to give legal advice.

HAR understands that the review and decision processes of the Supreme Court create a level of uncertainty for real estate professionals that only a clean statutory amendment can address. We have also learned that the State Attorney General, Hon. Mark J. Bennett, has written to the Hawai'i Supreme Court in opposition to the new draft Rule largely because of the numerous industry exemptions it affords.

HAR notes that the House companion measure to this bill, H.B. 1561, was heard on February 4, 2009 before the House Committee on Consumer Protection and Commerce. The committee deferred decision making on the bill, and no follow-up hearing has been scheduled yet.

For the above reasons, HAR urges the passage of this bill. The measure would make clear that real estate brokers and salespersons who are licensed, regulated, and in good standing under HRS § 467 and Hawaii Administrative Rules Chapter 99 would not be deemed to be practicing law without a license.

Mahalo for the opportunity to testify.



Senate Committee on Judiciary and Government Operations (JGO)
Senator Brian T. Taniguchi, Chair
Senator Dwight Y. Takamine, Vice Chair
Senator Robert Bunda
Senator Mike Gabbard
Senator Clarence K. Nishihara
Senator Sam Slom

RE: S.B.1044 and S.B.1219

HEARING: Wednesday, February 11, 2009, 8:30 am

The Hawaii State Bar Association (HSBA) submits the attached testimony in opposition to S.B. 1044 and S.B. 1219 regarding a proposed Unauthorized Practice of Law Rule under review by the Hawaii Supreme Court. For the reasons stated in the attached testimony, the HSBA submits that the proposed bills regarding the proposed UPL Rule should not be approved. We look forward to discussing this with you

Rai Saint Chu
President

OFFICERS

Rai Saint Chu, President
Hugh R. Jones, President-Elect
Louise K.Y. Ing, Vice-President
Ronette M. Kawakami, Secretary
Craig P. Wagnild, Treasurer

DIRECTORS

Nathan T.K. Aipa
Darren W.K. Ching
Steven J.T. Chow
James P. Dandar
Craig A. De Costa (Kauai)
P. Gregory Frey
Mark F. Gallagher
Geraldine N. Hasegawa (East Hawaii)
Carol S. Kitaoka (West Hawaii)
Derek R. Kobayashi
Gregory K. Markham
Alika L. Piper
Kenneth S. Robbins
Steven B. Songstad (Maui)
Suzanne T. Terada

YLD PRESIDENT

Damien A. Elefante

IMMEDIATE PAST PRESIDENT

Jeffrey H.K. Sia

HSBA/ABA DELEGATE

James A. Kawachika

EXECUTIVE DIRECTOR

Lyn Flanigan

Testimony of the
Hawai'i State Bar Association
Re: S.B. 1044; S.B. 1219

The Hawai'i State Bar Association (HSBA) respectfully submits this testimony in opposition to the above-referenced bills, which essentially seek to exempt certain licensed professional groups from a proposed Hawai'i Supreme Court rule defining the "practice of law." The amendment attempts to accomplish exemptions from the proposed court rule by adding a statutory definition of the "practice of law" and by exempting five groups of professionals from a Supreme Court rule defining the "practice of law", or stated otherwise, determining what is the "unauthorized practice of law."

The HSBA's opposition primarily is based on three grounds: (1) under the constitutional separation of powers doctrine, the promulgation of a "practice of law" definition is within the powers and authority of the judicial branch of government; (2) the proposed bills would constitute a total exemption from the unauthorized practice of law and as such are far too broad; and (3) the HSBA has worked with the professional groups seeking this exemption [with the exception of the physicians] on a revision to the proposed rule that takes into consideration the points and comments expressed by other licensed and regulated professional groups and associations. This revised rule, a copy of which is attached, has been submitted to the Supreme Court and is posted on the Judiciary website for comment.

1. On various occasions, the Hawai'i Supreme Court has held that it retains inherent authority to supervise and license members of the bar and the practice of law. This inherent authority, granted by the constitutional separation of powers of the government into the legislative, executive and judicial branches, is recognized in Hawai'i Revised Statutes § 605-1, which provides the Supreme Court has the sole authority to "examine, admit, and reinstate" as well as to "revoke or suspend" the license to practice law within the State of Hawai'i.

As this concept is currently recognized and practiced, the Hawai'i Supreme Court establishes the standards for qualification and the procedures and requirements for licensing and practice of attorneys in the State of Hawai'i. In fact, a committee of the Disciplinary Board of the Hawai'i Supreme Court is currently studying this and other issues and will soon recommend changes in the court's rules regulating the legal profession, which is the responsibility of the judicial branch of government.

Defining the practice of law, therefore, is the responsibility of the Judiciary, which administers and regulates the practice of law. This is in accord with the basic tenet of the separation of powers doctrine within Article VI, section 7 and codified in HRS Section 605-1. While the legislature can exercise its police power to regulate powers delegated to the court in exigent circumstances in order to protect the public's welfare, such exigent circumstances do not exist relative to this issue. The currently proposed UPL Rule posted by the Hawaii Supreme Court was a collaborative product between the HSBA and a coalition of licensed and unlicensed professionals and other interested groups and individual entities, and the

proposed UPL Rule generated by that collaboration specifically protects the lawful livelihood of various professions, groups, and individuals even beyond the scope of the S.B. 1044; S.B. 1219.

The HSBA respectfully submits that the proper course and procedure for review and establishment of regulations relating to the practice of law in the State of Hawai'i is to recognize the authority vested in the Hawai'i Supreme Court to establish and regulate those standards.

It was in keeping with the constitutional authority vested in the judicial branch of our government, and in recognition of the harm that is caused to consumers by untrained, unlicensed, and unregulated individuals who handle legal matters, that the HSBA, through its Consumer Protection Committee, asked the Hawai'i Supreme Court to promulgate a rule that would define the "practice of law" and enhance the protection for consumers who suffer financial loss and loss of rights or opportunities at the hands of untrained, unlicensed and unregulated individuals handling their legal matters. The Hawai'i Supreme Court initially proposed such a rule and posted it on the Judiciary website for comment in 2007. The work performed through 2008 culminated in the drafting of the currently proposed UPL Rule.

2. S.B.1044 and S.B.1219 propose amendments to H.R.S. §605-14 and to the H.R.S. chapters which regulate insurers (431), doctors* (453), engineers* (464), certified public accountants (466), and realtors (467), which are far too broad, to the extent that they exempt professionals licensed under H.R.S. Chapters 431, 453, 464, 466 and 467 from all regulation under a practice of law rule. This is unacceptably broad because the exemption would allow for the "practice of law" by persons lacking appropriate legal training or license and there would not be any recourse for harm caused by their exempted "practice of law."

The definition of "practice of law" under S.B. 1044 is overly broad, which is ironic considering that many of the initial comments and criticisms voiced by certain licensed professional groups to the initially proposed UPL Rule pertained to what they perceived to be an overly broad definition of "practice of law." The currently proposed UPL Rule tightened the definition to meet those concerns. The definition within S.B. 1044 exempts the activities of those licensed under chapters 431, 453, 464, 466, or 467 if they do not "provide or profess to provide professional legal advice, services based on legal competency, or standing in the law." A person licensed under any of the chapters, thus, could "get away" with practicing law by merely denying or professing that he or she is providing legal services. In short, a non-attorney could engage in the practice of law without any restrictions provided he or she "professed" not to be practicing law. The bill would not prevent a realtor or a certified public accountant, who "professed" not to be providing professional legal advice or services "based on legal competency or standing in the law," from appearing in court to represent a defendant in a murder case. By analogy, it would be like an attorney who does not profess to be providing medical advice or services based on medical competency or standing, but who then conducts a medical procedure without a medical license. The HSBA is concerned about untrained, non-licensed individuals who disclaim or "profess" that they are not providing legal

services or advice to others, and yet provide such service or advice to the detriment of consumers. S.B. 1044 would permit such activity.

The proposed definition of “practice of law” within S.B. 1044 has an exemption that only benefits licensees. One of the issues raised to the HSBA last year during the collaborative process in re-drafting an acceptable UPL Rule was from groups, organizations, and individuals who were not licensed or subject to licensing requirements under Hawaii law. S.B.1044 and S.B.1219 does not provide for those groups, organizations, and individuals, whereas the currently proposed UPL Rule does.

Based on the foregoing, the Hawai'i State Bar Association respectfully requests that S.B. 1044, amending H.R.S. §605-14 (relating to the unauthorized practice of law), and S.B. 1219, amending H.R.S. §467-7 and relating to realtors and the “practice of law,” not be passed.

*We note that the doctors and engineers were not represented in the UPL Coalition and are unsure how they are affected in their professional work by a UPL Rule.

Proposed UPL Rule (revised as of 10/23/08 HSBA Meeting)

Rule _____. Unauthorized Practice of Law

(a) Purpose.

It is recognized that individuals have a right to represent themselves in legal matters. However, the privilege of representing others is granted and supervised by the Hawaii Supreme Court for the protection of the public from harm by persons engaged in the unauthorized practice of law in this state. Such persons generally lack the legal education, training, and experience of a licensed lawyer in this state and are not subject to Hawaii's Rules of Professional Conduct or disciplinary system established in this state for licensed lawyers. It is recognized that there are persons in this state who are licensed and/or otherwise authorized by the laws of this state to provide the public with necessary services in the fields of insurance, accounting, and real estate, among others. It is not the intent of this Rule to abridge or restrict those persons from conducting or engaging in those activities permitted or authorized by the laws of this state.

(b) Prohibition.

No person shall practice law in this state or in any manner hold themselves out as a lawyer, or being authorized or competent to practice law in this state unless the person is an active member of the state bar in good standing, except as otherwise permitted by this rule or any other supreme court rule.

(c) Definitions.

"Person" refers to individuals and entities.

"Practice of law" is the giving of legal advice, counsel, assistance, or service where there is a client relationship of trust or reliance between the party giving such advice, counsel, assistance, or service and the party to whom it is given. The practice of law includes, but is not limited to:

(1) Giving advice or counsel to another person or entity about the person's or entity's legal rights and obligations or the legal rights and obligations of others where a relationship of trust or reliance exists between the party giving such advice or counsel and the party to whom it is given.

(2) Holding oneself out in any manner as a lawyer, attorney, legal counselor or advisor entitled and able to engage in the practice of law in this state.

(3) Selecting, drafting, or completing documents that affect the legal rights of another person or entity.

(4) Representing another person in a court, an administrative proceeding, an arbitration proceeding, a hearing, a deposition, or any other formal or informal dispute resolution process in which legal documents are submitted or a record is established.

(5) Negotiating legal rights or obligations with others on behalf of another person or entity.

(6) Providing oral or written legal opinions.

“Qualifying institution” is a business organization that is authorized and registered to do business as provided by law.

(d) Exceptions and exclusions.

The following activity by a non-lawyer, who is not otherwise claiming to be a lawyer, or a lawyer not licensed in this State is permitted:

(1) Appearing *pro se*.

(2) Acting as a representative when authorized by law or by a governmental agency, including the representation of a person in small claims court without compensation and upon express approval of the court or representing a legal entity as an employee representative in small claims court.

(3) Serving as a neutral mediator, arbitrator, conciliator or facilitator when such service does not include rendering advice or counsel as set forth under section (c)(1) above.

(4) Serving as in-house counsel for a single qualifying institution; provided in-house counsel

(a) registers and maintains registration with the State Bar in accordance with the requirements of Rule 17,

(b) provides no personal representation to individuals, including customers, shareholders, owners, partners, officers, employees, servants, or agents of the qualifying institution,

(c) makes no state court appearances on behalf of any person or entity other than him or her self, and

(d) agrees to submit to the disciplinary jurisdiction of the supreme court and its Disciplinary Board.

(5) Acting as a legislative lobbyist.

(6) Making legal forms available to the general public, whether by sale or otherwise, or publishing legal self-help information by print or electronic media.

(7) Participating in labor negotiations, arbitrations or conciliations arising under collective bargaining rights or agreements, or as otherwise allowed by law.

(8) Performing services as a law clerk to a judge, justice, or member of the bar.

(9) Performing services as a paralegal under the supervision of a judge, justice, or member of the bar.

(10) Preparing tax returns and performing any other statutorily or legally authorized services as a certified public accountant, enrolled agent, public accountant, public bookkeeper, or tax preparer, including, but not limited to financial planning or accompanying or representing a taxpayer client in a hearing before the Board of Taxation in Hawaii.

(11) Performing or providing services authorized by statute or regulation in this state by real estate licensees who are licensed real estate brokers or salespersons under and pursuant to H.R.S. Chapter 467 and H.A.R. Chapter 99, including, but not limited to, the following:

(a) Preparation of real estate sales and/or purchase agreements and contracts of sale.

(b) Preparation of real property leases or rental agreements.

(c) Providing or completing forms related to the sale, lease, rental, and/or purchase of real estate, improvements, and personal property for their customers.

(d) Providing information or advice relating to the sale, lease, rental, and/or purchase of real estate and improvements.

(e) Negotiating for or on behalf of clients or customers relative to the sale, lease, rental, and/or purchase of real estate and improvements.

(12) Performing or providing services authorized by statute or regulation in this state by an entity or organization in the business of insurance or a self-insured entity or organization licensed in this state, and their licensed agents, affiliated licensees, and employees of such entities, including claims representatives, adjustors or handlers.

(13) Selling, soliciting or negotiating insurance and annuity products, informing customers of their options with respect to the purchase, ownership and naming of beneficiaries of such products and the performance of any other function associated

with the purchase, replacement and administration of an insurance or annuity product, and adjustment or handling of insurance claims by insurance companies and their claims representatives and/or insurance agents as well as licensed claims representatives and insurance agents not affiliated or employed by a particular insurance company.

(14) Providing information or education about law, regulations, legal procedures, and compliance issues by a person, entity or organization for the purpose of teaching, training or educating others.

(15) Performing activities that are preempted by federal law.

(16) Preparing, filling in, or explaining a form or document used in a transaction or furnishing or explaining any statement or notice provided for by state or federal law, when performed by a merchant incidental to the sale of a product or service.

(17) Performing or providing services otherwise authorized by statute or regulation in this state.

(18) Performing such other activities as the courts of Hawaii have determined do not constitute the unauthorized practice of law.

(e) Governmental Agencies.

Nothing in this rule affects the ability of a governmental agency to carry out its responsibilities as provided by law.

(f) General Information.

Nothing in this rule affects the ability of a person or entity to provide information of a general nature about the law and legal procedures to members of the public.

(g) Document Use By A Party

Nothing contained in this rule shall be construed to prohibit the preparation or use by any party to a transaction of any legal or business form or document used in the transaction.

(h) No Private Cause of Action Created

Nothing in this Rule creates or may be the basis of a private cause of action or claim cognizable in any court, administrative agency or alternative dispute forum.