HCCA

Hawaii Council of Community Associations
www.hawaiicouncil.com

January 31, 2022

Representative Aaron Johanson, Chair
Representative Lisa Kitagawa, Vice-Chair
House Committee on Consumer Protection and Commerce

Re: HB1857 Relating to Condominium Associations. Testimony in Opposition
Thursday, February 3, 2022 at 2 p.m.

Chair Johanson, Vice-Chair Kitagawa and Members of the Committee:

I am Jane Sugimura, President of the Hawaii Council of Associations of Apartment Owners (HCCA).

HCCA opposes this bill and asks that this bill be deferred for the following reasons:

- Attorneys' fees payments by the Association are generally operating expenses and cannot be paid from the reserve funds based on the express language in HRS §541B-148;
- The Association has a fiduciary duty to collect delinquent maintenance fees and generally engage attorneys to do the collection. The 25% cap on attorneys' fees is based on HRS §607-14, which governs the award of attorneys' fees on assumpsit claims. Since many maintenance fee collections never get to litigation the 25% should not be applicable. Also, Associations engage attorneys for covenant and rule enforcement, which do not have a monetary amount and therefore the 25% would not be applicable;
- Attorneys representing the association to collect delinquent maintenance fees or to enforce compliance with covenants or rules by necessity need to communicate with the unit owners in the course of their collection or enforcement action so this requirement would prevent association counsel from doing their jobs;
- Association counsel are generally paid by their client, i.e., by the association, and do not seek payment from the unit owner. We are aware of only one attorney who may be doing this and we agree that that should not be case; however, that is not a reason to enact this legislation.

Thank you for allowing me to testify on this bill.

Jane Sugimura
President

1050 Bishop Street #366, Honolulu, Hawaii 96813

Dear Representative Johanson, Chair, Representative Kitigawa, Vice Chair, and members of the Committee on Consumer Protection & Commerce:

I respectfully OPPOSE H.B. 1857. If passed, this measure will hurt condominium associations and condominium unit owners alike. This measure will create serious hardships for condominium associations and condominium unit owners by imposing unreasonable barriers to resolving claims with the assistance of legal counsel. This measure will also result in greater financial hardship to unit owners (who comply with their association's project documents and who pay their unit's share of common expense assessments). For the reasons stated below, the Committee should not pass this measure.

This measure would make it almost impossible for condominium associations and condominium unit owners to be reimbursed for attorneys' fees incurred in disputes.
Most legal disputes between condominium associations and unit owners involve claims to collect a unit's share of unpaid common expense assessments, foreclose an association's lien, or to enforce a provision of the association's declaration, bylaws, house rules, Chapter 514B, or the rules of the real estate commission. For decades, Hawaii law has included a fee-shifting statute for these types of disputes (which is presently provided under HRS Section 514B-157). This measure, however, would flip the fee-shifting statute on its head, and make it impossible for associations and unit owners to recover fees in these types of cases. This measure will, in effect, require all other owners of units to collectively pay the fees incurred by their association as a direct result of other owners who do not comply with an association's project documents or who do not pay common expense assessments.

When an owner violates an association's project documents or does not pay assessments, a condominium association often has no choice but to retain an attorney. The attorneys' fees incurred are paid directly from the association's funds to the law firm handling a matter, and the association accountant will often classify the attorneys' fees as a reimbursable or account receivable. If this measure is passed, it is highly likely that associations will not be able to seek reimbursement of any attorneys' fees in cases where an owner has violated the project document or has not paid their share of assessments. As a result, associations will be required to budget for the legal fees as an additional expense, and all the unit owners will be unfairly burdened with increases in their share of assessments.

This measure would impose unreasonable limits on the speech of association attorneys.
Without good reason, Section 2 of this measure would prohibit condominium association attorneys from communicating with anyone other than the Board of Directors, except under limited circumstances. In particular, this measure provides that an association attorney "shall only communicate with the board; provided that attorneys retained by the association may communicate with unit owners for purposes of requests and responses for essential requirements of each matter[.]" See page 3, lines 7 through 11.

In effect, this measure would require that an association attorney communicate only with a board of directors, even if a communication does not involve a matter which is in dispute. The only exception to the restriction in this measure that association attorneys communicate only with the board is that they may communicate with a unit owner for the purposes of "requests and responses for essential requirements of each matter." For the reasons stated below, such limitations on attorney communications would be extremely overbearing and unreasonable. Furthermore, the exception stated

in lines 9 and 10 on page 3 is vague and ambiguous, as it is not clear what is meant by "requests and responses for essential requirements of each matter" and how this is decided.

An association attorney can be essential in resolving legal disputes between an association and a unit owner. Association attorneys will often communicate an association's claims or demands to an owner by sending letters, engaging in phone calls, negotiating settlement, or assisting with mediation, before ever going to court. Direct communication between unit owners (or their attorneys) and an association's attorneys can therefore be essential to resolving legal disputes.

This measure would also lead to the absurd result of prohibiting an association attorney from communicating with other association representatives, employees, or agents (such as an association's managing agent, property manager, and resident manager). It would prohibit association attorneys from communicating with an owner's representatives or the owner's legal counsel. It would prohibit attorneys from communicating with third parties with whom communications may be necessary to resolve or prevent disputes (such as witnesses, expert witnesses, tenants of units, or any other person who might have knowledge that about a matter). Even though associations are required to be represented by attorneys in court actions (with a possible exception for certain small claims actions), this bill would have the effect of prohibiting the association's attorney from communicating with the court or the other parties to the litigation, including witnesses. It would also prevent associations from having their attorneys communicate with other branches of government or governmental entities

Furthermore, in cases where there is a serious threat of bodily injury or death to others, this measure would have the alarming effect of prohibiting an association attorney from communicating with parties who could assist with safety concerns, such as the police department, fire department, security personnel, or safety contractors. For instance, while many associations are working to comply with the City and County of Honolulu's fire sprinkler mandate, this measure would impose unnecessary obstacles on the ability of an association's attorney to communicate with fire safety experts or other third parties while assisting associations with compliance issues.

Additionally, this measure would prevent associations from retaining lawyers to represent them in contract negotiations with vendors because it would bar the attorneys from communicating with vendors. Likewise, attorneys would not be able to file claims with the association's insurance carrier or negotiate insurance settlements because they would be barred from communicating with the carrier.

In essence, this bill will deprive associations of their right to effective legal representation, which is unwarranted, unreasonable, and likely unconstitutional. It is also unreasonable and fundamentally unfair that the owner is free to hire legal counsel who can speak to whomever he/she wishes. This bill is so lopsided that it is offends the sense of reasonableness and fairness.

The last clause of Section 2 of this measure is also problematic, as it would create a serious obstacle for associations seeking reimbursement of reasonable attorneys' fees (whether by letter, a judicial proceeding, or to collect attorneys' fees awarded by the court).

The legislature has outlined ways for condominium associations and condominium unit owners to resolve disputes without going to court.
In many instances, disputes between a condominium unit owner and their condominium association may be resolved without the involvement of an attorney, and without going to court. The legislature has outlined various ways unit owners and condominium associations may resolve disputes without going to court. For instance, Sections 514B-146(d), 514B-146.5(a), 514B-161, 514B-162, and 514B-162.5, each avail to unit owners and condominium associations the option of participating in mediation or arbitration for various disputes. As such, many disputes can be resolved through mediation or arbitration, without an association or an owner incurring substantial attorneys' fees, and Section 514B-157, which governs attorneys' fees awards in certain cases, includes a provision which encourages mediation. It is not clear what purpose this measure will serve other than to impose unfair burdens which may ultimately have a chilling effect on associations retaining and relying upon on legal counsel when necessary to resolve almost any and every type of legal matter. This bill will also make it impossible for Associations to be represented by legal counsel in mediation or arbitration because the attorney would be barred from speaking to the arbitrator or mediator. Yet, the owner is free to hire legal counsel who may speak to anyone. This is hardly fair or reasonable.

A twenty-five percent cap on attorneys' fees is not reasonable.
This measure also seeks to impose a twenty-five percent cap on attorneys' fees based upon the "original debt" for which recovery is sought "in each matter." See Page 3, lines 4 through 6. Generally, a twenty-five percent cap on an association's legal fees should not be imposed because it would result in all unit owners being responsible for bearing the unfair burden of paying attorneys' fees which were incurred as a result of the default or breach of another owner. That said, not all matters where attorneys' fees are incurred involve an "original debt." While attorneys often assist associations in collecting debts owed by an owner, there are numerous other types of matters which do not arise from an "original debt." Therefore, this measure would not only place unfair burdens on condominium unit owners, but it is also very problematic as drafted.

This measure also includes a wrong factual finding.
This measure states that the legislature finds that "it is the board, not the individual unit owners, who are the clients of the attorneys." Generally, attorneys who represent an association do not represent the "board" or "individual directors." Attorneys who represent an association generally represent the association, as an entity, which acts through its board. Association attorneys communicate with board members, because, in most instances, it is the board that is vested with decision making authority and the party to whom the attorney-client privilege runs.

In summary, this is an extremely bad bill. It is bad not only for condominium associations, but their members. This bill should be deferred.

For the foregoing reasons, I respectfully OPPOSE H.B. 1857 and strongly urge your Committee not to pass this measure.

HB-1857
Submitted on: 2/1/2022 6:13:31 PM
Testimony for CPC on 2/3/2022 2:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Mark McKellar	Law Offices of Mark K. McKellar, LLLC	Oppose	No

Comments:

Dear Representative Johanson, Chair, Representative Kitigawa, Vice Chair, and members of the Committee on Consumer Protection & Commerce:

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association accountant will often classify the attorneys' fees as a reimbursable or account receivable. If this measure is passed, it is highly likely that associations will not be able to seek reimbursement of any attorneys' fees in cases where an owner has violated the project document or has not paid their share of assessments. As a result, associations will be required to budget for the legal fees as an additional expense, and all the unit owners will be unfairly burdened with increases in their share of assessments.

This measure would impose unreasonable limits on the speech of association attorneys.

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The last clause of Section 2 of this measure is also problematic, as it would create a serious obstacle for associations seeking reimbursement of reasonable attorneys' fees (whether by letter, a judicial proceeding, or to collect attorneys' fees awarded by the court).

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In many instances, disputes between a condominium unit owner and their condominium association may be resolved without the involvement of an attorney, and without going to court. The legislature has outlined various ways unit owners and condominium associations may resolve disputes without going to court. For instance, Sections 514B-146(d), 514B-146.5(a), 514B-161, 514B-162, and 514B-162.5, each avail to unit owners and condominium associations the option of participating in mediation or arbitration for various disputes. As such, many disputes can be resolved through mediation or arbitration, without an association or an owner incurring substantial attorneys' fees, and Section 514B-157, which governs attorneys' fees awards in certain cases, includes a provision which encourages mediation. It is not clear what purpose this measure will serve other than to impose unfair burdens which may ultimately have a chilling effect on associations retaining and relying upon on legal counsel when necessary to resolve almost any and every type of legal matter. This bill will also make it impossible for Associations to be represented by legal counsel in mediation or arbitration because the attorney would be barred from speaking to the arbitrator or mediator. Yet, the owner is free to hire legal counsel who may speak to anyone. This is hardly fair or reasonable.

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HB-1857
Submitted on: 2/2/2022 9:32:54 AM
Testimony for CPC on 2/3/2022 2:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Gary Zanercik	Sunset kahili AOAO	Oppose	No

Comments:

I am the President of a condo assn on Kauai. The only sourceof funds is the unit owners. When one unit owner is delinquent, the other owners suffer. Responsible owners sholud not be penalized by having to pay attorney fees to collect from delinquent, irresponsible owners. Attornesy are abdolutely needed to collect delinquent fees and enven then it takes forever. I know we have had to do it and the other responsible owners effectively had to [provide the irresponsible owner with a free loan until collected. The costs contiunue, someone has to pay and its the responsible owners! If anythin legislation should be passed expediting the collection of fees and foreclosure on fee lien rights. What ever happened to rsponsibility?

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For the foregoing reasons, I respectfully OPPOSE H.B. 1857 and strongly urge your Committee not to pass this measure.

P.O. Box 976
Honolulu, Hawaii 96808

HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE

Testimony Regarding HB 1857

DATE: Thursday, February 3, 2022
TIME: 2:00 PM
PLACE: Conference Room 329 and
via video conference

John Morris
(808) 523-0702

Chair Johanson and Members of the Committee,

My name is John Morris and I am testifying on behalf of the Legislative Action Committee Of The Community Associations Institute, Hawaii Chapter ("CAI"). CAI is a national organization devoted to improving the management and operation of condominiums and other homeowner associations. The Hawaii chapter is a local chapter of the national CAI organization.

CAI opposes HB 1857 because it overlooks the fundamental principles of management and operation of a condominium in Hawaii and the efforts the legislature has already taken to allow owners to contest association claims without incurring any legal fees. The bill also encourages owners to ignore the obligations they agreed to when they purchased their units.

- Several years ago, the legislature amended the condominium law to provide a very comprehensive provision for mediation of disputes, section 514B-161 (which also includes a subsidy of up to $3,000 for the cost of the mediation service). The section clearly states that each party to mediation shall bear the attorney's fees, costs, and other expenses of preparing for and participating in mediation unless otherwise agreed. Therefore, if an owner has a dispute about the association's enforcement of the rules, the owner can comply with the association's request and then, to avoid legal fees, can immediately file for mediation of the dispute. In that way, the owner will incur no legal fees at all.

- The same is true for disputes about maintenance fees. Section 514B-146 gives an owner the right to demand mediation or arbitration of any dispute about the association's maintenance fee assessments. Of course, the owner also has the option of paying the assessment and then disputing it, as well as the option of asking the board for a payment plan. Regardless, that process makes HB 1857 unnecessary because the legislature has already addressed this issue.

- Similarly, several years ago, the legislature amended section 514B-146 to provide that a unit owner who contests the amount of any attorney fees, penalties, fines, etc., may make a demand in writing for mediation of the validity of those charges. Once the owner makes a demand, the association is prohibited from collecting the disputed charges until it has participated in mediation. Thus, as with disputes about the rules, every owner has the option of mediating disputes about legal fees without paying the legal fees until the mediation is complete.

- HB 1857 also overlooks the fact that few if any condominium associations resort to immediate legal action when an owner violates the rules or fails to pay the owner's association dues. Instead, the common practice is to give at least two or three warnings to the owner about the violation or the nonpayment before the matter is referred to an attorney. Even then, with respect to delinquencies, under the Federal Fair Debt Collection Practices Act, attorneys must give owners 30 days to respond to an initial demand letter before taking any further action. Therefore, contrary to the assumption of HB 1857, associations <u>rarely</u> resort to <u>immediate</u> legal action for a rules violation or for nonpayment.

- CAI certainly agrees that if a board seeks legal advice on matters affecting <u>all</u> of the association members, the cost of that legal advice should be billed as a common expense. For example, a board may seek legal advice on whether it can lease a portion of the common elements to an individual, take out a loan, impose a special assessment on all owners for a particular improvement to the common area, etc. The cost of that legal advice <u>should</u> be paid as a common expense because the advice is for the benefit of all of the members of the association. In fact, the condominium law already clearly states that principle.

- The same would be true if an owner asked the board a question and the board decided to seek legal advice to answer the question. Nothing in the existing condominium law authorizes the board to assess an owner if the board decides to seek legal advice in response to an owner's question, <u>unless</u> the situation involves a violation or non-payment by the owner.

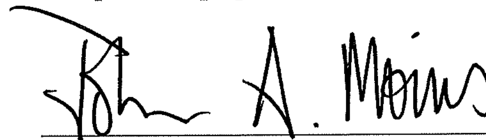
- That is not what HB 1857 proposes. Instead, it proposes that if the conduct of an individual owner forces the association to seek legal advice and take legal action against that owner for violation of the covenants or nonpayment of association dues, the association, not the owner, should pay for the cost of that legal action. This proposal overlooks the fact that the "association" is not some large, faceless entity. Instead, the association is comprised of all the other owners who are following the rules and are paying their association dues. Everyone who purchases a property governed by an association agrees to follow the rules and pay association dues at the time of the purchase. There is no reason why, if that owner fails to honor those commitments, all the other owners should have to pay for expenses incurred. Contrary to the statements in the preamble to HB 1857, that type of legal expense is not protecting the collective interests of the association.

- Finally, the 25% limit on attorney's fees imposed by HB 1857 will encourage owners to fail to pay on time or at all. For example, if an owner owes $2,000, the owner will be aware that the association can only collect $500 of that amount -- 25% -- as legal fees. (That may not seem like a lot but if every owner in a 100-unit condominium owes just $500, the association will be short $50,000.) Often, the costs of collection will easily exceed 25% when the amounts being claimed are relatively small. Even filing a complaint for the delinquency may cost several hundred dollars or more. The proposed 25% limit will allow owners to not pay, knowing that it will be difficult for the association to justify pursuing small amounts because the association will be unable to collect the legal fees incurred for doing so.

In summary, the legislature should not pass laws that encourage owners to ignore the obligations they agreed to comply with when they purchased their units. Therefore, CAI urges the legislature to defer HB 1857 and allow owners to use the processes the legislature has already created to contest claims for legal fees.

Thank you for this opportunity to testify.

Very truly yours,



John A. Morris

JAM:alt

Dear Representative Johanson, Chair, Representative Kitigawa, Vice Chair, and members of the Committee on Consumer Protection & Commerce:

I respectfully OPPOSE H.B. 1857. If passed, this measure will hurt condominium associations and condominium unit owners alike. This measure will create serious hardships for condominium associations and condominium unit owners by imposing unreasonable barriers to resolving claims with the assistance of legal counsel. This measure will also result in greater financial hardship to unit owners (who comply with their association's project documents and who pay their unit's share of common expense assessments). For the reasons stated below, the Committee should not pass this measure.

This measure would make it almost impossible for condominium associations and condominium unit owners to be reimbursed for attorneys' fees incurred in disputes.
Most legal disputes between condominium associations and unit owners involve claims to collect a unit's share of unpaid common expense assessments, foreclose an association's lien, or to enforce a provision of the association's declaration, bylaws, house rules, Chapter 514B, or the rules of the real estate commission. For decades, Hawaii law has included a fee-shifting statute for these types of disputes (which is presently provided under HRS Section 514B-157). This measure, however, would flip the fee-shifting statute on its head, and make it impossible for associations and unit owners to recover fees in these types of cases. This measure will, in effect, require all other owners of units to collectively pay the fees incurred by their association as a direct result of other owners who do not comply with an association's project documents or who do not pay common expense assessments.

When an owner violates an association's project documents or does not pay assessments, a condominium association often has no choice but to retain an attorney. The attorneys' fees incurred are paid directly from the association's funds to the law firm handling a matter, and the association accountant will often classify the attorneys' fees as a reimbursable or account receivable. If this measure is passed, it is highly likely that associations will not be able to seek reimbursement of any attorneys' fees in cases where an owner has violated the project document or has not paid their share of assessments. As a result, associations will be required to budget for the legal fees as an additional expense, and all the unit owners will be unfairly burdened with increases in their share of assessments.

This measure would impose unreasonable limits on the speech of association attorneys.
Without good reason, Section 2 of this measure would prohibit condominium association attorneys from communicating with anyone other than the Board of Directors, except under limited circumstances. In particular, this measure provides that an association attorney "shall only communicate with the board; provided that attorneys retained by the association may communicate with unit owners for purposes of requests and responses for essential requirements of each matter[.]" See page 3, lines 7 through 11.

In effect, this measure would require that an association attorney communicate only with a board of directors, even if a communication does not involve a matter which is in dispute. The only exception to the restriction in this measure that association attorneys communicate only with the board is that they may communicate with a unit owner for the purposes of "requests and responses for essential requirements of each matter." For the reasons stated below, such limitations on attorney communications would be extremely overbearing and unreasonable. Furthermore, the exception stated

in lines 9 and 10 on page 3 is vague and ambiguous, as it is not clear what is meant by "requests and responses for essential requirements of each matter" and how this is decided.

An association attorney can be essential in resolving legal disputes between an association and a unit owner. Association attorneys will often communicate an association's claims or demands to an owner by sending letters, engaging in phone calls, negotiating settlement, or assisting with mediation, before ever going to court. Direct communication between unit owners (or their attorneys) and an association's attorneys can therefore be essential to resolving legal disputes.

This measure would also lead to the absurd result of prohibiting an association attorney from communicating with other association representatives, employees, or agents (such as an association's managing agent, property manager, and resident manager). It would prohibit association attorneys from communicating with an owner's representatives or the owner's legal counsel. It would prohibit attorneys from communicating with third parties with whom communications may be necessary to resolve or prevent disputes (such as witnesses, expert witnesses, tenants of units, or any other person who might have knowledge that about a matter). Even though associations are required to be represented by attorneys in court actions (with a possible exception for certain small claims actions), this bill would have the effect of prohibiting the association's attorney from communicating with the court or the other parties to the litigation, including witnesses. It would also prevent associations from having their attorneys communicate with other branches of government or governmental entities

Furthermore, in cases where there is a serious threat of bodily injury or death to others, this measure would have the alarming effect of prohibiting an association attorney from communicating with parties who could assist with safety concerns, such as the police department, fire department, security personnel, or safety contractors. For instance, while many associations are working to comply with the City and County of Honolulu's fire sprinkler mandate, this measure would impose unnecessary obstacles on the ability of an association's attorney to communicate with fire safety experts or other third parties while assisting associations with compliance issues.

Additionally, this measure would prevent associations from retaining lawyers to represent them in contract negotiations with vendors because it would bar the attorneys from communicating with vendors. Likewise, attorneys would not be able to file claims with the association's insurance carrier or negotiate insurance settlements because they would be barred from communicating with the carrier.

In essence, this bill will deprive associations of their right to effective legal representation, which is unwarranted, unreasonable, and likely unconstitutional. It is also unreasonable and fundamentally unfair that the owner is free to hire legal counsel who can speak to whomever he/she wishes. This bill is so lopsided that it is offends the sense of reasonableness and fairness.

The last clause of Section 2 of this measure is also problematic, as it would create a serious obstacle for associations seeking reimbursement of reasonable attorneys' fees (whether by letter, a judicial proceeding, or to collect attorneys' fees awarded by the court).

The legislature has outlined ways for condominium associations and condominium unit owners to resolve disputes without going to court.
In many instances, disputes between a condominium unit owner and their condominium association may be resolved without the involvement of an attorney, and without going to court. The legislature has outlined various ways unit owners and condominium associations may resolve disputes without going to court. For instance, Sections 514B-146(d), 514B-146.5(a), 514B-161, 514B-162, and 514B-162.5, each avail to unit owners and condominium associations the option of participating in mediation or arbitration for various disputes. As such, many disputes can be resolved through mediation or arbitration, without an association or an owner incurring substantial attorneys' fees, and Section 514B-157, which governs attorneys' fees awards in certain cases, includes a provision which encourages mediation. It is not clear what purpose this measure will serve other than to impose unfair burdens which may ultimately have a chilling effect on associations retaining and relying upon on legal counsel when necessary to resolve almost any and every type of legal matter. This bill will also make it impossible for Associations to be represented by legal counsel in mediation or arbitration because the attorney would be barred from speaking to the arbitrator or mediator. Yet, the owner is free to hire legal counsel who may speak to anyone. This is hardly fair or reasonable.

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This measure also includes a wrong factual finding.
This measure states that the legislature finds that "it is the board, not the individual unit owners, who are the clients of the attorneys." Generally, attorneys who represent an association do not represent the "board" or "individual directors." Attorneys who represent an association generally represent the association, as an entity, which acts through its board. Association attorneys communicate with board members, because, in most instances, it is the board that is vested with decision making authority and the party to whom the attorney-client privilege runs.

In summary, this is an extremely bad bill. It is bad not only for condominium associations, but their members. This bill should be deferred.

For the foregoing reasons, I respectfully OPPOSE H.B. 1857 and strongly urge your Committee not to pass this measure.

HB-1857
Submitted on: 2/2/2022 1:18:20 PM
Testimony for CPC on 2/3/2022 2:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Lourdes Scheibert	Kokua Council, Participant of 'Oia' 'i'o	Support	Yes

Comments:

To: Rep Aaron Ling Johanson Chair

Re: HB1857, Relating to Condominium Associations

Aloha Chair Johanson, Vice-Kitagawa, and Members of the Committee,

I am Lourdes Scheibert, a director of Kokua Council, one of Hawaii's oldest advocacy groups. We focus on policies and practices which can impact the well-being of seniors and our community.

I am also a participant of Hui 'Oia'i'o, informally known as "COCO," a coalition of over three hundred property owners--mostly seniors--from over one hundred and fifty common-interest associations in Hawaii, and **I support HB1857** with the following change:

In the last sentence of Section 3 regarding 514B-157(3) in SB2730 the inserted word, "not," should be deleted:

...(3) Enforcing any provision of the declaration, bylaws, house rules, and this chapter, or the rules of the real estate commission;

against an owner, occupant, tenant, employee of an owner, or any other person who may in any manner use the property, shall be promptly paid on demand to the association by such person or persons; provided that if the claims upon which the association takes any action are not substantiated, all costs and expenses, ~~not~~ including reasonable attorneys' fees, incurred by any such person or persons as a result of the action of the association, shall be promptly paid on demand to such person or persons by the association."

TESTIMONY

HB1857 is to address using a one-size-fits-all collection practice from a $100.00 fine to a $50K + assessment show reasons for continued disputes in condominium self-governance.

As an example, perhaps, a $50K plus assessment to each owner in a 100 unit equates to $5M total for major repair/replacement of years of deferred maintenance decisions made by the

board. There are provisions and due process where the board can authorize the Associations attorney to collect the assessment from owners who are delinquent. Or provisions in 514B to arrange for agreement with the delinquent owner to pay in installments. Or provisions of drastic measures in the board imposing non-judicial-forclosures.

What about the **"manini' fines** an example of a $100. This type of disputes should be treated as a separate category. These fees can escalate to major disputes. In one instant that I know of escalated to $12,000.00 because the owner believed a House Rule violation was imposed in efforts of retaliation to silence the owner. Attorney fees should be capped at 25% of the original principal balance. The following quote, an example, from a House Rule document demonstrates the severity of bill collections that enacts a one-size-fits-all bill collection.

BE IT FURTHER RESOLVED that there is hereby levied against any account which is not paid in full as of the FIFTEENTH (15TH) day of each month, a late fee in the amount of FIVE PERCENT (5%), the Managing Agent is authorized and directed to charge to and collect from any delinquent association member who is delinquent for any amount over $100.00;

The following 1991 research paper used as reference in 514B recodification identifies the source of many disputes experienced back to 1980's (and further) and has escalated to today. The present management methodology is top heavy in administration costs and legal fees that can best be used for repairing the building's infrastructure. By implementing HB1857 will bring management reform with the amendment.

Meaningful reform in condominium self-governance and management practices should happen today with advice of the following:

Gregory K. Tanaka, January, 1991 - Condominium Dispute Resolution: Philosophical Considerations and Structural Alternatives

The board structure itself may be an underlying source of many disputes. *The present structure, modeled after corporate boards, is best suited to the financial or investment function. It is, however, an awkward structure vis-a-vis other two extremely important functions — governing and community living.*

It may be appropriate in this light to consider new models for an association's ***legal structure****. One might be the "town meeting and city manager" which would better match the governance and community living functions without sacrificing control over finance and investment (done through a finance committee). Or it may be enough to suggest to boards that they establish at least three committees each having clear missions—one for finance/investment, one for governing and one for community lifestyle/planning.*

Condominium Managing Agents (CMA's) represent the system's first chance to engage in "fire control" over disputes. CMA's are being paid to manage. It would be important to do everything possible to assist them in performing this duty and to then hold them accountable for it. The same would apply to resident or general managers in some buildings.

Thank-you

Dear Representative Johanson, Chair, Representative Kitigawa, Vice Chair, and members of the Committee on Consumer Protection & Commerce:

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Furthermore, in cases where there is a serious threat of bodily injury or death to others, this measure would have the alarming effect of prohibiting an association attorney from communicating with parties who could assist with safety concerns, such as the police department, fire department, security personnel, or safety contractors. For instance, while many associations are working to comply with the City and County of Honolulu's fire sprinkler mandate, this measure would impose unnecessary obstacles on the ability of an association's attorney to communicate with fire safety experts or other third parties while assisting associations with compliance issues.

Additionally, this measure would prevent associations from retaining lawyers to represent them in contract negotiations with vendors because it would bar the attorneys from communicating with vendors. Likewise, attorneys would not be able to file claims with the association's insurance carrier or negotiate insurance settlements because they would be barred from communicating with the carrier.

In essence, this bill will deprive associations of their right to effective legal representation, which is unwarranted, unreasonable, and likely unconstitutional. It is also unreasonable and fundamentally unfair that the owner is free to hire legal counsel who can speak to whomever he/she wishes. This bill is so lopsided that it is offends the sense of reasonableness and fairness.

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This measure also includes a wrong factual finding.
This measure states that the legislature finds that "it is the board, not the individual unit owners, who are the clients of the attorneys." Generally, attorneys who represent an association do not represent the "board" or "individual directors." Attorneys who represent an association generally represent the association, as an entity, which acts through its board. Association attorneys communicate with board members, because, in most instances, it is the board that is vested with decision making authority and the party to whom the attorney-client privilege runs.

In summary, **<u>this is an extremely bad bill</u>**. It is bad not only for condominium associations, but their members. This bill should be deferred.

For the foregoing reasons, I respectfully OPPOSE H.B. 1857 and strongly urge your Committee not to pass this measure.

RE: H.B. 1857

Dear Representative Johanson, Chair, Representative Kitigawa, Vice Chair, and Members of the Committee:

I am an attorney who represents condominium and planned community associations in Hawaii. **I respectfully OPPOSE H.B.1857.**

This bill will harm associations and their members by making it difficult, if not impossible, to recover attorneys' fees incurred in collecting assessments from owners who are in default and enforcing covenants against owners who are in violation. This will have the negative effect of benefitting owners who default in the payment of assessments and violate the covenants by freeing them of the obligation to reimburse the association for the attorneys' fees incurred as a result of their default or breach and placing the burden of that expense upon all owners. This is unfair and unjust.

The language that states that attorneys' fees incurred by an association shall be paid from association funds or reserves and that an association shall not assess, demand, or seek reimbursement of attorneys' fees against a unit owner unless the association assesses, demands, or seeks reimbursement of the fees against all the units in accordance with the allocations under section 514B-41 and the association has prevailed will make it impossible for associations to hire attorneys because they will not be able to pay their attorneys. Assessments are the source of association funds and reserves, so all, or almost all, association monies come from assessments. If an association cannot assess the owners for the funds necessary to pay attorneys' fees unless it has prevailed, then it will have no funds to pay for attorneys' fees for general representation. Attorneys are hired for many things, including contract negotiations, drafting amendments, and giving general legal advice. There are no prevailing parties in these instances, so this bill would have the effect of preventing associations from hiring attorneys as needed. Boards are expected, as part of their fiduciary duty, to rely upon experts, which includes hiring attorneys to advise boards on legal matters. If boards are unable to hire attorneys because they are prohibited by law from paying them, they will not be able to perform their fiduciary duties. This bill, if adopted, will cause irreparable harm to associations and their members.

Additionally, what is an association to do if it does not prevail in a lawsuit? Where are the funds to come from to pay the attorney if the fees cannot be paid from association funds or reserves, which are funded through "assessments"? This would require all associations to find attorneys who will work on a contingency fee basis, which will be difficult in many cases.

This bill provides that association attorneys may communicate only with a condominium association's board of directors, subject to a narrow and ambiguous exception that allows attorneys retained by an association to "communicate with unit owners for purposes of requests and responses for essential requirements of each matter." This language will prohibit association attorneys from communicating with people necessary to perform legal services. For example, it would prohibit an association attorney from communicating with the managing agent, vendors,

insurance agents, or even the court in litigation. It will prevent association attorneys from negotiating contracts with third parties, filing claims with insurance carriers, or communicating with experts. The bill will, in essence, deprive associations from effective legal representation, which is not only unreasonable, but likely unconstitutional. It is also fundamentally unfair that an owner who fails to pay assessments or breaches the covenants is free to hire legal counsel who can speak to whomever he/she wishes, while the association's attorney is barred from communicating with others. This bill is so lopsided that it is offends the sense of reasonableness and fairness.

This bill will also prevent attorneys from adequately representing their clients. If I, as an attorney, am prohibited by statute from communicating with persons other than my client and, in very limited circumstances, an owner, I cannot possibly perform my duties to my client. I would not be able to adequately represent my association client in a lawsuit if I cannot communicate with the adverse party, the court, or witnesses. I would not be able to adequately advise my client on a number of matters if I cannot consult with others as needed in the course of my representation. This bill, in essence, will prohibit lawyers from performing their duties and will deprive associations of their right to adequate legal representation.

I also oppose the bill for the reasons stated in the testimony of Paul Ireland Koftinow.

For the foregoing reasons, I respectfully OPPOSE H.B.1857 and strongly urge your Committee to permanently defer is measure.

Sincerely,

M. Anne Anderson

HB-1857
Submitted on: 2/1/2022 4:38:27 PM
Testimony for CPC on 2/3/2022 2:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Laurence Sussman	Individual	Oppose	No

Comments:

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This measure also seeks to impose a twenty-five percent cap on attorneys' fees based upon the "original debt" for which recovery is sought "in each matter." See Page 3, lines 4 through 6. Generally, a twenty-five percent cap on an association's legal fees should not be imposed because it would result in all unit owners being responsible for bearing the unfair burden of paying attorneys' fees which were incurred as a result of the default or breach of another owner. That said, not all matters where attorneys' fees are incurred involve an "original debt." While attorneys often assist associations in collecting debts owed by an owner, there are numerous other types of matters which do not arise from an "original debt." Therefore, this measure would not only place unfair burdens on condominium unit owners, but it is also very problematic as drafted.

This measure also includes a wrong factual finding.

This measure states that the legislature finds that "it is the board, not the individual unit owners, who are the clients of the attorneys." Generally, attorneys who represent an association do not represent the "board" or "individual directors." Attorneys who represent an association generally represent the association, as an entity, which acts through its board. Association attorneys communicate with board members, because, in most instances, it is the board that is vested with decision making authority and the party to whom the attorney-client privilege runs.

1. summary, this is an extremely bad bill. It is bad not only for condominium associations, but their members. This bill should be deferred.

For the foregoing reasons, I respectfully OPPOSE H.B. 1857 and strongly urge your Committee not to pass this measure.

Laurence Sussman

HB-1857
Submitted on: 2/1/2022 4:41:28 PM
Testimony for CPC on 2/3/2022 2:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Paul A. Ireland Koftinow	Individual	Oppose	Yes

Comments:

Dear Representative Johanson, Chair, Representative Kitigawa, Vice Chair, and members of the Committee on Consumer Protection & Commerce:

I respectfully OPPOSE H.B. 1857. If passed, this measure will hurt condominium associations and condominium unit owners alike. This measure will create serious hardships for condominium associations and condominium unit owners by imposing unreasonable barriers to resolving claims with the assistance of legal counsel. This measure will also result in greater financial hardship to unit owners (who comply with their association's project documents and who pay their unit's share of common expense assessments). For the reasons stated below, the Committee should not pass this measure.

This measure would make it almost impossible for condominium associations and condominium unit owners to be reimbursed for attorneys' fees incurred in disputes.

Most legal disputes between condominium associations and unit owners involve claims to collect a unit's share of unpaid common expense assessments, foreclose an association's lien, or to enforce a provision of the association's declaration, bylaws, house rules, Chapter 514B, or the rules of the real estate commission. For decades, Hawaii law has included a fee-shifting statute for these types of disputes (which is presently provided under HRS Section 514B-157). This measure, however, would flip the fee-shifting statute on its head, and make it impossible for associations and unit owners to recover fees in these types of cases. This measure will, in effect, require all other owners of units to collectively pay the fees incurred by their association as a direct result of other owners who do not comply with an association's project documents or who do not pay common expense assessments.

When an owner violates an association's project documents or does not pay assessments, a condominium association often has no choice but to retain an attorney. The attorneys' fees incurred are paid directly from the association's funds to the law firm handling a matter, and the association accountant will often classify the attorneys' fees as a reimbursable or account

receivable. If this measure is passed, it is highly likely that associations will not be able to seek reimbursement of any attorneys' fees in cases where an owner has violated the project document or has not paid their share of assessments. As a result, associations will be required to budget for the legal fees as an additional expense, and all the unit owners will be unfairly burdened with increases in their share of assessments.

This measure would impose unreasonable limits on the speech of association attorneys.

Without good reason, Section 2 of this measure would prohibit condominium association attorneys from communicating with anyone other than the Board of Directors, except under limited circumstances. In particular, this measure provides that an association attorney "shall only communicate with the board; provided that attorneys retained by the association may communicate with unit owners for purposes of requests and responses for essential requirements of each matter[.]" See page 3, lines 7 through 11.

In effect, this measure would require that an association attorney communicate only with a board of directors, even if a communication does not involve a matter which is in dispute. The only exception to the restriction in this measure that association attorneys communicate only with the board is that they may communicate with a unit owner for the purposes of "requests and responses for essential requirements of each matter." For the reasons stated below, such limitations on attorney communications would be extremely overbearing and unreasonable. Furthermore, the exception stated in lines 9 and 10 on page 3 is vague and ambiguous, as it is not clear what is meant by "requests and responses for essential requirements of each matter" and how this is decided.

An association attorney can be essential in resolving legal disputes between an association and a unit owner. Association attorneys will often communicate an association's claims or demands to an owner by sending letters, engaging in phone calls, negotiating settlement, or assisting with mediation, before ever going to court. Direct communication between unit owners (or their attorneys) and an association's attorneys can therefore be essential to resolving legal disputes.

This measure would also lead to the absurd result of prohibiting an association attorney from communicating with other association representatives, employees, or agents (such as an association's managing agent, property manager, and resident manager). It would prohibit association attorneys from communicating with an owner's representatives or the owner's legal counsel. It would prohibit attorneys from communicating with third parties with whom communications may be necessary to resolve or prevent disputes (such as witnesses, expert witnesses, tenants of units, or any other person who might have knowledge that about a

matter). Even though associations are required to be represented by attorneys in court actions (with a possible exception for certain small claims actions), this bill would have the effect of prohibiting the association's attorney from communicating with the court or the other parties to the litigation, including witnesses. It would also prevent associations from having their attorneys communicate with other branches of government or governmental entities

Furthermore, in cases where there is a serious threat of bodily injury or death to others, this measure would have the alarming effect of prohibiting an association attorney from communicating with parties who could assist with safety concerns, such as the police department, fire department, security personnel, or safety contractors. For instance, while many associations are working to comply with the City and County of Honolulu's fire sprinkler mandate, this measure would impose unnecessary obstacles on the ability of an association's attorney to communicate with fire safety experts or other third parties while assisting associations with compliance issues.

Additionally, this measure would prevent associations from retaining lawyers to represent them in contract negotiations with vendors because it would bar the attorneys from communicating with vendors. Likewise, attorneys would not be able to file claims with the association's insurance carrier or negotiate insurance settlements because they would be barred from communicating with the carrier.

In essence, this bill will deprive associations of their right to effective legal representation, which is unwarranted, unreasonable, and likely unconstitutional. It is also unreasonable and fundamentally unfair that the owner is free to hire legal counsel who can speak to whomever he/she wishes. This bill is so lopsided that it is offends the sense of reasonableness and fairness.

The last clause of Section 2 of this measure is also problematic, as it would create a serious obstacle for associations seeking reimbursement of reasonable attorneys' fees (whether by letter, a judicial proceeding, or to collect attorneys' fees awarded by the court).

The legislature has outlined ways for condominium associations and condominium unit owners to resolve disputes without going to court.

In many instances, disputes between a condominium unit owner and their condominium association may be resolved without the involvement of an attorney, and without going to

court. The legislature has outlined various ways unit owners and condominium associations may resolve disputes without going to court. For instance, Sections 514B-146(d), 514B-146.5(a), 514B-161, 514B-162, and 514B-162.5, each avail to unit owners and condominium associations the option of participating in mediation or arbitration for various disputes. As such, many disputes can be resolved through mediation or arbitration, without an association or an owner incurring substantial attorneys' fees, and Section 514B-157, which governs attorneys' fees awards in certain cases, includes a provision which encourages mediation. It is not clear what purpose this measure will serve other than to impose unfair burdens which may ultimately have a chilling effect on associations retaining and relying upon on legal counsel when necessary to resolve almost any and every type of legal matter. This bill will also make it impossible for Associations to be represented by legal counsel in mediation or arbitration because the attorney would be barred from speaking to the arbitrator or mediator. Yet, the owner is free to hire legal counsel who may speak to anyone. This is hardly fair or reasonable.

A twenty-five percent cap on attorneys' fees is not reasonable.

This measure also seeks to impose a twenty-five percent cap on attorneys' fees based upon the "original debt" for which recovery is sought "in each matter." See Page 3, lines 4 through 6. Generally, a twenty-five percent cap on an association's legal fees should not be imposed because it would result in all unit owners being responsible for bearing the unfair burden of paying attorneys' fees which were incurred as a result of the default or breach of another owner. That said, not all matters where attorneys' fees are incurred involve an "original debt." While attorneys often assist associations in collecting debts owed by an owner, there are numerous other types of matters which do not arise from an "original debt." Therefore, this measure would not only place unfair burdens on condominium unit owners, but it is also very problematic as drafted.

This measure also includes a wrong factual finding.

This measure states that the legislature finds that "it is the board, not the individual unit owners, who are the clients of the attorneys." Generally, attorneys who represent an association do not represent the "board" or "individual directors." Attorneys who represent an association generally represent the association, as an entity, which acts through its board. Association attorneys communicate with board members, because, in most instances, it is the board that is vested with decision making authority and the party to whom the attorney-client privilege runs.

In summary, this is an extremely bad bill. It is bad not only for condominium associations, but their members. This bill should be deferred.

For the foregoing reasons, I respectfully OPPOSE H.B. 1857 and strongly urge your Committee not to pass this measure.

Sincerely,

Paul A. Ireland Koftinow

HB-1857
Submitted on: 2/1/2022 5:11:06 PM
Testimony for CPC on 2/3/2022 2:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
lynne matusow	Individual	Oppose	No

Comments:

This is a very bad bill. I am resident owner occupant and board member of a high rise condo. This bill screws me and my fellow owners, badly. This bill would eliminate the ability of condominium associations to recover attorneys' fees and costs against owners in almost every case. The Association will end up paying for the attorneys' fees incurred in collecting assessments and enforcing the rules. Additionally, this bill would require that association attorneys communicate only with a condominium association's board of directors, subject to a narrow and confusing exception. It will prevent the association attorney from communicating with its managing agent, vendors, insurance agents, or even the court in litigation. In essence, this bill will deprive associations from effective legal representation. It will also prevent lawyers from adequately representing their clients.

The financial stability of condo associations will be at risk. We won't be able to recover fees in most cases. Budgets will become irrelevant. This bill wil force other owners of units to collectively pay the fees incurred by their association as a direct result of misvehaving owners who do not obey the declaraitonm byalws and house rule or who do not pay their common expense assessment. This measure will prohibit reimbursement of attorney fees where an owner has not obeyed documents or paid their assessments.

Then there is the assault on free speech. It limits who the attroneys may communicate with. Direct communication between unit owners,and their attorneys, is vital in resolving legal disputes. This bill kills that. It also prohibits association attorneys from contacting other association representatives, employees, property manager, and resident manager, among others, including governmetnal entities.

Then there is the safety issue. This macabre bill prohibit attorneys from contacting polife, firel security personnel, and safety contractors. Our attorneys would not be able to file claims with our insurance carrier or negotiating insurance settlements. This bill sounds like what occurs in authoritarian countries, no effective legal representation.

The 25% cap on fees does not reflect reality. Attorneys set their own fees. Usually they are based on hours worked and who did the work. The fees are what they are and the association should not be absorbing the costs because legislators think they are too high.

The board is not the client of the attorney's. In fact, it is the association. That is a wrong factual finding. Do not know if there are others.

This bill belongs in the trash heap. Please kill it, now.

HB-1857
Submitted on: 2/1/2022 5:50:15 PM
Testimony for CPC on 2/3/2022 2:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Laura Bearden	Individual	Oppose	No

Comments:

Dear Representative Johanson, Chair, Representative Kitigawa, Vice Chair, and members of the Committee on Consumer Protection & Commerce:

I respectfully OPPOSE H.B. 1857. If passed, this measure will hurt condominium associations and condominium unit owners alike. This measure will create serious hardships for condominium associations and condominium unit owners by imposing unreasonable barriers to resolving claims with the assistance of legal counsel. This measure will also result in greater financial hardship to unit owners (who comply with their association's project documents and who pay their unit's share of common expense assessments). For the reasons stated below, the Committee should not pass this measure.

This measure would make it almost impossible for condominium associations and condominium unit owners to be reimbursed for attorneys' fees incurred in disputes.

Most legal disputes between condominium associations and unit owners involve claims to collect a unit's share of unpaid common expense assessments, foreclose an association's lien, or to enforce a provision of the association's declaration, bylaws, house rules, Chapter 514B, or the rules of the real estate commission. For decades, Hawaii law has included a fee-shifting statute for these types of disputes (which is presently provided under HRS Section 514B-157). This measure, however, would flip the fee-shifting statute on its head, and make it impossible for associations and unit owners to recover fees in these types of cases. This measure will, in effect, require all other owners of units to collectively pay the fees incurred by their association as a direct result of other owners who do not comply with an association's project documents or who do not pay common expense assessments.

When an owner violates an association's project documents or does not pay assessments, a condominium association often has no choice but to retain an attorney. The attorneys' fees incurred are paid directly from the association's funds to the law firm handling a matter, and the association accountant will often classify the attorneys' fees as a reimbursable or account

receivable. If this measure is passed, it is highly likely that associations will not be able to seek reimbursement of any attorneys' fees in cases where an owner has violated the project document or has not paid their share of assessments. As a result, associations will be required to budget for the legal fees as an additional expense, and all the unit owners will be unfairly burdened with increases in their share of assessments.

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In effect, this measure would require that an association attorney communicate only with a board of directors, even if a communication does not involve a matter which is in dispute. The only exception to the restriction in this measure that association attorneys communicate only with the board is that they may communicate with a unit owner for the purposes of "requests and responses for essential requirements of each matter." For the reasons stated below, such limitations on attorney communications would be extremely overbearing and unreasonable. Furthermore, the exception stated in lines 9 and 10 on page 3 is vague and ambiguous, as it is not clear what is meant by "requests and responses for essential requirements of each matter" and how this is decided.

An association attorney can be essential in resolving legal disputes between an association and a unit owner. Association attorneys will often communicate an association's claims or demands to an owner by sending letters, engaging in phone calls, negotiating settlement, or assisting with mediation, before ever going to court. Direct communication between unit owners (or their attorneys) and an association's attorneys can therefore be essential to resolving legal disputes.

This measure would also lead to the absurd result of prohibiting an association attorney from communicating with other association representatives, employees, or agents (such as an association's managing agent, property manager, and resident manager). It would prohibit association attorneys from communicating with an owner's representatives or the owner's legal counsel. It would prohibit attorneys from communicating with third parties with whom communications may be necessary to resolve or prevent disputes (such as witnesses, expert witnesses, tenants of units, or any other person who might have knowledge that about a

matter). Even though associations are required to be represented by attorneys in court actions (with a possible exception for certain small claims actions), this bill would have the effect of prohibiting the association's attorney from communicating with the court or the other parties to the litigation, including witnesses. It would also prevent associations from having their attorneys communicate with other branches of government or governmental entities

Furthermore, in cases where there is a serious threat of bodily injury or death to others, this measure would have the alarming effect of prohibiting an association attorney from communicating with parties who could assist with safety concerns, such as the police department, fire department, security personnel, or safety contractors. For instance, while many associations are working to comply with the City and County of Honolulu's fire sprinkler mandate, this measure would impose unnecessary obstacles on the ability of an association's attorney to communicate with fire safety experts or other third parties while assisting associations with compliance issues.

Additionally, this measure would prevent associations from retaining lawyers to represent them in contract negotiations with vendors because it would bar the attorneys from communicating with vendors. Likewise, attorneys would not be able to file claims with the association's insurance carrier or negotiate insurance settlements because they would be barred from communicating with the carrier.

In essence, this bill will deprive associations of their right to effective legal representation, which is unwarranted, unreasonable, and likely unconstitutional. It is also unreasonable and fundamentally unfair that the owner is free to hire legal counsel who can speak to whomever he/she wishes. This bill is so lopsided that it is offends the sense of reasonableness and fairness.

The last clause of Section 2 of this measure is also problematic, as it would create a serious obstacle for associations seeking reimbursement of reasonable attorneys' fees (whether by letter, a judicial proceeding, or to collect attorneys' fees awarded by the court).

The legislature has outlined ways for condominium associations and condominium unit owners to resolve disputes without going to court.

In many instances, disputes between a condominium unit owner and their condominium association may be resolved without the involvement of an attorney, and without going to

court. The legislature has outlined various ways unit owners and condominium associations may resolve disputes without going to court. For instance, Sections 514B-146(d), 514B-146.5(a), 514B-161, 514B-162, and 514B-162.5, each avail to unit owners and condominium associations the option of participating in mediation or arbitration for various disputes. As such, many disputes can be resolved through mediation or arbitration, without an association or an owner incurring substantial attorneys' fees, and Section 514B-157, which governs attorneys' fees awards in certain cases, includes a provision which encourages mediation. It is not clear what purpose this measure will serve other than to impose unfair burdens which may ultimately have a chilling effect on associations retaining and relying upon on legal counsel when necessary to resolve almost any and every type of legal matter. This bill will also make it impossible for Associations to be represented by legal counsel in mediation or arbitration because the attorney would be barred from speaking to the arbitrator or mediator. Yet, the owner is free to hire legal counsel who may speak to anyone. This is hardly fair or reasonable.

A twenty-five percent cap on attorneys' fees is not reasonable.

This measure also seeks to impose a twenty-five percent cap on attorneys' fees based upon the "original debt" for which recovery is sought "in each matter." See Page 3, lines 4 through 6. Generally, a twenty-five percent cap on an association's legal fees should not be imposed because it would result in all unit owners being responsible for bearing the unfair burden of paying attorneys' fees which were incurred as a result of the default or breach of another owner. That said, not all matters where attorneys' fees are incurred involve an "original debt." While attorneys often assist associations in collecting debts owed by an owner, there are numerous other types of matters which do not arise from an "original debt." Therefore, this measure would not only place unfair burdens on condominium unit owners, but it is also very problematic as drafted.

This measure also includes a wrong factual finding.

This measure states that the legislature finds that "it is the board, not the individual unit owners, who are the clients of the attorneys." Generally, attorneys who represent an association do not represent the "board" or "individual directors." Attorneys who represent an association generally represent the association, as an entity, which acts through its board. Association attorneys communicate with board members, because, in most instances, it is the board that is vested with decision making authority and the party to whom the attorney-client privilege runs.

In summary, this is an extremely bad bill. It is bad not only for condominium associations, but their members. This bill should be deferred.

For the foregoing reasons, I respectfully OPPOSE H.B. 1857 and strongly urge your Committee not to pass this measure.

House of Representatives
Committee on Consumer Protection and Commerce
Thursday, February 3, 2022
2:00 p.m.

To: Chair Aaron Ling Johanson
Re: HB1857, Relating to Condominium Associations

Aloha Chair Johanson, Vice-Chair Kitagawa, and Members of the Committee,

I am Lila Mower, president of Kokua Council, one of Hawaii's oldest advocacy groups. We focus on policies and practices which can impact the well-being of seniors and our community.

I am also the leader of Hui 'Oia'i'o, informally known as "COCO," a coalition of over three hundred property owners--mostly seniors--from over 150 common-interest associations in Hawaii.

I **support HB1857** with the following change: on page 4, line 12 of the pdf version of SB2730, delete the inserted word, "not," so that reasonable attorneys' fees are included.

As a former director on three condominium association boards and a condominium owner and resident for over four decades, I realize that condominium owners have difficulty accessing justice because their association boards can use various remedies such as fines, liens, and foreclosures, even if these enforcements may be without true cause.

I have witnessed condominium owners saddled with unreasonable legal fees foisted upon them by their associations to stifle inquiry and dissent, and to intimidate those who are merely seeking to enforce their statutory rights and protections.

Absolute power corrupts absolutely. With no checks and balances to limit these association boards, the obligations of associations to owners become inconsequential.

Associations do not have to be correct; their obstructive tactics using excessive legal fees are rewarded when owners are financially and emotionally drained and abandon their efforts for redress. These owners are forced to recognize their powerlessness and capitulate because they cannot outgun their association board with its limitless ability to retain attorneys whose legal fees are often assigned to the affected owners. These owners and their neighbors who observe these abusive acts are silenced because of fear of the loss of services to which they are rightfully entitled.

Legislators concerned about "consumer protection" should feel outraged at even one such occurrence.

Unfortunately, I personally know of dozens of such events besides my own which is why I **support HB1857** with the suggested change.

HB-1857
Submitted on: 2/1/2022 7:08:38 PM
Testimony for CPC on 2/3/2022 2:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Jeff Sadino	Individual	Support	Yes

Comments:

I **STRONGLY SUPPORT** HB1857,

Allowing 100% reimbursement of attorney fees to the Association creates a lot of unintended consequences and incentivizes a culture of negligence, including:

1. Reduces the incentive that Boards have to work with an Owner to resolve disagreements. With 100% reimbursement, the Board simply refers the disagreement to their attorneys so that they don't have to deal with the stress of it. This happens even in violation of enumerated procedures in the Governing Documents for conflict resolution.
2. Reduces the incentive that Managing Agents have to provide guidance or resolve disagreements. When a problem comes across the desk of a Managing Agent, they simply refer it to their attorneys so that they don't have to deal with it.
3. Reduces the incentive for the lawyers to do their job correctly. In fact, if the attorney needs to fix their own mistakes, it is actually better for them because then they get to bill more attorney hours to the defenseless Owner.

None of these consequences are hypothetical. All of them (and more) have happened to me:

1. I asked for a Board Hearing to discuss a disagreement, as detailed in our Governing Documents. Their reply was to send me to their attorneys.
2. I asked my Managing Agent for the name of the supervisor and also for their managing contract with us. Both times, the Managing Agent forwarded my requests onto their attorneys and I got charged attorney fees. (I was not provided the name of the manager.)
3. The debt collection lawyers applied my payments in a way that was illegal. I explained this to them, they agreed with me, and issued me a refund of my own money. However, they charged me attorney hours to go through whatever process they went through to determine that they made a mistake in the first place. (This charge was more than the amount of my refund.) They also kept in place the charge for their original (and incorrect) debt collection letter.

I can't say that I am surprised by this type of behavior. I would probably feel tempted to do the same thing if I was in their shoes.

Please get rid of 100% reimbursement of attorney fees to the Association. They have not been responsible with it. It incentivizes the wrong behaviors. Please pass this Bill.

Thank You,

Jeff Sadino

RE: Committee on Consumer Protection & Commerce, February 3, 2022

On Page 3, line 3, please clarify how it is determined that the Association "prevailed."

On Page 4, line 12, please remove the word "not" that is proposed to be added.

HB-1857
Submitted on: 2/1/2022 8:57:09 PM
Testimony for CPC on 2/3/2022 2:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Steve Glanstein	Individual	Oppose	No

Comments:

I oppose this legislation and concur with Mr. Koftinow's testimony in opposition to HB1857.

This proposed legislation makes it more difficult or impossible for an association to make itself whole due to the actions of one or more owners. It begins with a faulty proposition that the attorney's client is the board rather than the **entire association**. It continues with a mandate that legal services and costs should be paid out of an association's funds and reserves.

The effect of this proposed legislation will **penalize all other owners** for the actions of a few owners. Most owners (a) comply with the association' documents, and (b) pay their share of the costs and expenses. The other owners should not be forced to pay for the legal fees and services due to the actions of a few owners.

HB-1857
Submitted on: 2/1/2022 9:12:42 PM
Testimony for CPC on 2/3/2022 2:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Chandra Kanemaru	Individual	Oppose	No

Comments:

Dear Representative Johanson, Chair, Representative Kitagawa, Vice Chair, and members of the Committee on Consumer Protection & Commerce:

I respectfully OPPOSE H.B. 1857. If passed, this measure will hurt condominium associations and condominium unit owners alike. This measure will create serious hardships for condominium associations and condominium unit owners by imposing unreasonable barriers to resolving claims with the assistance of legal counsel. This measure will also result in greater financial hardship to unit owners (who comply with their association's project documents and who pay their unit's share of common expense assessments). For the reasons stated below, the Committee should not pass this measure.

This measure would make it almost impossible for condominium associations and condominium unit owners to be reimbursed for attorneys' fees incurred in disputes.

Most legal disputes between condominium associations and unit owners involve claims to collect a unit's share of unpaid common expense assessments, foreclose an association's lien, or to enforce a provision of the association's declaration, bylaws, house rules, Chapter 514B, or the rules of the real estate commission. For decades, Hawaii law has included a fee-shifting statute for these types of disputes (which is presently provided under HRS Section 514B-157). This measure, however, would flip the fee-shifting statute on its head, and make it impossible for associations and unit owners to recover fees in these types of cases. This measure will, in effect, require all other owners of units to collectively pay the fees incurred by their association as a direct result of other owners who do not comply with an association's project documents or who do not pay common expense assessments.

1. an owner violates an association's project documents or does not pay assessments, a condominium association often has no choice but to retain an attorney. The attorneys' fees incurred are paid directly from the association's funds to the law firm handling a matter, and the association accountant will often classify the attorneys' fees as a

reimbursable or account receivable. If this measure is passed, it is highly likely that associations will not be able to seek reimbursement of any attorneys' fees in cases where an owner has violated the project document or has not paid their share of assessments. As a result, associations will be required to budget for the legal fees as an additional expense, and all the unit owners will be unfairly burdened with increases in their share of assessments.

This measure would impose unreasonable limits on the speech of association attorneys.

Without good reason, Section 2 of this measure would prohibit condominium association attorneys from communicating with anyone other than the Board of Directors, except under limited circumstances. In particular, this measure provides that an association attorney "shall only communicate with the board; provided that attorneys retained by the association may communicate with unit owners for purposes of requests and responses for essential requirements of each matter[.]" See page 3, lines 7 through 11.

In effect, this measure would require that an association attorney communicate only with a board of directors, even if a communication does not involve a matter which is in dispute. The only exception to the restriction in this measure that association attorneys communicate only with the board is that they may communicate with a unit owner for the purposes of "requests and responses for essential requirements of each matter." For the reasons stated below, such limitations on attorney communications would be extremely overbearing and unreasonable. Furthermore, the exception stated in lines 9 and 10 on page 3 is vague and ambiguous, as it is not clear what is meant by "requests and responses for essential requirements of each matter" and how this is decided.

An association attorney can be essential in resolving legal disputes between an association and a unit owner. Association attorneys will often communicate an association's claims or demands to an owner by sending letters, engaging in phone calls, negotiating settlement, or assisting with mediation, before ever going to court. Direct communication between unit owners (or their attorneys) and an association's attorneys can therefore be essential to resolving legal disputes.

1. measure would also lead to the absurd result of prohibiting an association attorney from communicating with other association representatives, employees, or agents (such as an association's managing agent, property manager, and resident manager). It would prohibit association attorneys from communicating with an owner's representatives or the owner's legal counsel. It would prohibit attorneys from communicating with third parties with whom communications may be necessary to resolve or prevent disputes (such as

witnesses, expert witnesses, tenants of units, or any other person who might have knowledge that about a matter). Even though associations are required to be represented by attorneys in court actions (with a possible exception for certain small claims actions), this bill would have the effect of prohibiting the association's attorney from communicating with the court or the other parties to the litigation, including witnesses. It would also prevent associations from having their attorneys communicate with other branches of government or governmental entities

Furthermore, in cases where there is a serious threat of bodily injury or death to others, this measure would have the alarming effect of prohibiting an association attorney from communicating with parties who could assist with safety concerns, such as the police department, fire department, security personnel, or safety contractors. For instance, while many associations are working to comply with the City and County of Honolulu's fire sprinkler mandate, this measure would impose unnecessary obstacles on the ability of an association's attorney to communicate with fire safety experts or other third parties while assisting associations with compliance issues.

1. this measure would prevent associations from retaining lawyers to represent them in contract negotiations with vendors because it would bar the attorneys from communicating with vendors. Likewise, attorneys would not be able to file claims with the association's insurance carrier or negotiate insurance settlements because they would be barred from communicating with the carrier.

1. essence, this bill will deprive associations of their right to effective legal representation, which is unwarranted, unreasonable, and likely unconstitutional. It is also unreasonable and fundamentally unfair that the owner is free to hire legal counsel who can speak to whomever he/she wishes. This bill is so lopsided that it is offends the sense of reasonableness and fairness.

The last clause of Section 2 of this measure is also problematic, as it would create a serious obstacle for associations seeking reimbursement of reasonable attorneys' fees (whether by letter, a judicial proceeding, or to collect attorneys' fees awarded by the court).

The legislature has outlined ways for condominium associations and condominium unit owners to resolve disputes without going to court.

1. many instances, disputes between a condominium unit owner and their condominium association may be resolved without the involvement of an attorney, and without going to court. The legislature has outlined various ways unit owners and condominium associations may resolve disputes without going to court. For instance, Sections 514B-146(d), 514B-146.5(a), 514B-161, 514B-162, and 514B-162.5, each avail to unit owners and condominium associations the option of participating in mediation or arbitration for various disputes. As such, many disputes can be resolved through mediation or arbitration, without an association or an owner incurring substantial attorneys' fees, and Section 514B-157, which governs attorneys' fees awards in certain cases, includes a provision which encourages mediation. It is not clear what purpose this measure will serve other than to impose unfair burdens which may ultimately have a chilling effect on associations retaining and relying upon on legal counsel when necessary to resolve almost any and every type of legal matter. This bill will also make it impossible for Associations to be represented by legal counsel in mediation or arbitration because the attorney would be barred from speaking to the arbitrator or mediator. Yet, the owner is free to hire legal counsel who may speak to anyone. This is hardly fair or reasonable.

A twenty-five percent cap on attorneys' fees is not reasonable.

This measure also seeks to impose a twenty-five percent cap on attorneys' fees based upon the "original debt" for which recovery is sought "in each matter." See Page 3, lines 4 through 6. Generally, a twenty-five percent cap on an association's legal fees should not be imposed because it would result in all unit owners being responsible for bearing the unfair burden of paying attorneys' fees which were incurred as a result of the default or breach of another owner. That said, not all matters where attorneys' fees are incurred involve an "original debt." While attorneys often assist associations in collecting debts owed by an owner, there are numerous other types of matters which do not arise from an "original debt." Therefore, this measure would not only place unfair burdens on condominium unit owners, but it is also very problematic as drafted.

This measure also includes a wrong factual finding.

This measure states that the legislature finds that "it is the board, not the individual unit owners, who are the clients of the attorneys." Generally, attorneys who represent an association do not represent the "board" or "individual directors." Attorneys who represent an association generally represent the association, as an entity, which acts through its board. Association attorneys communicate with board members, because, in most instances, it is the board that is vested with decision making authority and the party to whom the attorney-client privilege runs.

1. summary, this is an extremely bad bill. It is bad not only for condominium associations, but their members. This bill should be deferred.

For the foregoing reasons, I respectfully OPPOSE H.B. 1857 and strongly urge your Committee not to pass this measure.

Respectfully,

Chandra R.N. Kanemaru

Country Club Village, Phase 2

AOAO Board Director, Secretary

HB-1857
Submitted on: 2/1/2022 9:53:04 PM
Testimony for CPC on 2/3/2022 2:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Marcia Kimura	Individual	Support	Yes

Comments:

This bill should be amended by deleting the word "not" at the beginning of line 12, on page 4.

As one of more than 170,000 Hawaii condo owners, I support HB1857, the intent of which addresses a major concern of condo owners - the threat to the security of home ownership when boards become the clients of attorneys they hire, then demand legal fee reimbursement from individual owners. These fees are wrongfully and covertly imposed on that individual, when full payment should be paid from association funds that cover legal expenses contributed to monthly by all of a condominium's owners. Moreover, their claims that they, the boards, rightfully transfer the legal fees to owners should and must be substantiated in court, not arbitrarily imposed on owners.

Legal fee abuses perpetrated by boards on owners include:

1. boards' retaliation against, or silencing of an individual owner by directing false allegations of covenant violations against that owner, hiring an attorney about the matter, then charging the owner with legal fees the association should be paying.

2. board refusal to communicate with an owner about an issue, including alleged de minimis violations, while forcing an owner to work only with the association attorney.

3. allowing the attorney to demand payments directly from the owner.

4. allowing unlimited legal fees charged for debt collection. As regards collection of delinquent sums by the attorneys, their total and final fees should not exceed 25% of the original principal balances. This is already mandated by both the Federal and Hawaii Fair Debt and Collections Practices Act (**HRS § 443B-9)** which define the attorneys pursuing debt collection as "collectors" bound by the 25% cap, that the Hawaii offshoot of FDCPA requires be awarded in court actions resulting from suits that must first be filed by the collectors.

These legal charges would likely never explode to the amounts boards demand owners pay, if associations were rightly held responsible for the legal charges

they should pay when their boards hire attorneys. If these fees become intractable for the targeted owner, unjust nonjudicial foreclosure often ensues, leading to loss of the owner's property. All this, while tremendous financial gain becomes reality for those committing the abuses.

For these reasons, I ask with firm conviction, that you move HB1857, with the above-mentioned amendment, through to final passage. Thank you for your serious consideration and hoped-for support of this measure.

HB-1857
Submitted on: 2/2/2022 8:42:31 AM
Testimony for CPC on 2/3/2022 2:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Lance S. Fujisaki	Individual	Oppose	No

Comments:

Dear Representative Johanson, Chair, Representative Kitigawa, Vice Chair, and members of the Committee on Consumer Protection & Commerce:

I respectfully OPPOSE H.B. 1857. If passed, this measure will hurt condominium associations and condominium unit owners alike. This measure will create serious hardships for condominium associations and condominium unit owners by imposing unreasonable barriers to resolving claims with the assistance of legal counsel. This measure will also result in greater financial hardship to unit owners (who comply with their association's project documents and who pay their unit's share of common expense assessments). For the reasons stated below, the Committee should not pass this measure.

This measure would make it almost impossible for condominium associations and condominium unit owners to be reimbursed for attorneys' fees incurred in disputes.

Most legal disputes between condominium associations and unit owners involve claims to collect a unit's share of unpaid common expense assessments, foreclose an association's lien, or to enforce a provision of the association's declaration, bylaws, house rules, Chapter 514B, or the rules of the real estate commission. For decades, Hawaii law has included a fee-shifting statute for these types of disputes (which is presently provided under HRS Section 514B-157). This measure, however, would flip the fee-shifting statute on its head, and make it impossible for associations and unit owners to recover fees in these types of cases. This measure will, in effect, require all other owners of units to collectively pay the fees incurred by their association as a direct result of other owners who do not comply with an association's project documents or who do not pay common expense assessments.

When an owner violates an association's project documents or does not pay assessments, a condominium association often has no choice but to retain an attorney. The attorneys' fees incurred are paid directly from the association's funds to the law firm handling a matter, and the association accountant will often classify the attorneys' fees as a reimbursable or account receivable. If this measure is passed, it is highly likely that associations will not be able to seek reimbursement of any attorneys' fees in cases where an owner has violated the project document or has not paid their share of assessments. As a result, associations will be required to budget for the legal fees as an additional expense, and all the unit owners will be unfairly burdened with increases in their share of assessments.

This measure would impose unreasonable limits on the speech of association attorneys.

Without good reason, Section 2 of this measure would prohibit condominium association attorneys from communicating with anyone other than the Board of Directors, except under limited circumstances. In particular, this measure provides that an association attorney "shall only communicate with the board; provided that attorneys retained by the association may communicate with unit owners for purposes of requests and responses for essential requirements of each matter[.]" See page 3, lines 7 through 11.

In effect, this measure would require that an association attorney communicate only with a board of directors, even if a communication does not involve a matter which is in dispute. The only exception to the restriction in this measure that association attorneys communicate with a unit owner for the purposes of "requests and responses for essential requirements of each matter." For the reasons stated below, such limitations on attorney communications would be extremely overbearing and unreasonable. Furthermore, the exception stated in lines 9 and 10 on page 3 is vague and ambiguous, as it is not clear what is meant by "requests and responses for essential requirements of each matter" and how this is decided.

An association attorney can be essential in resolving legal disputes between an association and a unit owner. Association attorneys will often communicate an association's claims or demands to an owner by sending letters, engaging in phone calls, negotiating settlement, or assisting with mediation, before ever going to court. Direct communication between unit owners (or their attorneys) and association attorneys can therefore be essential to resolving legal disputes.

This measure would also lead to the absurd result of prohibiting an association attorney from communicating with other association representatives, employees, or agents (such as an association's managing agent, property manager, and resident manager). It would prohibit association attorneys from communicating with an owner's representatives or the owner's legal counsel. It would prohibit attorneys from communicating with third parties with whom communications may be necessary to resolve or prevent disputes (such as witnesses, expert witnesses, tenants of units, or any other person who might have knowledge about a matter). Even though associations are required to be represented by attorneys in court actions (with a possible exception for certain small claims actions), this bill would have the effect of prohibiting the association's attorney from communicating with the court or the other parties to the litigation, including witnesses. It would also prevent associations from having their attorneys communicate with other branches of government or governmental entities

Furthermore, in cases where there is a serious threat of bodily injury or death to others, this measure would have the alarming effect of prohibiting an association attorney from communicating with parties who could assist with safety concerns, such as the police department, fire department, security personnel, or safety contractors. For instance, while many associations are working to comply with the City and County of Honolulu's fire sprinkler mandate, this measure would impose unnecessary obstacles on the ability of an association's attorney to communicate with fire safety experts or other third parties while assisting associations with compliance issues.

Additionally, this measure would prevent associations from retaining lawyers to represent them in contract negotiations with vendors because it would bar the attorneys from communicating with vendors. Likewise, attorneys would not be able to file claims with the association's insurance carrier or negotiate insurance settlements because they would be barred from communicating with the carrier.

In essence, this bill will deprive associations of their right to effective legal representation, which is unwarranted, unreasonable, and likely unconstitutional. It is also unreasonable and fundamentally unfair that the owner is free to hire legal counsel who can speak to whomever he/she wishes. This bill is so lopsided that it offends the sense of reasonableness and fairness.

The last clause of Section 2 of this measure is also problematic, as it would create a serious obstacle for associations seeking reimbursement of reasonable attorneys' fees (whether by letter, a judicial proceeding, or to collect attorneys' fees awarded by the court).

The legislature has outlined ways for condominium associations and condominium unit owners to resolve disputes without going to court.

In many instances, disputes between a condominium unit owner and their condominium association may be resolved without the involvement of an attorney, and without going to court. The legislature has outlined various ways unit owners and condominium associations may resolve disputes without going to court. For instance, Sections 514B-146(d), 514B-146.5(a), 514B-161, 514B-162, and 514B-162.5, each avail to unit owners and condominium associations the option of participating in mediation or arbitration for various disputes. As such, many disputes can be resolved through mediation or arbitration, without an association or an owner incurring substantial attorneys' fees, and Section 514B-157, which governs attorneys' fees awards in certain cases, includes a provision which encourages mediation. It is not clear what purpose this measure will serve other than to impose unfair burdens which may ultimately have a chilling effect on associations retaining and relying upon legal counsel when necessary to resolve almost any and every type of legal matter. This bill will also make it impossible for Associations to be represented by legal counsel in mediation or arbitration because the attorney would be barred from speaking to the arbitrator or mediator. Yet, the owner is free to hire legal counsel who may speak to anyone. This is hardly fair or reasonable.

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In summary, this is an extremely harmful bill. It is harmful not only for condominium associations, but their members. This bill should be deferred.

For the foregoing reasons, I respectfully OPPOSE H.B. 1857 and strongly urge your Committee not to pass this measure.

Lance Fujisaki

HB-1857
Submitted on: 2/2/2022 10:37:04 AM
Testimony for CPC on 2/3/2022 2:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Philip Nerney	Individual	Oppose	No

Comments:

An owner who causes an expense by violating statutory or contractual obligations should be charged the cost to obtain compliance. Alternatively, innocent owners will pay the expense.

This bill would also make enforcement impractical if not impossible in many cases.

HB-1857
Submitted on: 2/2/2022 12:42:34 PM
Testimony for CPC on 2/3/2022 2:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Joshua Hanzel	Individual	Oppose	No

Comments:

Dear Representative Johanson, Chair, Representative Kitigawa, Vice Chair, and members of the Committee on Consumer Protection & Commerce:
I respectfully OPPOSE H.B. 1857. If passed, this measure will hurt condominium associations and
condominium unit owners alike. This measure will create serious hardships for condominium associations and condominium unit owners by imposing unreasonable barriers to resolving claims with
the assistance of legal counsel. This measure will also result in greater financial hardship to unit owners
(who comply with their association's project documents and who pay their unit's share of common
expense assessments). For the reasons stated below, the Committee should not pass this measure.
This measure would make it almost impossible for condominium associations and condominium unit
owners to be reimbursed for attorneys' fees incurred in disputes.
Most legal disputes between condominium associations and unit owners involve claims to collect a
unit's share of unpaid common expense assessments, foreclose an association's lien, or to enforce a
provision of the association's declaration, bylaws, house rules, Chapter 514B, or the rules of the real
estate commission. For decades, Hawaii law has included a fee-shifting statute for these types of disputes (which is presently provided under HRS Section 514B-157). This measure, however, would flip
the fee-shifting statute on its head, and make it impossible for associations and unit owners to recover
fees in these types of cases. This measure will, in effect, require all other owners of units to collectively
pay the fees incurred by their association as a direct result of other owners who do not comply with an
association's project documents or who do not pay common expense assessments.
When an owner violates an association's project documents or does not pay assessments, a condominium association often has no choice but to retain an attorney. The attorneys' fees incurred
are paid directly from the association's funds to the law firm handling a matter, and the

association
accountant will often classify the attorneys' fees as a reimbursable or account receivable. If this measure is passed, it is highly likely that associations will not be able to seek reimbursement of any
attorneys' fees in cases where an owner has violated the project document or has not paid their share
of assessments. As a result, associations will be required to budget for the legal fees as an additional
expense, and all the unit owners will be unfairly burdened with increases in their share of assessments.

This measure would impose unreasonable limits on the speech of association attorneys.

Without good reason, Section 2 of this measure would prohibit condominium association attorneys from
communicating with anyone other than the Board of Directors, except under limited circumstances. In
particular, this measure provides that an association attorney "shall only communicate with the board;
provided that attorneys retained by the association may communicate with unit owners for purposes of
requests and responses for essential requirements of each matter[.]" See page 3, lines 7 through 11.

In effect, this measure would require that an association attorney communicate only with a board of
directors, even if a communication does not involve a matter which is in dispute. The only exception to
the restriction in this measure that association attorneys communicate only with the board is that they
may communicate with a unit owner for the purposes of "requests and responses for essential
requirements of each matter." For the reasons stated below, such limitations on attorney
communications would be extremely overbearing and unreasonable. Furthermore, the exception stated

in lines 9 and 10 on page 3 is vague and ambiguous, as it is not clear what is meant by "requests and
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by sending letters, engaging in phone calls, negotiating settlement, or assisting with mediation, before
ever going to court. Direct communication between unit owners (or their attorneys) and an
association's attorneys can therefore be essential to resolving legal disputes.

This measure would also lead to the absurd result of prohibiting an association attorney from
communicating with other association representatives, employees, or agents (such as an association's

managing agent, property manager, and resident manager). It would prohibit association attorneys
from communicating with an owner's representatives or the owner's legal counsel. It would prohibit
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personnel, or safety contractors. For instance, while many associations are working to comply with the
City and County of Honolulu's fire sprinkler mandate, this measure would impose unnecessary obstacles
on the ability of an association's attorney to communicate with fire safety experts or other third parties
while assisting associations with compliance issues.
Additionally, this measure would prevent associations from retaining lawyers to represent them in
contract negotiations with vendors because it would bar the attorneys from communicating with
vendors. Likewise, attorneys would not be able to file claims with the association's insurance carrier or
negotiate insurance settlements because they would be barred from communicating with the carrier.
In essence, this bill will deprive associations of their right to effective legal representation, which is
unwarranted, unreasonable, and likely unconstitutional. It is also unreasonable and fundamentally
unfair that the owner is free to hire legal counsel who can speak to whomever he/she wishes. This bill
is so lopsided that it is offends the sense of reasonableness and fairness.
The last clause of Section 2 of this measure is also problematic, as it would create a serious obstacle for
associations seeking reimbursement of reasonable attorneys' fees (whether by letter, a judicial
proceeding, or to collect attorneys' fees awarded by the court).

The legislature has outlined ways for condominium associations and condominium unit owners to
resolve disputes without going to court.
In many instances, disputes between a condominium unit owner and their condominium association
may be resolved without the involvement of an attorney, and without going to court. The legislature
has outlined various ways unit owners and condominium associations may resolve disputes without
going to court. For instance, Sections 514B-146(d), 514B-146.5(a), 514B-161, 514B-162, and 514B-162.5,
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Therefore, this measure would not only place unfair burdens on condominium unit owners, but it is also
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association, as an entity, which acts through its board. Association attorneys communicate with board
members, because, in most instances, it is the board that is vested with decision making authority and
the party to whom the attorney-client privilege runs.
In summary, this is an extremely bad bill. It is bad not only for condominium associations, but their
members. This bill should be deferred.
For the foregoing reasons, I respectfully OPPOSE H.B. 1857 and strongly urge your Committee not to
pass this measure.

HB-1857
Submitted on: 2/2/2022 1:19:13 PM
Testimony for CPC on 2/3/2022 2:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
R Laree McGuire	Individual	Oppose	No

Comments:

Strongly oppose. Owners who cause attorneys' fees to be incurred by the Association should be required to pay those attorneys' fees. I incorporate by reference testimony submitted by John Morris on behalf of CAI-LAC, Hawaii Chapter.

HB-1857
Submitted on: 2/2/2022 1:59:14 PM
Testimony for CPC on 2/3/2022 2:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Lori Carter	Individual	Oppose	No

Comments:

Dear Representative Johanson, Chair, Representative Kitigawa, Vice Chair, and members of the Committee on Consumer Protection & Commerce:

I respectfully OPPOSE H.B. 1857. If passed, this measure will hurt condominium associations and condominium unit owners alike. This measure will create serious hardships for condominium associations and condominium unit owners by imposing unreasonable barriers to resolving claims with the assistance of legal counsel. This measure will also result in greater financial hardship to unit owners (who comply with their association's project documents and who pay their unit's share of common expense assessments). For the reasons stated below, **the Committee should not pass this measure**.

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