

Minutes

Standard Forms Committee Meeting
Thursday, June 17, 2021
9:30 a.m.-11:30 a.m., 12:15 p.m.-3:15 p.m.
Via Zoom



The Standard Forms Committee (“SFC”) of the Hawaii Association of REALTORS® was held on Thursday, June 21, 2021 via Zoom. Chair Woodstock called the meeting to order at 9:31 a.m.

Call to Order

Chair Linda “Dusty” Woodstock, Vice Chair Jeannie Wenger, Ayako Ancheta, Sharon Brown, John Connelley, Carol Cummings, Frank Goodale, Patti Ichida, Phoebe Nikolakakis, Patrick O’Neill, Kalama Kim, Ex Officio, Kelly Liberatore, Ex Officio, Anthony Pace, and Beth Worall Daily.

Attendees

Staff: Ethel Keyes and Jason E. Korta. Legal Counsel: Shimpei Oki. Non-voting member: Olivia Schubert. Guest speaker: Shannon Heaven. Guest observer: Suzanne Young, and Lovette Llantos

Dusty Woodstock introduced Shannon Heaven to lead a discussion on the use of so-called “love letters” in real-estate transactions. Shannon Heaven noted the recent changes in California relating to love letters and advocated for revised disclosure and liability language in our own Standard Forms. Her concern was that love letters could violate fair housing prohibitions.

Love Letters & Fair Housing

Committee members questioned whether love letters triggered protections under fair housing law. A short discussion was had on whether drafting or delivering a love letter on behalf of a buyer-client could violate fair housing prohibitions relating to the offering or advertising of property for sale.

It was noted that the National Association of Realtors (NAR) had not taken a position that would require the Hawai’i Realtors (HAR) to change its disclosures, liability waivers, or general practices regarding love letters. It was also noted, however, that NAR had recently revised its Code of

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Ethics to include nonmandatory guidance on love letters and that HAR's board of directors had thrice requested the Standard Forms Committee (SFC) to review its Standard Forms for concerns arising from the use of love letters.

The SFC agreed that love letters warranted additional consideration and discussion. John Connelley agreed to lead an informal group to identify Standard Forms that raise fair housing issues and that may, in light of recent thinking on fair housing and the use of love letters in real-estate transactions, require revision before their scheduled revision date. Carol Cummings, Patti Ichida, and Phoebe Nikolakakis agreed to join John Connelley's group. The group agreed to report their findings to the SFC at the SFC's next meeting in July.

A motion was adopted that the SFC shall withhold submittal of its prior motion relating to Fair Housing disclosure statements (below) to the board of directors.

Board of Directors not to create a separate Fair Housing Disclosure Document form at this time. The Standard Forms Committee will review the fair housing disclosures contained in the various forms as they are scheduled pursuant to the revision schedule.

RATIONALE: The Standard Forms Committee believes this is an education issue. The Standard Forms Committee believes HAR should participate in disseminating information and promote CE classes that address this issue. The Standard Forms Committee believes the current federal and state laws and NAR Code of Ethics address this adequately

A motion was adopted that the Standard Forms Committee shall not submit the listing agreement to the membership for comment at this time.

The SFC considered and discussed the minutes from its last meeting. After making various grammatical revisions, the SFC agreed to adopt the minutes, as revised.

Minutes

A motion was adopted that the minutes of the SFC meeting held on May 20, 2021 shall be and hereby are approved, as revised.

A. Copyright Infringement

Shimpei Oki and Jason E. Korta reported to the committee on their efforts to end unauthorized, third-party use of HAR's Standard Forms. Shimpei Oki reminded the SFC that he had sent cease and desist letters to ASAPCashHomeBuyers.com, PDFFiller.com, TopProducer.com, and Wikidownloads.com, but advised the committee that those organizations had not ceased their impermissible use of HAR's Standard Forms. Jason E. Korta advised the SFC that the City and County of Honolulu had taken down its impermissible use of HAR's Standard Form Rental Agreement from its website. Shimpei Oki and Jason E. Korta agreed to work together on to end prior-identified and continuing unauthorized use of HAR's Standard Forms.

The SFC members searched the Internet for unauthorized use of HAR Standard Forms. The members found unauthorized use of one or more of its Standard Forms on the following websites:

- ForSaleByOwner.com.
- JinShinJyutsu.org.
- JimWagner.com.

Jason E. Korta agreed to investigate these newly discovered copyright infringements and prepare a takedown notice under the Digital Millennium Copyright Act.

B. Be Aware, Be Prepared: Changes to State Eviction Law

Ethel Keyes reported on the registration and attendance at the recently-held webinar: *Be Aware, Be Prepared: Changes to State Eviction Law*. She reported that 609 registered and 368 attended.

C. Purchase Contract

The Standard Forms Committee considered a request by a brokerage firm to set the word-numeral default in the Standard Form Purchase Contract zipForm program. The SFC found that default provisions are generally dangerous, and rejected the proposed inclusion of a new default in the Standard Form Purchase Contract.

A. Designated Agency Disclosure and Agreement

John Connelley led a discussion on the proposed Designated Agency Disclosure and Agreement. The discussion began with the SFC's general recognition that `okinas were missing throughout the proposed agreement. Jason E. Korta agreed to insert the `okinas where indicated.

The discussion then moved to the SFC's review of membership comments. In response to various member comments, the SFC made various stylistic and grammatical revisions to sections A-4 (defining designated agency); A-5 (listing the services that a designated agent can provide); A-6 (delineating services that a designated agent may not provide); A-7 (setting forth the agreement to designated agency); and A-8 (furnishing consents and waivers). The SFC also revised the style and punctuation of various headings throughout the proposed agreement.

The SFC also reviewed the legal memorandum and opinion that Goodsell Anderson Quinn & Stifel furnished, as outside counsel for HAR. Shimpei Oki aided that discussion and reinforced the memorandum's general conclusion that designated agency is neither permitted nor prohibited under relevant law. Shimpei Oki also stressed that designated agency, although theoretically permissible, would likely be tricky to implement in most practical situations, due to fiduciary duties owed by the broker to the client.

The discussion concluded with the SFC's decision to approve the revised Designated Agency Disclosure and Agreement form and submit it to the board of directors in July.

A motion was adopted that the Designated Agency Disclosure and Agreement, as revised by the Standard Forms Committee this day, be submitted to the HAR board of directors for review and approval.

B. Rental Agreement

Chair Dusty Woodstock commenced a discussion of the Standard Form Rental Agreement. She began the discussion by directing Jason E. Korta to discuss the changes HAR's board of directors made to the agreement.

HAR's board of directors had, as Jason E. Korta described, revised section C(1) of the Standard Form Rental Agreement (defining the COVID Relief Period) to replace references to the Hawai'i Revised Statutes with references to Hawai'i Session Law. The reason for this change was that the session law may not be codified into the Hawai'i Revised Statutes by the time the revised Standard Form Rental Agreement is published.

Stylistic and grammatical revisions were noted in the second and third paragraphs of the agreement. Jason E. Korta also noted certain revisions that he made to conform to current law. The SFC also accepted the subcommittee's recommendation to include references to *occupants*, as well as the subcommittee's revisions relating to prorated rent.

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Certain revisions relating to the rights of active duty servicemember-tenants to terminate the lease and receive a prorated return of the security deposit, under certain conditions, were noted. It was explained that this additional language was to reflect recent changes in the law. The SFC accepted these changes and decided to incorporate them into the section of the agreement that is devoted to military tenants.

Next up for consideration were the revisions that subcommittee made to the section 8 of the agreement (relating to damaged or missing property). The SFC agreed to those changes.

Chair Dusty Woodstock then noted that Jason E. Korta had made revisions to section 9 (relating to pets and service animals), but requested that the SFC defer consideration of those revisions until she had the opportunity to discuss those proposed revisions with Jason E. Korta in greater detail. The SFC agreed to defer consideration of the proposed revisions to section 9.

The amendments that the subcommittee recommended relating to smoking were discussed and accepted by the SFC.

The SFC then turned its attention to section 13 (relating to addenda to the rental agreement). It was noted that the subcommittee had included *inventory* as an option field, which, if checked, would be incorporated into the rental agreement by reference. The SFC agreed with the revision.

The SFC then noted that revisions had been made to sections 9 (relating to residential use), 10 (relating to short-term rentals, and 11 (relating to assignments and sublets). It was noted that the revisions preserved the subcommittee's intent in prohibiting short-term rentals and commercial uses of the property. The SFC agreed to the revisions.

The committee then turned its attention to section C(1) (relating to landlord remedies upon a tenant's failure to pay rent), to which revisions were also proposed. The revisions were made to comply with legislation that the governor had recently signed. The SFC agreed with these revisions.

The SFC then noted the proposed changes to sections C(4) (relating to abandoned property) and C(5) (relating to holdover tenancies) of the agreement. It was shown that these changes were necessary to comply with current law and preserve the intent of the subcommittee with regard to holdover tenants and abandoned property. The SFC agreed, therefore, to the changes.

Shimpei Oki described the reasons for the revisions that he made to section H (relating to military tenants). The SFC agreed with those changes, except for his reference to Hawai'i Revised Statutes, which the SFC agreed should be to the relevant legislative act.

A motion was adopted that the revisions to section H of the Standard Form Rental Agreement be, and thereby were, approved.

The SFC agreed to defer approval of the entire revised Standard Form Rental Agreement until its next meeting in July because Chair Dusty Woodstock had requested additional time to discuss the proposed revisions to the agreement's pet provisions.

A. Seller's Real Property Disclosure Statement

Jason E. Korta led a discussion on whether recent legislation would require the SFC to revise the Seller's Real Property Disclosure Statement (SRPDS). He directed the SFC's attention to S.B. 474, which he said would, if enacted, require the SFC to make changes to the SRPDS. He then previewed those changes to the SFC.

Jason E. Korta advised the committee of S.B. 474's current legislative status. He informed the committee that the bill was awaiting the governor's signature, and that the bill would become law unless the governor notified the legislature by June 21, 2021 of his intent to veto the legislation. He further noted that the bill, if enacted would become not become effective until May 1, 2022.

The SFC agreed to defer consideration of any revisions to the SRPDS until its next meeting, at which time it would know whether H.B. 474 would become law.

B. Referral Fee Contract

Jason E. Korta informed the SFC that a broker had recently contacted him to express concerns regarding a potential latent ambiguity in the Standard Form Referral Fee Contract. The broker's concern was that the Standard Form Referral Fee Contract's use of the term *compensation* could be interpreted to mean take-home *earnings* or *gross revenue*.

The broker was concerned that, if *compensation* was interpreted to mean *gross revenue*, then a referring brokerage would have to pay a percentage of all revenue received (including revenue held in trust, to be later paid by the receiving broker to satisfy the general exercise tax).

New Business

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To avoid any potential for ambiguity, Jason E. Korta recommended replacing the term *compensation* with the term *commission*, as a broker's commission paid is a fixed and ascertainable sum, not subject to reasonable interpretation. The SFC considered the revision, but was undecided on whether to endorse it.

Instead, the SFC directed Tony Pace to assemble an informal group to investigate standard form referral agreements used by other brokerages. Tony Pace agreed to investigate and return his findings to the SFC at its next meeting in July.

The committee agreed to hold its next meeting on July 8, 2021 via Zoom.

Date of Next Meeting

There being no further business, the meeting was adjourned at 3:30 p.m.

Adjournment

Jason E. Korta,
Staff Attorney,
HAR

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