



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
TWENTY-SIXTH LEGISLATURE, 2012**

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ON THE FOLLOWING MEASURE:

S.B. NO. 2240, RELATING TO THE STATE CODE OF ETHICS.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Friday, January 27, 2012 TIME: 9:30 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): David M. Louie, Attorney General, or  
Deputy Attorney General Robyn B. Chun or Charleen M. Aina

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Chair Hee and Members of the Committee:

The Department of the Attorney General **supports** the passage of this bill.

The bill exempts members of groups convened by statute or resolution, executive order or proclamation, or by the invitation of the Legislature, the Governor, or another state officer, solely for the purpose of providing advice or comments to, or to formulate recommendations for the Legislature, Governor or a state department, agency or officer, from the requirements and limitations of the State Ethics Code, chapter 84, Hawaii Revised Statutes, by excepting them from the Code's definition of "employee."

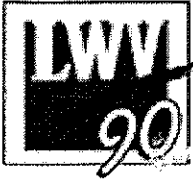
With increasing frequency, the Legislature, Governor, and other state officials and agencies find themselves having to deal with issues and situations that require technical or experiential information that government does not have and cannot readily obtain. In many of these instances, task forces or other informally organized groups of individuals from the community who have and are willing to share information and their expertise to address these kinds of issues or situations, have been formed. In the last year, however, ethics related concerns have been raised about these informally organized groups because it is unclear whether they are "boards, commissions, or committees" of the State, such that their members would be "employees" under the State's Ethics Code, and precluded from acting on matters a group was formed to address, if they stood to gain financially. See sections 84-13 and 84-14, Hawaii Revised Statutes.

This bill resolves that ambiguity by opting in favor of informed decision-making, and exempting members of groups informally organized to provide government with the benefit of

Testimony of the Department of the Attorney General  
Twenty-Sixth Legislature, 2012  
Page 2 of 2

their members' specialized knowledge, expertise, advice, and recommendations, from the State's Ethics Code.

We respectfully request that the committee pass this bill.



LEAGUE OF  
WOMEN VOTERS®

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Senate Committee on Judiciary and Labor  
Chair Senator Clayton Hee, Vice Chair Senator Maile Shimabukuro

Friday 1/27/12 at 9:30 AM in Room 016  
SB 2240 — RELATING TO THE STATE CODE OF ETHICS

TESTIMONY

JoAnn Maruoka, Legislative Committee Member, League of Women Voters of Hawaii

Chair Hee, Vice Chair Shimabukuro, and Committee Members:

**The League of Women Voters of Hawaii opposes SB 2240** which exempts certain “limited-use” members of groups convened solely to provide comments, share technical knowledge or expertise, or assist in formulating recommendations to, with or for the legislature, governor, or other state departments, agencies, or boards, from the state code of ethics.

While we understand the need for and certainly encourage participation by citizens in such groups, our concern is that this exemption not only sets a bad tone, but could well start down a slippery slope, and frankly, is not needed. If the issue is the filing of financial disclosures, Hawaii Revised Statutes, Chapter 84 Standards of Conduct states that it applies to permanent employees (84-17 sub-para c (3)) and the annual financial disclosure is required only of “The members of every state board or commission whose original terms of office are for periods exceeding one year and whose functions are not solely advisory” (84-17 sub-para c (9)). Thus, such non-permanent advisors addressed by this bill are not subject to the financial disclosure requirements.

The purpose in having a Code of Ethics is to prevent corruption in government. Every step forward in protecting against corruption helps improve public confidence in government. For government to work people must have faith in the integrity of its elected officials and the culture of honesty. Excluding those who provide advice or comments to, or formulate recommendations for the legislature, the governor, or a state department, agency, or officer sends a mixed message about our laws designed to make ethics a shining principle of an incorruptible government. We want all those who participate in the formulation of public policy, laws and rules to be held to a high standard.

We urge you to hold this bill. Thank you for the opportunity to submit testimony.



Hawaii Credit Union League

Your Partner For Success

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Testimony to the Senate Committee on Judiciary and Labor  
Friday, January 27, 2012 at 9:30 a.m.

Testimony in Support of SB2240, Relating to State Code of Ethics

To: The Honorable Clayton Hee, Chair  
The Honorable Maile Shimabukuro, Vice-Chair  
Members of the Committee on Judiciary and Labor

My name is **Stefanie Sakamoto**, and I am testifying on behalf of the Hawaii Credit Union League, the local trade association for 83 Hawaii credit unions, representing approximately 811,000 credit union members across the state.

We are in **support** of SB 2240, Relating to the State Code of Ethics, which would exempt members of advisory groups formed by statute or resolution, from the State Code of Ethics. As the legislature is aware, an ethics problem arose with respect to the Mortgage Foreclosure Task Force in 2011, of which HCUL was a member. We appreciate the efforts of the legislature to avoid similar problems in the future, so that we may continue to participate in such task forces and/or advisory groups if asked.

Thank you for the opportunity to testify.

LAW OFFICES

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January 27, 2012

Senator Clayton Hee, Chair  
and members of the Senate Committee on Judiciary and Labor  
Hawaii State Capitol  
Honolulu, Hawaii 96813

Re: **Senate Bill 2240 (State Code of Ethics)**  
**Hearing Date/Time: Friday, January 27, 2012, 9:30 a.m.**

I am Marvin S. C. Dang. I **strongly support** this Bill.

The purpose of this Bill is to exempt members of groups convened solely to provide comments, share technical knowledge or expertise, or assist in formulating recommendations to, with or for the legislature, Governor, or other state departments, agencies, or boards, from the state code of ethics.

I am a member of the Mortgage Foreclosure Task Force representing the Hawaii Financial Services Association. I currently serve as Vice Chair of the Task Force. However, this testimony is written in my individual capacity as one of the Mortgage Foreclosure Task Force members. I am not writing as the Vice Chair nor am I writing on behalf of any of the other Task Force members.

The Mortgage Foreclosure Task Force was created by the legislature by Act 162 in 2010 to "undertake a study to develop both general and specific policies and procedures necessary to improve the manner in which mortgage foreclosures are conducted in [Hawaii]." The Task Force was directed to submit reports of its findings and recommendations, including any proposed legislation, to the 2011 and 2012 legislatures. The Task Force began meeting in July, 2010.

Ten months after the Mortgage Foreclosure Task Force started meeting, the Hawaii State Ethics Commission sent a Memorandum dated May 26, 2011 to the members of the Task Force. The Memorandum stated, among other things,

"The State Ethics Code prohibits a member of the Task Force from being compensated to represent non-governmental organizations, such as businesses, both for-profit and not for-profit, trade organizations, or other groups, on matters in which the Task Force participated or will participate.

...

"... We strongly advise members of the Task Force against testifying, in the future, as paid representatives of non-governmental organizations on matters in which the Task Force participated or will participate."

On July 18, 2011, I sent a letter to the Ethics Commission. A copy of my letter is attached as Exhibit "A".

In my letter to the Ethics Commission, I wrote:

"I disagree with the conclusions in your Memorandum. A copy of your Memorandum is attached for your reference. I contend that your Memorandum is overly broad and inconsistent with applicable statutes. Accordingly, I am respectfully requesting that you reconsider and retract your Memorandum." (Emphasis included.)

Also in my letter to the Ethics Commission, I stated:

"For you to make that interpretation, you needed to have determined that a "task force", such as the Mortgage Foreclosure Task Force, is a board, commission or committee under the definition of "employee" in HRS §84-3. ...

"As you may know, a "task force" is different from a board or commission, and it is not a committee (such as a committee that is part of a department). The Mortgage Foreclosure Task Force has a limited duration: it was created by Act 162 on June 3, 2010 and it sunsets on June 30, 2012. It was established by the Legislature to conduct an analysis of all factors affecting mortgage foreclosures and to recommend appropriate legislation. It is required to submit reports of its findings and recommendations to the Legislature. The Task Force is solely advisory. It does not have regulatory powers. It does not make policy. Its members are not appointed by the Governor nor are they confirmed by the Senate. The Task Force is within the Department of Commerce & Consumer Affairs for administrative purposes." (Emphasis added.)

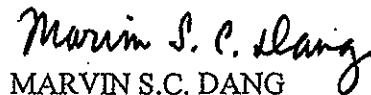
The Ethics Commission did not retract its Memorandum.

Unfortunately, as a result of the Memorandum of May 26, 2011, 2 members of the Mortgage Foreclosure Task Force resigned before the Task Force's August 2, 2011 meeting.

I should point out that from 2005 through 2007, I was a member and Vice Chair of the legislatively-created Hawaii Identity Theft Task Force (and previously the Anti-Phishing Task Force). The issue raised by the Ethics Commission in its Memorandum last year was never raised by the Ethics Commission regarding the Identity Theft Task Force.

This Bill is important to ensure that advisory task forces created by the legislature, similar to the Mortgage Foreclosure Task Force, are able to include people who have an interest, knowledge, or expertise in the particular issue. People shouldn't be precluded from providing their input as task force members merely because they will later be testifying or advocating on these issues for compensation.

Thank you for considering my testimony.

  
MARVIN S.C. DANG

Enclosure

LAW OFFICES

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July 18, 2011

Leslie H. Kondo, Executive Director and General Counsel  
Hawaii State Ethics Commission  
1001 Bishop Street, ASB Tower, Ste. 970  
Bishop Square  
Honolulu, Hawaii 96813

Re: Your May 26, 2011 Memorandum to the Mortgage Foreclosure Task Force Members

Dear Mr. Kondo:

You sent a Memorandum dated May 26, 2011 ("Memorandum") to the members of the Mortgage Foreclosure Task Force. I am a member of the Task Force representing the Hawaii Financial Services Association.

This letter is written in my individual capacity as one of the Task Force members. I am not writing as the Vice Chair and Acting Chair of the Task Force, nor am I writing on behalf of any of the other Task Force members.

I disagree with the conclusions in your Memorandum. A copy of your Memorandum is attached for your reference. I contend that your Memorandum is overly broad and inconsistent with applicable statutes. Accordingly, I am respectfully requesting that you reconsider and retract your Memorandum.

My concerns about your Memorandum are detailed below as "issues". Within the "issues" are various questions that I have for you.

**RELEVANT STATUTES:**

The sections of the Hawaii Revised Statutes ("HRS") referred to in your Memorandum are in HRS Chapter 84 (Standards of Conduct). The sections are:

1. HRS §84-3, which provides in part:

EXHIBIT "A"

Leslie H. Kondo, Executive Director and General Counsel  
Hawaii State Ethics Commission  
July 18, 2011  
Page 2

“Employee” means any nominated, appointed, or elected officer or employee of the State, including members of boards, commissions, and committees, and employees under contract to the State or of the constitutional convention, but excluding legislators, delegates to the constitutional convention, justices and judges.

2. HRS §84-14(d), which is part of the Code of Ethics and which reads:

No legislator or employee shall assist any person or business or act in a representative capacity for a fee or other compensation to secure passage of a bill or to obtain a contract, claim, or other transaction or proposal in which he has participated or will participate as a legislator or employee, nor shall he assist any person or business or act in a representative capacity for a fee or other compensation on such bill, contract, claim, or other transaction or proposal before the legislature or agency of which he is an employee or legislator.

**ISSUES:**

**Issue No. 1:**

On page 2 of your Memorandum, you state:

The State Ethics Commission interprets “employee,” as defined in the State Ethics Code, to include volunteer members of a legislative-created task force such as the Mortgage Foreclosure Task Force.

For you to make that interpretation, you needed to have determined that a “task force”, such as the Mortgage Foreclosure Task Force, is a board, commission or committee under the definition of “employee” in HRS §84-3. HRS §84-3 provides in relevant part:

“Employee” means any nominated, appointed, or elected officer or employee of the State, including members of boards, commissions, and committees, . . . . (emphasis added)

As you may know, a “task force” is different from a board or commission, and it is not a committee (such as a committee that is part of a department). The Mortgage Foreclosure Task Force



Leslie H. Kondo, Executive Director and General Counsel  
Hawaii State Ethics Commission  
July 18, 2011  
Page 3

has a limited duration: it was created by Act 162 on June 3, 2010 and it sunsets on June 30, 2012. It was established by the Legislature to conduct an analysis of all factors affecting mortgage foreclosures and to recommend appropriate legislation. It is required to submit reports of its findings and recommendations to the Legislature. The Task Force is solely advisory. It does not have regulatory powers. It does not make policy. Its members are not appointed by the Governor nor are they confirmed by the Senate. The Task Force is within the Department of Commerce & Consumer Affairs for administrative purposes.

HRS §84-3 refers only to “boards, commissions, and committees”. No other entity is mentioned. Compare this to an unrelated statute (HRS §662D-1) which refers to “board, commission, division, office, officer, public body, task force, or any other similar entity” (emphasis added).

There is a principle of statutory interpretation called “expressio unius est exclusio alterius”, which means “the inclusion of the one thing is the exclusion of the other”. In other words, when one or more things of a class are expressly mentioned, others of the same class are excluded.

**Questions:**

Do you agree that because HRS §84-3 refers only to “boards, commissions, and committees” and not to “task forces” or other entities, you cannot liberally construe a “task force” to be a “board, commission or committee”? If not, why not?

**Note:** I strongly disagree with your determination that a Task Force member is an “employee” under HRS §84-3, HRS §84-14(d), and the Code of Ethics. However, in this letter, when I refer to a Task Force member as an “employee”, that is only when I raise various issues about your Memorandum. It does not mean I am conceding that a Task Force member is an “employee”.

**Issue No. 2:**

In your Memorandum, you decided that a member of the Task Force is an “employee” under the definition in HRS §84-3. Once you made that determination, you then subjected the Task Force members to the provisions in HRS §84-14(d) of the Code of Ethics merely because that Section uses the word “employee”.

As you are aware, there are many other sections in the Code of Ethics which also use the word “employee”. Those sections include, but are not limited to:

- a. HRS §84-11 (no employee shall solicit, accept, or receive gifts under certain

Leslie H. Kondo, Executive Director and General Counsel  
Hawaii State Ethics Commission  
July 18, 2011  
Page 4

circumstances),

b. HRS §84-11.5 (employees shall annually file a gift disclosure statement with the Ethics Commission under certain conditions),

c. HRS §84-12 (no employee shall disclose certain confidential information),

d. HRS §84-13 (no employee shall use or attempt to use the employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts or treatment for oneself or others),

e. HRS §84-15 (a state agency shall not enter into certain contracts with an employee or a business in which an employee has a controlling interest unless certain conditions are met), and

f. HRS §84-18 (as part of the restrictions on post-employment, no former employee shall, within 12 months after termination of the former employee's employment, assist any person or business or act in a representative capacity for a fee or other consideration, on matters in which the former employee participated as an employee).

**Questions:**

Do you agree that a Task Force member is not subject to the above provisions or to any other provisions in the Code of Ethics which use the word "employee"? If you disagree, what is your legal basis?

**Issue No. 3:**

On page 3 of your Memorandum you claim that:

The State Ethics Code prohibits, among other things, an "employee" from being paid to assist or represent another person or business on a matter in which the employee has participated or in which he will participate. (emphasis added)

At the end of that sentence, you have a footnote which specifically references HRS §84-14(d). The text of that Section is on page 2 of this letter.

**Questions:**

Leslie H. Kondo, Executive Director and General Counsel  
Hawaii State Ethics Commission  
July 18, 2011  
Page 5

a. HRS §84-14(d) does not contain the phrase “on a matter”. That Section instead uses the phrase “to secure passage of a bill or to obtain a contract, claim or other transaction or proposal”. Do you agree that by using the phrase “on a matter” in your sentence, you’ve broadened what HRS §84-14(d) actually prohibits? If not, why not?

b. Your same sentence ends with the phrase “in which the employee has participated or in which he will participate.” At the end of your sentence you left out the phrase “as an employee” which is in HRS §84-14(d). Do you agree that the omitted phrase (“as an employee”) would actually limit the scope of what you claim HRS §84-14(d) prohibits? If not, why not?

c. One principle of statutory interpretation is that whenever possible, each word in a statutory provision is to be given meaning and is not to be treated as surplusage. Do you agree that you should not have left out the phrase “as an employee” at the end of your sentence? If not, why not?

**Issue No. 4:**

In another sentence in your Memorandum on page 3, you assert that:

The State Ethics Code prohibits a member of the Task Force from being compensated to represent non-governmental organizations, such as businesses, both for-profit and not for-profit, trade organizations, or other groups, on matters in which the Task Force participated or will participate. (emphasis added)

**Questions:**

a. Do you agree that by using the phrase “on matters” in your sentence, you’ve broadened what HRS §84-14(d) actually prohibits? If not, why not?

b. In your sentence, you use the phrase “in which the Task Force participated or will participate” (emphasis added). However, HRS §84-14(d) uses the words “in which the employee has participated or in which he will participate” (emphasis added). Because, you claim that a Task Force member is an “employee”, do you agree that your sentence should have instead stated: “in which the Task Force member participated or will participate”? If not, why not?

c. At the end of your sentence you left out the phrase “as an employee” which is in HRS §84-14(d). Do you agree that you should not have left out the phrase “as an employee” at the end of your sentence? If not, why not?

Leslie H. Kondo, Executive Director and General Counsel  
Hawaii State Ethics Commission  
July 18, 2011  
Page 6

**Issue No. 5:**

You state in your Memorandum on page 2 that the Mortgage Foreclosure Task Force

. . . adopted several recommendations and submitted proposed legislation as part of its preliminary report to the 2011 Legislature; that the proposed legislation primarily involved the non-judicial foreclosure process . . . . (emphasis added)

The recommendations of the Task Force were in a December, 2010 report to the 2011 Legislature. The Task Force last met in December, 2010.

When describing prohibited activities, HRS §84-14(d) is very specific and uses the following words: “to secure passage of a bill ... in which he has participated or will participate as ... [an] employee” (emphasis added).

Various bills based on the Task Force’s proposed legislation were formally introduced in the 2011 Legislature by legislators in January, 2011. Those bills include Senate Bill 652 and House Bill 879.

a. Do you agree that a “proposed legislation” is not a “bill” because a “bill” needs to be formally introduced by a legislator when the Legislature is in session? If not, why not?

b. There is a principle of statutory interpretation that the words of a statute should be given their ordinary meaning, absent clear and express legislative intention to the contrary. Do you agree that “proposed legislation” is not the same as a “bill” for the purpose of HRS §84-14(d) of the Ethics Code? If not, why not?

c. Do you agree that the Mortgage Foreclosure Task Force members in 2010 only participated with “proposed legislation” and did not participate with “bills”? If not, why not?

**Issue No. 6:**

In your Memorandum on page 3, when you describe the types of restrictions on the activities of an “employee”, you use the phrases “lobby ... on legislation that was recommended by the Task Force” and “testified on bills that were drafted or recommended by the Task Force”.

Leslie H. Kondo, Executive Director and General Counsel  
Hawaii State Ethics Commission  
July 18, 2011  
Page 7

However, when describing prohibited activities, HRS §84-14(d) uses the following specific phrase: “to secure passage of a bill ... in which he has participated or will participate as ... [an] employee” (emphasis added).

**Questions:**

a. Do you agree that if a Task Force member testifies against a bill or lobbies against a bill, that activity would not be considered as an action to “secure passage of a bill”? If not, why not?

b. Do you also agree that an activity referred to in Question (a), above, would not violate HRS §84-14(d) and the Ethics Code? If not, why not?

c. Do you agree that if a Task Force member testifies against a bill or lobbies against a bill which contains a recommendation of the Task Force, that activity would not be considered as an action to “secure passage of a bill”? If not, why not?

d. Do you also agree that an activity referred to in Question (c), above, would not violate HRS §84-14(d) and the Ethics Code? If not, why not?

e. Do you agree that when you used the phrases “lobby on legislation” and “testified on bills” to describe prohibited activities, you broadened what HRS §84-14(d) and the Ethics Code actually prohibit? If not, why not?

**Issue No. 7:**

One of the recommendations of the Mortgage Foreclosure Task Force to the 2011 Legislature was that the Legislature should “defer action” on revisions to Part II of HRS Chapter 667 relating to the alternate non-judicial foreclosure process because “the task force will address this item as part of its report to the 2012 Legislature.” Various bills in the 2011 Legislature contained revisions to Part II of HRS Chapter 667. On behalf of the Hawaii Financial Services Association, I submitted testimony opposing Senate Bill 651, H.D. 1 which contained revisions to Part II of HRS Chapter 667.

**Questions:**

a. Do you agree that if a bill has provisions that are contrary to a recommendation of the Task Force, and if a Task Force member testifies against that bill or lobbies against that bill, that activity would not be considered as an action to “secure passage of a bill”? If not, why not?

Leslie H. Kondo, Executive Director and General Counsel  
Hawaii State Ethics Commission  
July 18, 2011  
Page 8

b. Do you agree that such an activity would not violate HRS §84-14(d) and the Ethics Code? If not, why not?

**Issue No. 8:**

Some of the bills in the 2011 Legislature contained concepts which were not discussed or considered by the Mortgage Foreclosure Task Force. One example is a moratorium on certain types of non-judicial foreclosures.

**Questions:**

a. Do you agree that if a Task Force member testifies against a bill or lobbies against a bill which contains concepts not discussed or considered by the Task Force members, that activity would not be considered as an action to "secure passage of a bill"? If not, why not?

b. Do you agree that such an activity would not violate HRS §84-14(d) and the Ethics Code? If not, why not?

**Issue No. 9:**

HRS §84-14(d) prohibits an employee from assisting any person or business or acting in a representative capacity "for a fee or other compensation to secure passage of a bill" in which the employee has participated or will participate as a legislator or employee.

**Questions:**

If a Mortgage Foreclosure Task Force member is not receiving a "fee or other compensation" to secure passage of a bill in which he or she participated as a Task Force member, do you agree that the member can testify and/or lobby on the bill without violating HRS §84-14(d) and the Ethics Code? If not, why not?

**Issue No. 10:**

On page 3 in the next to the last paragraph of your Memorandum, you state:

We strongly advise members of the Task Force against testifying, in the future, as paid representatives of non-governmental organizations

Leslie H. Kondo, Executive Director and General Counsel  
Hawaii State Ethics Commission  
July 18, 2011  
Page 9

on matters in which the Task Force participated or will participate.  
(emphasis added)

**Question:**

Based on the issues which I have raised in this letter, do you agree that your above advice to the members of the Mortgage Foreclosure Task Force is overly broad and inconsistent with what HRS §84-14(d) and the Ethics Code prohibit?

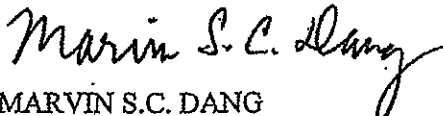
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If you agree with me on the various issues I have raised in this letter, I respectfully ask that you reconsider and retract your May 26, 2011 Memorandum. Because of the far-reaching ramifications of your Memorandum and the issues raised in this letter regarding HRS §84-14(d) and the Code of Ethics, perhaps these matters can be best resolved during the 2012 Legislative Session.

For your information, the Mortgage Foreclosure Task Force plans to meet on Tuesday, August 2, 2011. A written retraction by you before that time would be welcome.

Thank you.

Sincerely,

  
MARVIN S.C. DANG

(MSCD/af)

Enclosure