

**Bill No. and Title: House Bill No. 1897, Relating To Condominium Alternative Dispute Resolution**

**Purpose:** Amends the conditions and procedures of alternative dispute resolution methods for condominium-related disputes, including the use of evaluative mediation or binding arbitration.

**Judiciary's Position:**

The Center for Alternative Dispute Resolution (CADR) takes no position as to the substance of this bill and provides only the following comments.

1. Attorneys' Fees and Costs (Part II, Section 2)

Regarding the section on attorneys' fees and costs beginning on page 1, line 14, continuing until page 2, line 5, CADR raises an issue for your consideration. Including the "[c]ollection of any delinquent assessment; [f]oreclosure of any lien on a unit owner's unit; or [i]nterpretation or enforcement of the declaration, bylaws, house rules, this chapter, or rules of the commission" language in this bill appears to mirror the last paragraph of HRS § 607-14 ("Attorneys' fees in actions in the nature of assumpsit, etc."). That portion of HRS § 607-14 reads in relevant part:

Nothing in this section shall limit the recovery of reasonable attorneys' fees and costs by a planned community association and its members in actions for the collection of delinquent assessments, the foreclosure of any lien, or the enforcement of any provision of the association's governing documents, or affect any right of a prevailing party to recover attorneys' fees in excess of twenty-five per cent of the judgment pursuant to any statute that specifically provides that a prevailing party may recover all of its reasonable attorneys' fees. "Planned community association" for the purposes of this section means a nonprofit homeowners or community association existing pursuant to covenants running with the land.

CADR respectfully submits that the Committee could clarify the bill by making a cross-reference to existing law that provides for the contemplated fees and costs recovery. The utility of such a cross-reference is manifold—homeowners subject to HRS Ch. 514B, homeowners' associations, unit owners, and their respective attorneys would benefit from the additional clarity when making cost-benefit analyses of bringing (or abstaining from bringing) an action under HRS Ch. 514B, analyzing the quantum of fees and costs owed or potentially owed to the eventual prevailing party. Similarly, mediators, arbitrators, and judges would benefit from the additional clarity when making assessments or determinations regarding the allocation of fees and costs in settlement agreements, arbitration awards, and court orders.

2. Definition of Evaluative Mediation (Part III, Section 3)

CADR notes the proposed definition of "evaluative mediation" on page 13 at lines 3 thru

14. Presently, CADR takes no position regarding the proposed definition of “evaluative mediation,” except to note that any changes to the alternative dispute resolution (“ADR”) mechanisms falling under HRS Ch. 514B should necessarily include a clear definition of the type of mediation the legislature wishes to include. CADR’s position is that the existing language in HRS § 514B-161(c) regarding requests for “evaluative mediation” is vague for lack of a definition of that phrase. Thus, any amendment to the ADR language in HRS Ch. 514B that includes the phrase “evaluative mediation” should define that phrase for the avoidance of doubt.

CADR also notes for the Committee’s attention concepts fundamental to the mediation process outlined in the Uniform Mediation Act (“UMA”). In 2003, the Uniform Law Commission wrote the following:

Consensual dispute resolution allows parties to tailor not only the result but also the process to their needs, with minimal intervention by the State. For example, parties can agree with the mediator on the general approach to mediation, including whether the mediator will be evaluative or facilitative. This party agreement is a flexible means to deal with expectations regarding the desired style of mediation, and so increases party empowerment. Indeed, some scholars have theorized that individual empowerment is a central benefit of mediation.<sup>1</sup>

Additionally, when the UMA was adopted by Hawai‘i in 2013 (SB966), the committees that passed the bill emphasized that the purpose of the measure was to “promote autonomy by authorizing the parties to decide matters that can be set by agreement.”<sup>2</sup>

Thus, considering the principles underlying the UMA as adopted in Hawai‘i, the Committee may want to leave the mediation methodology (*i.e.*, facilitative vs. evaluative) open for the parties to decide with respect to each individual dispute. HRS § 514B-161(d)(3) already outlines the procedures to follow if the parties cannot agree on a mediator. CADR’s position is that adding a requirement for a certain type of mediation will only serve to decrease autonomy and flexibility to all parties.

### 3. Qualifications of Mediators and Arbitrators (Part III, Section 3)

On the proposed “514B-F Qualifications of mediators and arbitrators” section on page 10, CADR notes that other states have mediator qualification requirements that allow a broader number of individuals to serve as mediators if they meet certain experience requirements. In a smaller state like Hawai‘i that has an abundance of AOA/O disputes, slightly less restrictive mediator qualifications may be more appropriate to meet caseload demands.

Notably, Florida stipulates that “Mediators must have ‘at least 20 hours of training in mediation techniques’ or have ‘mediated at least 20 disputes’ in order to be certified.” Nevada maintains “specialized lists of mediators and arbitrators with specific training and experience in association disputes, including interpretation and enforcement of governing documents.”<sup>3</sup>

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<sup>1</sup> UNIF. MEDIATION ACT PREFATORY NOTE (amended 2003), 11–12 (Unif. L. Comm’n 2001).

<sup>2</sup>Haw. Conf. Comm. Rep. No. 66, at 2 (2013).

<sup>3</sup> Buenaventura, M., Nabel, A., Cherney, S., & Marsolais, E., *Five States’ Approaches to Aspects of Condominium Law*. RAND EDUCATION, EMPLOYMENT, AND INFRASTRUCTURE, INFRASTRUCTURE AND JUSTICE PROGRAM at 63–64, 67 (2025).

#### 4. Disclosures of Mediators (Part III, Section 3)

Finally, on the added “Disclosures by mediators and arbitrators” section beginning on page 10, line 18, CADR proposes that the section on mediator disclosures (page 10, line 18 to page 11, line 15) be changed to match the arbitrator disclosures requirement (page 11, lines 16-17). The Hawai‘i Uniform Mediation Act<sup>4</sup> has a detailed section on disclosures that effectively covers what is listed in the current draft of the bill. HRS § 658H-9 states in relevant part:

**[658H-9] Mediator’s disclosure of conflicts of interest; background.**

(a) Before accepting a mediation, an individual who is requested to serve as a mediator shall:

(1) Make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable mediation party or nonparty participant in the mediation; and

(2) Disclose any such known fact to the mediation parties as soon as is practical before accepting a mediation.

(b) If a mediator learns any fact described in subsection (a)(1) after accepting a mediation, the mediator shall disclose it as soon as practicable.

CADR’s suggested edit would be to replace page 10, line 18 to page 11, line 15 with “Disclosures by mediators shall be governed pursuant to HRS § 658H-9.”

Thank you for the opportunity to provide comments on HB1897.

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<sup>4</sup> Haw. Rev. Stat. Ch. 658H