LINDA LINGLE
GOVERNOR OF HAWAII

CHIYOME LEINAALA FUKINO, M.D.
DIRECTOR OF HEALTH

STATE OF HAWAII
DEPARTMENT OF HEALTH
P.O. Box 3378
HONOLULU, HAWAII 96801-3378

In reply, please refer to:
File:

HOUSE COMMITTEE ON HEALTH

HB1539, RELATING TO MEDICAL TREATMENT

Testimony of Chiyome Leinaala Fukino, M.D.
Director of Health

February 10, 2009
8:30 a.m.

Department's Position: The department appreciates the intent of this bill, but must respectfully oppose it as currently drafted.

Fiscal Implications: Unquantified, but this bill would require additional staff time during a hospital licensing survey to determine if this requirement is being met.

Purpose and Justification: Under HAR Title 11 Chapter 93, hospitals are required to have written policies concerning the rights and responsibilities of patients. This includes that "the patient has a right to have the patient's medical condition and treatment discussed with the patient by a physician of the patient's choice … and to be afforded the opportunity to participate in the planning of the patient's medical treatment." Since the disclosure of the patient's condition is already included in their rights, it would appear that this bill is redundant and unnecessary. And while it would appear to be a worthwhile requirement, the bill is unclear and may be overly broad and too punitive if someone were to fail to comply. It is unclear whether the bill is aimed at medical errors or for any cause resulting in a negative consequence. Negative consequences may result from the natural progression of the injury or illness and not the result of care that is being provided using evidence-based standards of care in accordance

with hospital policy and practices. Yet the failure to comply may result in license revocation and other penalties.

Thank you for the opportunity to testify.

TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) formerly known as the CONSUMER LAWYERS OF HAWAII (CLH) IN SUPPORT OF H.B. NO. 1539

February 10, 2009

To: Chairman Ryan Yamane and Members of the House Committee on Health:

My name is Bob Toyofuku and I am testifying on behalf of the Hawaii Association for Justice (formerly known as CLH*) in Support of H.B. No. 1539.

Purpose of Bill.

The purpose of this bill is to require health care providers to notify patients or their representatives of any adverse events that result in serious harm or death to the patient within 72 hours of discovery of the adverse event. The notification is not admissible as evidence of liability.

In 2007, the Legislature passed HB 1253 (Act 88) that made statements of sympathy inadmissible to prove liability. (HRS section 626-1, Hawaii Rules of Evidence Rule 409.5) In the context of medical errors, this bill takes the next step toward encouraging full disclosure of adverse medical events. This bill carefully balances two important and often conflicting interests: protecting a patient's right to know about any unexpected medical consequences that may harm them and the health care provider's concern that disclosure of an adverse medical event may be an admission of liability.

Background for "Sorry" Laws with Disclosure Requirements

In 1999, a report by the Institute of Medicine, "To Err is Human," indicated that up to 98,000 deaths occur each year in the United States as a result of medical errors. Since then, there has been a steady movement focused on patient safety and improving

communication between health care providers and patients to create a more transparent environment to avoid triggering an automatic adversarial situation.

Two significant organizations support disclosure of medical errors. The American Medical Association Code of Medical Ethics describes standards of professional conduct that includes disclosure to the patient of facts necessary to ensure understanding of what has occurred, without concern about legal liability.

The Joint Commission on Accreditation of Healthcare Organizations (JCAHO) requires that hospitalized patients and their families be told of "unanticipated outcomes" of care (Standard - Ethics, Rights, and Responsibilities (RI) 2.90, 2005) and that clinicians and health care organizations inform patients and families of adverse events.

At least 29 states have adopted "sorry" laws as a means to reduce medical malpractice claims. These laws encourage full disclosure of mistakes or errors in judgments by eliminating a physician's fear that the admission will be used against them. Over the past several years, many of these states have added mandatory notification requirements that impose a duty on health care providers to inform patients of adverse medical outcomes. These states include Florida, Nevada, New Jersey, Pennsylvania, Vermont, Colorado and Illinois. This bill is patterned after the Colorado and Illinois statutes.

"Sorry" Laws and Disclosure of Medical Errors Reduces Medical Malpractice Claims and Malpractice Insurance

The Veterans Affairs Medical Center at Lexington, KY is a pioneer in adopting a full disclosure policy. The Lexington program requires immediate notification to the patient of a possible mistake, face to face communication of details, an apology, and if it

is determined that the hospital was at fault, restitution is offered. A study of the success of the Lexington Program was conducted by Kraman and Hamm, "Risk Management: Extreme Honesty May be the Best Policy," Annals of Internal Medicine, Vol. 131, No. 12, 12/21/99, which concluded that in comparison with other Veterans Affairs medical facilities, Lexington had lower payments than 30 other facilities, averaged payment of $15,000 versus $98,000 average of other facilities, quicker case closure than the average, in general, more positive economic outcomes.

Other medical centers, such as University of Michigan and University of Illinois, which have adopted policies of disclosure, also report reduction in malpractice claims and litigation expenses. See, attached New York Times article, "Doctors Say 'I'm Sorry' before 'See You in Court'," for a discussion of the success of disclosure policies in reducing malpractice claims.

Many insurance companies are also offering incentives for premium discounts for insured physicians who participate in the insurer's risk management and education program. For example, Med Pro offers a 5% discount. (as reported in www.sorryworks.net/article 44)

Disclosure of Medical Errors Leads to Improved Patient Safety as "lessons learned"

Health care providers have operated under the "deny and defend" model for too long. Unfortunately, when mistakes are covered up, no one learns from the mistakes or takes steps to correct practices and protocols that could prevent future errors. This bill will stop the "deny and defend" practice immediately and shift to the "lessons learned" approach to medical treatment. While most conscientious health care providers take

risk management very seriously, this bill puts patient safety as the highest priority for health care providers, without regard to concerns over liability.

Conclusion.

Our experience is that many clients come to attorneys because they simply don't know why something bad has happened in their medical treatment. They complain that no one has given them reasons, and worse, some have told them that they can't talk to them. One physician whose wife was seriously injured due to malpractice would not have initiated litigation if only the hospital had been candid, admitted its mistake and offered to help out with the additional medical costs necessitated by the malpractice. Patients deserve full disclosure when mistakes are made. This bill will lead to improved patient safety procedures, reduce medical errors, which in turn will lead to reduced malpractice claims and costs of insurance.

Thank you for the opportunity to present this testimony.

To: House Committee on Health
Rep. Ryan I. Yamane, Chair
Rep. Scott Y. Nishimoto, Vice Chair

Health Committee

2/10/2009
8:30 a.m.
Room 329

From: Hawaii Medical Association
Gary A. Okamoto, MD, President
Philip Hellreich, MD, Legislative Co-Chair
Linda Rasmussen, MD, Legislative Co-Chair
April Donahue, Executive Director
Richard C. Botti, Government Affairs
Lauren Zirbel, Government Affairs

Re: HB 1539 RELATING TO MEDICAL TREATMENT

Chairs & Committee Members:

This is a positive measure.

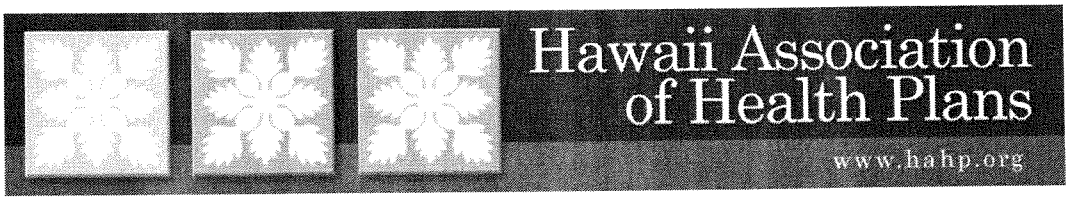
HMA does request that the following amendment be made:

The words "may be life threatening" replace the words "results in serious harm or death"

"**§321-** **Duty to notify patients of adverse events; definitions; penalty; rules.** (a) An appropriately trained designee of a health care provider shall notify in person each patient, or the patient's relative or representative, regarding any adverse event that **may be life threatening** [~~results in serious harm or death~~] to the patient within seventy-two hours of the adverse event or discovery of the adverse event

Thank you for the opportunity to provide this testimony.

Hawaii Medical Association
1360 S. Beretania St.
Suite 200
Honolulu, HI 96814
(808) 536-7702
(808) 528-2376 fax
www.hmaonline.net



February 10, 2009

The Honorable Ryan Yamane, Chair
The Honorable Scott Nishimoto, Vice Chair
House Committee on Health

Re: HB 1539 – Relating to Medical Treatment

Dear Chair Yamane, Vice Chair Nishimoto and Members of the Committee:

My name is Rick Jackson and I am President of the Hawaii Association of Health Plans ("HAHP"). HAHP is a non-profit organization consisting of seven (7) member organizations:

AlohaCare
Hawaii Medical Assurance Association
HMSA
Hawaii-Western Management Group, Inc.
MDX Hawai'i
University Health Alliance
UnitedHealthcare

Our mission is to promote initiatives aimed at improving the overall health of Hawaii. We are also active participants in the legislative process. Before providing any testimony at a Legislative hearing, all HAHP member organizations must be in unanimous agreement of the statement or position.

HAHP appreciates the opportunity to testify in support of HB 1539 which would lower medical malpractice insurance premiums by adopting legislation that directly affects elements impacting medical malpractice insurance rates. HAHP supports the intent of this bill as a good first step toward helping to contain the spiraling cost of medical malpractice insurance.

We agree with statements made by local physician organizations that the current medical tort system drives significant "defensive medicine" costs and has led to Neighbor Island shortages in key surgical specialties. The members of HAHP see these facts daily in our medical claims costs and in limitations in the numbers and types of our contracted physicians on neighbor islands.

Thank you for the opportunity to offer comments today.

Sincerely,

Rick Jackson
President

Trecker & Fritz
Attorneys At Law

Collin M. (Marty) Fritz
Allen K. Williams
Suite 701
820 Mililani Street
Honolulu, Hawaii 96813-2937

(808) 528-3900
Fax: (808) 533-3684
Toll Free: (800) 237-9300

Memo

To: Chair, House Health Committee

From: Marty Fritz

Date: February 10, 2009, Tuesday at 8:30 a.m.

Re: **HB 1539**

Honorable Chair and Committee Members. My name is Marty Fritz. I am a lawyer who represents a small number of medical malpractice victims who suffer horrific injuries or death from doctors errs.

The bills your committee is hearing relating to tort reform have one basic assumption--- there is a need for some change. The arguments I have heard supporting these bills are primarily that there is an explosion in medical malpractice verdicts in the State of Hawaii which is leading large numbers of physicians to leave the state. There are no specifics presented, rather emotional non specific allegations of the negative effects of the current system. The reason why these arguments are non specific is because they are unable to be supported by relating on evidence and analysis.

As a former member of the bipartisan committee appointed by the legislature in the late 1990's to make a two year study of the tort system, I am quite aware of how faulty perceptions combined with emotions and publicity can powerfully impact the legislative process. In the 1990's there was a perception that the costs of the tort system were out of control. The study, which thoroughly reviewed actual cases and filings, found to nearly everyone's surprise that just the opposite was true i.e. *there had been a significant drop in accidents and court filings.*

Of Counsel:
Steven J. Trecker

Yvonne L. Geesey
PO Box 62245
Honolulu, HI 96839
geesey@hawaii.edu

Aloha Chairperson Yamane, Vice-Chair Nishimoto and members of the Health Committee.

Mahalo for the opportunity to offer testimony in support of House Bill 1539, reporting adverse events in health care.

My name is Yvonne Geesey and I am an advanced practice registered nurse—a nurse practitioner and an attorney.

I see patients one day a week and work in the law the other four days. I am here today testifying as an individual.

As a nursing student at UH I made a horrible mistake. I was working in the NICU, the neonatal intensive care unit. I was taking care of a six-month-old girl who was dying of AIDS. She was to receive the drug AZT via intravenous line over 2 hours. I hung the IV, threaded the line through the pump, connected it to her IV and programmed the pump. Then I went off to take care of another patient. I was horrified to hear her pump alarm 20 minutes later. I immediately realized I had programmed the pump to infuse the AZT over 20 minutes, not 2 hours.

Fortunately she suffered no ill effects. This happened in 1993, a time when health care providers didn't admit their mistakes. We were trained to document what happened without admitting an error had been made and inform the staff and attending physician. I told my nursing professor, the charge nurse, and the infectious disease doctor, but I didn't tell the most important person of all, the little girl's mom.

My nursing professor and classmates eventually left for the day. I couldn't leave. I stayed and when the baby's mom came in I told her what had happened and apologized. That act nearly got me kicked out of nursing school in my last year.

Admitting unintended events to our patients is the morally right thing to do. The health care institution I practice at is a leader in disclosing adverse events to our patients and I am very proud of that.