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TWENTY-FIFTH LEGISLATURE
Regular Session of 2009

Tuesday, February 24, 2009
2:05 .p.m.

TESTIMONY ON HOUSE BILL NO. 310, H.D.1, RELATING TO MEDICAL TORTS

TO THE HONORABLE JON RIKI KARAMATSU, CHAIR,
AND MEMBERS OF THE COMMITTEE:

My name is Rod Maile, and I am the Senior Hearings Officer for the Office of Administrative Hearings, Department and Commerce and Consumer Affairs ("DCCA"), and amongst my responsibilities as the Senior Hearings Officer, I am the administrator of the Medical Claims Conciliation Panel ("MCCP"). Thank you for the opportunity to present testimony on House Bill No. 310, H.D. 1, Relating to Medical Torts.

DCCA supports the concepts of: 1) encouraging the parties to MCCP proceedings to be as thorough as possible in their respective presentations to the

MCCP, and 2) having the courts consider the advisory decision of the MCCP in regards to imposing sanctions on parties that have rejected the decision of the MCCP, pursued judicial proceedings, and failed to improve their respective positions by more than thirty percent. However, we believe that House Bill No. 310, H.D. 1 would have a substantial impact on the MCCP proceedings.

First, not all claims filed with the MCCP complete the MCCP hearing process. In some cases, the claimants are not able to service the notice of claim on one or more of the parties. In other cases, the hearing is continued upon the mutual agreement of the parties because of scheduling conflicts, the need for further preparation, or because of ongoing settlement discussions. In such situations, pursuant to Hawai`i Revised Statutes ("HRS") §671-18, if a decision by the MCCP is not reached within twelve months, or the alternative dispute resolution process is not completed within twelve months, the statute of limitations resumes running and the party filing the claim may commence a suit based on the claim in any appropriate State court. Given the potential sanctions that could be imposed pursuant to House Bill No. 310, H.D. 1, there is a possibility that more MCCP claims would seek to have the hearing delayed in order to avoid having the MCCP issue a decision within the twelve-month period.

Next, in some cases in which one or more of the respondents are found to be actionably negligent by the MCCP, the parties have not presented sufficient evidence upon which the MCCP can make an advisory determination as to

damages. Under these circumstances, it is unclear how the provisions of House Bill No. 310, H.D. 1, would be applied when no damages have been specifically awarded the parties.

As to the cases in which advisory determinations of damages have been awarded by the MCCP, we would point out that HRS Chapter 671 ***does not contain a requirement that the parties settle their respective claims after they receive the decision of the MCCP.*** As such, House Bill No. 310, H.D. 1 could have the unintended effect of making the claimants seek artificially low damage awards (i.e., 30% less than the actual damages that claimants believe that they could prove at trial) from the MCCP in order for claimants to preserve their ability to pursue judicial action if the case is not settled.

Last, as a pragmatic consideration, we have significant concerns regarding the financial and logistical impact that House Bill No. 310, H.D. 1, will have on the MCCP process. The MCCP process has been advisory and non-binding since the MCCP was first created in 1976. Over the years, the MCCP process has continued to be successful in large part because the current process allows the parties to have their respective cases reviewed by the panel through an informal hearing process, and in turn, the MCCP issues advisory decisions which cannot be utilized in subsequent litigation, except under specific circumstances.

Logistically, most of the cases that are heard by the MCCP are completed in one day. Panel members spend many hours prior to the hearing reviewing the pleadings and exhibits submitted by the parties, so that the actual MCCP hearing is very focused, and extraneous and procedural matters are kept to an absolute minimum. It must be kept in mind that under the provisions of HRS §671-13, except for the production of hospital and medical records, nurses' notes, x-rays, and other records kept in the usual course of the practice of the health care provider, discovery by the parties is not allowed in MCCP proceedings, and in many cases, the first time the parties are able to hear the details from witnesses is at the MCCP hearing.

Consequently, if House Bill No. 310, H.D. 1, forces the parties to be more exhaustive in the presentation of their respective cases to the MCCP in order for the MCCP decisions to be more precise as to damages, we would anticipate that the length of the MCCP hearings will increase substantially. Because each MCCP panel member only receives $300 per hearing, asking MCCP panel members to serve on hearings lasting between two (2) to five (5) days, will in all likelihood make it more difficult for MCCP panel members to serve on panels, particularly the physician members. One alternative would be to increase the stipend for each MCCP panel member from $300 to $900 per claim heard, and increase the MCCP filing fee to $1,350, with any balances remaining after paying the panel costs refunded to the parties. However, the increase in the filing fees

would then create a financial hardship on parties that would not be able to afford to pay such filing fees, causing the MCCP to pay the balance of the MCCP panel costs and thereby partially underwrite the cost of the MCCP proceedings.

As a final observation, we would note that the number of claims filed with the MCCP has steadily decreased from 166 claims in 2002, to 100 claims in 2008 (as of November 25, 2008), and during that time, there have only been a handful of claims that the MCCP has determined to be palpably without merit. Consequently, we believe that the MCCP continues to serve the function that the Legislature originally intended, and we would be very reticent to support any substantive changes to the MCCP process.

For these reasons, DCCA would request that House Bill No. 310, H.D. 1, be deferred so that these concerns can be considered and addressed. Thank you for the opportunity to testify on this bill.

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Tuesday, February 24, 2009, 2:05 p.m. CR 325

To: COMMITTEE ON JUDICIARY
Rep. Jon Riki Karamatsu, Chair
Rep. Ken Ito, Vice Chair

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 310 RELATING TO MEDICAL TORTS

In Support

Chairs & Committee Members:

HMA has always supported sanctions against the non-prevailing party that rejects the Medical Claim Conciliation Panel (MCCP) decision. Thus we favor this measure.

The MCCP has done much in reducing the number of suits filed, and is working reasonably well. We do not want to see other changes to the panel that would render it less effective.

Thank you for the opportunity to provide this testimony.

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To: Chair, Judiciary Committee

From: Marty Fritz

Date: February 24, 2009, Tuesday at 2:05 p.m.

Re: **HB 310, HD1 (HSCR462)**

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

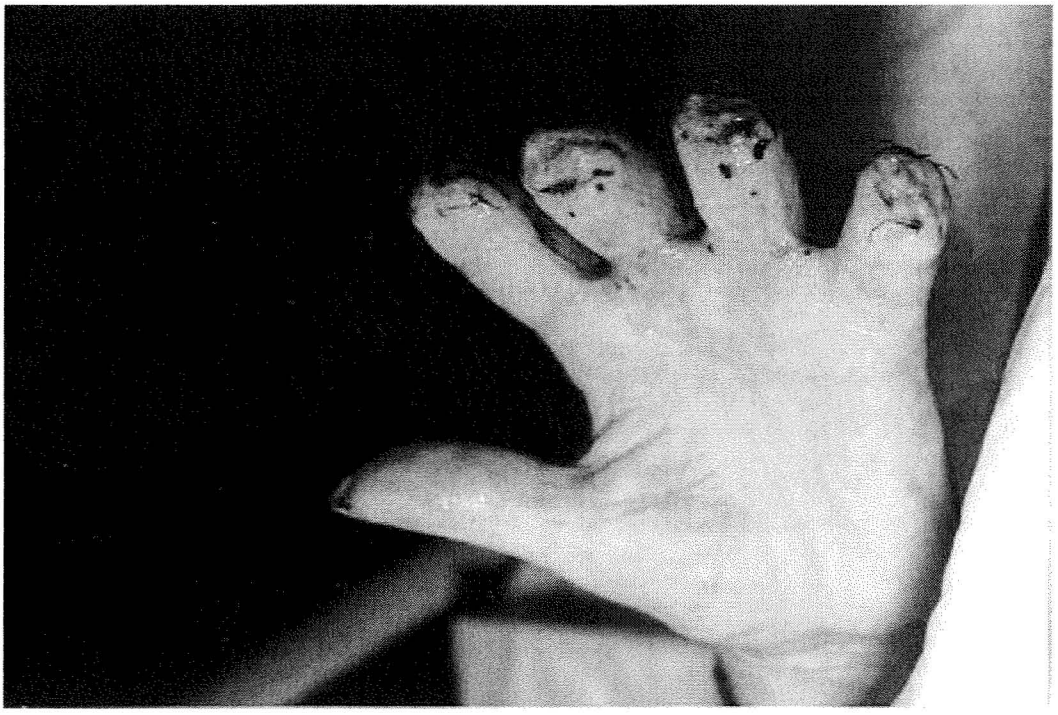
The bills your committee is hearing relating to tort reform have one basic assumption-- there is a need for some change. The arguments I have heard supporting these bills are primarily that there is an explosion in medical malpractice verdicts in the State of Hawaii which is leading large numbers of 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.*

Un-needed restrictions like those proposed including caps on non-economic damages can have devastating impacts on people injured as a result of medical negligence. Although arguments are made that economic damages are sufficient to ensure adequate awards this is clearly incorrect in my experience especially for specific groups such as housewives and non-working women, retirees, and youngsters, and those with little or no wage earning history or capacity. With caps as those proposed many of these people will obtain tiny awards for injuries that are crippling and literally make their lives hell on earth.

I have enclosed pictures a person who have been injured by medical errs. This person had her fingers and toes amputated. She was of retirement age, there was no treatment for injuries so she therefore, had little or no economic damages for a life changing painful, crippling conditions.

Of Counsel:
Steven J. Trecker



TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) formerly known as the CONSUMER LAWYERS OF HAWAII (CLH) REGARDING H.B. NO. 310, H.D. 1

February 24, 2009

To: Chairman Jon Riki Karamatsu and Members of the House Committee on Judiciary:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) regarding H.B. No. 310, H.D. 1.

The Medical Claims Conciliation Panel (MCCP) was created in 1976 as a process to assist in resolving medical malpractice claims when possible or provide guidance to the parties before a lawsuit was filed. Basically, as set forth on the DCCA website, the MCCP program is responsible for conducting informal conciliation hearings on claims against health care providers before such claims can be filed as lawsuits. The decisions of the MCCP panels are advisory in nature and are not binding on the parties, in the event that any party still wishes to pursue the matter via the courts. The MCCP program also provides an opportunity for the parties to exchange information in a relatively expedited and inexpensive manner, which in turn provides for opportunities for the parties to explore the conciliation of meritorious claims prior to such claims being brought before the courts. Also, the exchanging of information between the parties, and making conscientious and thorough presentations to the panels, discourages the pursuit of frivolous or fraudulent claims.

Further, the Legislature enacted an additional merit screening procedure in 2003. Medical malpractice claims must first be reviewed by a doctor in the same specialty involved in the claim. The claim cannot be filed unless there is a certificate of

consultation filed with the claim that the claim has merit. The measure was codified as HRS section 671-12.5 and applied to claims filed after 2003. The effectiveness of the procedure is reflected by the steep decline in the number of claims filed and the fact that only two of the claims heard by an MCCP panel during the past four years was found to be frivolous. The number of claims filed has dropped from a high of 173 in 2001 to 100 as reported in the current MCCP report to the legislature.

The MCCP is successful in reducing claims and preventing lawsuits by giving many pro se claimants a chance to have their "day in court." Creating severe penalties for either the claimant or the defense will alter the purpose and function of the MCCP and the parties. The current procedure is one of conciliation not adjudication. The process is streamlined, efficient, quick and inexpensive. Its purpose is to assist and advise, not to judge and determine the claim.

There is no formal discovery during the MCCP process and health care providers generally do not provide statements or explanations to claimants before the MCCP hearing. The hearing itself is generally the first time a claimant hears the provider's story. The claimant is not able to subpoena records or depose witnesses before the MCCP hearing. The patient is not allowed to take the depositions of nurses or other doctors who may have witnessed the malpractice or assisted in the patient's care to find out what actually happened. The hearing itself is abbreviated; typically lasting only a morning or afternoon and rarely taking more than a day. Because the patient hears the doctor's explanation for the first time at the hearing, neither the patient's medical experts nor attorney can effectively prepare for the hearing. This makes the assessment of

sanctions unfair unless the patient is given the opportunity to subpoena records and depose witnesses before the hearing.

This bill would transform the MCCP from a conciliation panel to an adjudication panel. This would force the parties engage in a mini-trial which will take several days instead of hours and become very costly. It would require the need to have complete discovery of information through depositions as well as testimony by experts and the parties. In other words, the panels would be sitting as "judges" as if it was a trial rather than conciliation or mediation oriented process.

The Circuit Courts employ the Court Annexed Arbitration Program (CAAP) to assist in the handling of tort cases. The CAAP procedure does provide for the imposition of fees and costs for parties who appeal CAAP awards and fail to improve their positions. However, there are fundamental differences between the MCCP and CAAP, most significantly that a lawsuit has already been filed and the parties have already completed the discovery needed for determination of liability and damages before a CAAP hearing in accordance with the purpose of the CAAP hearing to adjudicate not conciliate. The CAAP arbitrator is not even permitted to engage in conciliation or settlement discussions without the written consent of all parties. The conciliation function in court cases is instead normally reserved for a mediation process. CAAP arbitrators are litigation attorneys who are familiar with tort claims and who are trained to adjudicate tort claims. Thus the penalty provisions of CAAP should not be applied to the MCCP because the two programs serve fundamentally different purposes and function in a completely different manner.

The process proposed by this bill would turn the MCCP into an administrative health court and require extensive revision of applicable statutes, rules and funding.

Finally, the assessment of sanctions against the patient is unfair because an ordinary person will not be able to afford the threat of personal liability for its payment. If the doctor loses, it is the insurance company that will pay the penalty. The insurance company in turn will simply pass on the cost of the penalty as part of its cost of doing business as reflected in its premiums. So the threat of sanctions will have a disproportionate impact on the patient with little or no effect on the doctor or insurance company.

Because of our concerns stated above HAJ is not supportive of this measure. Thanks you for the opportunity to testify on this bill.