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

February 10, 2009

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

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.

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. 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 exchange of information between the parties 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, indicating 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 this screening 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." This bill will create severe penalties for either the claimant or the defense and significantly 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 hearing itself is abbreviated; typically lasting only about three hours (9am to noon or 1pm to 4pm).

This bill would transform the MCCP from a conciliation panel to an adjudication panel. This would force the parties to engage in a mini-trial which may take several days instead of hours and become substantially more costly for all parties. It would require the parties to 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, a lawsuit has been filed and the parties have completed the discovery needed for determination of liability and damages before a CAAP hearing is conducted for the purpose of adjudication, not conciliation. 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.

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

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 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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February 10, 2009

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

Re: HB 310 – Relating to Medical Torts

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 310 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

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Memo

To: Chair, House Health Committee

From: Marty Fritz

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

Re: **HB 310**

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