

**TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF
THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) FORMERLY KNOWN AS
CONSUMER LAWYERS OF HAWAII (CLH)
IN OPPOSITION TO H.B. No. 2575 HD1
RELATING TO TRAUMA**

February 23, 2010

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) in opposition to H.B. No. 2575 HD1 Relating to Trauma.

HAJ has concerns about H.B. No. 2575 HD1 as drafted because the language is too broadly worded and could be construed to limit discovery on factual information that should otherwise be subject to discovery in a civil proceeding. Accordingly, HAJ proposes language for H.B. No. 2575 HD2. Specifically:

1. In this bill, the multidisciplinary, multiagency committees are called "quality assurance" and "peer review" committees. These terms are defined by HRS §624-25.5 and do not apply to the type of committees that may be established by this bill. Under existing laws, the quality assurance committees (QAC) and peer review committees (PRC) are established by the bylaws and governing rules of a health care organization as part of its risk management program and charged with investigating adverse events and making recommendations for corrective actions. The committees created by this bill are intended to be policy advisors in nature and should not be confused with the QACs and PRCs under existing law. Therefore, HAJ proposes that the committees be called simply "advisory" committees.

2. The multidisciplinary, multiagency committees under this bill are composed of trauma, emergency, and tertiary care providers and agencies. This potentially is a very large group of people who would be exempt from discovery. HAJ is concerned that this language is too broad and could inappropriately extend protections to persons with factual information about an underlying medical event.

Therefore, HAJ proposes that the group of persons exempt from discovery be narrowed to a subcommittee called "System Performance Review Subcommittee" created for the express purpose of reviewing confidential patient care records and documents related to those patients in order to make recommendations on improvements to the trauma care system and quality care of providers. This subcommittee would have access to confidential patient care records and its meetings would be exempt from the Sunshine laws.

3. This bill protects members of the multidisciplinary, multiagency committees from being questioned in a civil proceeding regarding information presented or opinions formed as a result of their review, except where the member obtained the information independently or about public information. HAJ is concerned that this broad language could limit proper discovery of factual information simply because it was the subject of review by the committee. HAJ does not object to protecting a committee member from being compelled to testify about confidential patient care records and information presented for the committee's review where the committee member's knowledge is based solely on the

information presented for review and which is used as a basis for making recommendations on system improvements.

Therefore, HAJ proposes that the members of the system performance review subcommittee may not be compelled to testify about the patient care records reviewed and the basis for the recommendations made by the subcommittee.

However, this protection would not extend to a subcommittee member or person in attendance at the meeting, who obtained knowledge of the subject matter under review through means independent of the committee's review process.

4. This bill protects from discovery against the DOH "information" obtained through patient care records and system performance reviews and characterizes such information as "confidential." It does not prohibit discovery of such records from other sources and such records are not protected from discovery solely because the records were provided to the DOH.

The intent of this bill is to protect "information" from disclosure, similar to the protections afforded to a hospital's QAC and PRC. However, this bill attempts to protect the same type of documents that would otherwise be discoverable from a health care provider. Documents of factual information, such as incident reports, patient care records, data and witness statements are not protected from discovery, even if reviewed by a QAC or PRC. Instead, it is the QAC's and PRC's proceedings and records of its proceedings, such as minutes, recordings and reports which are protected from discovery. HAJ is concerned that giving the DOH far greater protections than that of QAC's and PRC's would lead to abuse of the discovery system. Further, from a public policy standpoint, any

documents related to system performance reviews should be public records, provided personal identifying information is omitted.

Therefore, HAJ proposes that only patient care and its related documents be designated as confidential and exempt from discovery, except upon a showing by clear and convincing evidence that such documents are not otherwise available from other sources. This would prevent end runs around of the discovery system. Further, to ensure that there is no conflict with existing laws, we propose specific language stating that nothing in this bill prohibits discovery of fact based documents from original sources.

In conclusion, HAJ has concerns about this proposed bill as written. HAJ has attached a proposed bill for your consideration, narrowly tailored to protect a system performance review subcommittee's members and patient records from discovery. Thank you for the opportunity to testify.

PROPOSED H.B. NO. 2575 HD2

RELATING TO TRAUMA

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Section 321-230, Hawaii Revised Statutes, is amended to read as follows:

"§321-230 **Technical assistance, data collection, evaluation.** (a) The department may contract for technical assistance and consultation, including but not limited to categorization, data collection, and evaluation appropriate to the needs of the state system. The collection and analysis of statewide emergency medical services data, including pediatrics, trauma, cardiac, medical, and behavioral medical emergencies, shall be for the purpose of improving the quality of services provided.

The department may implement and maintain a trauma registry for the collection of information concerning the treatment of critical trauma patients at state designated trauma centers, and carry out a system for the management of that information. The system may provide for the recording of information concerning treatment received before and after a trauma patient's admission to a hospital or medical center. All state designated trauma centers shall submit to the department [~~of health~~] periodic

reports of each patient treated for trauma in the state system in such manner as the department shall specify.

The department may form multidisciplinary and multiagency advisory committees to analyze, evaluate, and recommend improvements to the statewide trauma system and the services it provides to the public. Advisory committees shall be comprised of representatives of trauma, emergency, and tertiary care providers and organizations. Within any advisory committee, a system performance review subcommittee may be created for the express purpose of reviewing confidential patient care records and related documents in order to make recommendations on improvements to the trauma care system and quality care of providers. A system performance review subcommittee shall be exempt from chapter 92.

For the purposes of this subsection, "categorization" means systematic identification of the readiness and capabilities of hospitals and their staffs to adequately, expeditiously, and efficiently receive and treat emergency patients.

(b) The department shall establish, administer, and maintain an aeromedical emergency medical services system designed to collect and analyze data to measure the efficiency and effectiveness of each phase of an emergency aeromedical program.

The aeromedical emergency medical services system shall serve the emergency health needs of the people of the State by identifying:

- (1) The system's strengths and weaknesses;
- (2) The allocation of resources; and
- (3) The development of rotary-wing emergency aeromedical services standards;

provided that emergency helicopter use, including triage protocols, shall be based on national aeromedical triage and transport guidelines established by the Association of Air Medical Services, the American College of Surgeons, and the National Association of Emergency Medical Service Physicians. The department, in the implementation of this subsection, shall plan, coordinate, and provide assistance to all entities and agencies, public and private, involved in the system.

(c) The department shall use an emergency aeromedical services quality improvement committee comprised of representatives of trauma, emergency, and tertiary care physicians and providers to analyze information collected from the aeromedical quality improvement performance measures as established by the American College of Surgeons, and to recommend system standards and resources to maintain and improve the Hawaii emergency aeromedical services system.

(d) No member of a system performance review subcommittee who reviewed confidential patient care records and related documents and participated in making recommendations for improvements to the trauma care system and quality care of providers may be compelled to testify in any civil or criminal proceeding regarding the information reviewed by the subcommittee or basis for the recommendations presented as a result of the review. Nothing in this subsection shall be construed to prevent a person from testifying to information obtained independently of participation in a review by a system performance review subcommittee, or which is public information, or where disclosure is required by law or court order. The prohibition relating to testimony shall not apply to statements made by any person in attendance at a system performance review subcommittee meeting who is a party or percipient witness in an action or proceeding the subject matter of which was reviewed at the meeting.

(e) Confidential patient care records and related documents held by the department which were reviewed by a system performance review subcommittee are confidential and not subject to disclosure through subpoena, discovery, or introduction into evidence in any civil or criminal proceeding, except upon a showing by clear and convincing evidence that patient care records and related documents are not otherwise available from

other sources. Patient care records and related documents are not deemed to be confidential or immune from subpoena, discovery, or introduction into evidence through other sources solely because they were reviewed by a system performance review subcommittee. Nothing in this subsection shall prohibit from subpoena, discovery, or introduction into evidence any original sources of information and data including recommendations for system performance improvements and quality care, incident reports, occurrence reports, statements, or similar reports that state facts concerning a specific situation and records made in the regular course of business by trauma, emergency or health care providers, including patient medical records.

(f) To the extent that this section conflicts with other state confidentiality laws, this section shall prevail."

SECTION 2. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 3. This Act shall take effect upon its approval.

INTRODUCED BY: _____