TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION TO S.B. NO. 592

February 16, 2011

To: Chairman Josh Green, M.D. and Members of the Senate Committee on Health:

LATE TESTIMONY

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in OPPOSITION to S.B. No. 592, relating to Medical Torts.

The changes proposed by this measure would transform the current MCCP program from a Conciliation to a Litigation model, essentially mirroring the Court Annexed Arbitration Program (CAAP). This would be a huge mistake in light of the undeniable success of the current MCCP program.

THE FACTS

The number of medical claims filed has plummeted from 173 in 2001 to just 65 in 2010. Claims fell from 173 in 2001 to 166 in 2002, 132 in 203, 128 in 2004 and 105 in 2004. Claims fluctuated between 105 and 123 during the years 2004 through 2009; finally falling to just 65 last year. This data is all contained in the MCCP annual reports to the legislature and attached to the end of my testimony.

The medical profession in general labors under the mistaken impression that there is skyrocketing litigation and an avalanche of claims filed against doctors. Yet, there is no Hawaii data to support the hysteria generated by those clamoring for wholesale changes to the current system. Indeed, the MCCP's disposition of claims is even more impressive than the drop in the number of medical claims filed.

In contrast to the 65 claims filed in 2010, the MCCP disposed of 41 claims without the need for hearings. Four were rejected for lack of a certificate of consultation, 6 dismissed, 11 terminated by the director, 5 proceeded to mediation/ADR, 7 expired when the tolling period lapsed, 4 were withdrawn and 4 were settled. The MCCP is doing an admirable job of keeping claims filings down and disposing of claims before those claims proceed to litigation. Indeed, the large majority of claims were disposed of without payment. In a State with a population of approximately 1.3 million people, the significance of only 65 claims filed (and 41 disposed of without hearing) cannot be overstated; it is nothing short of remarkable. The current MCCP system is in fact working remarkably well. HAJ urges that the Committee seriously consider the ramifications of making significant changes without any supporting data to justify the changes and sufficient data to estimate the effect of such changes in the future. This is a prime example where application of the old adage, "If it ain't broke, don't fix it," should apply.

MCCP vs. CAAP

The fact that the MCCP resolves most claims before hearing is a consequence of its design as a Conciliation process, not a litigation process like the CAAP program. Therefore, the CAAP penalty feature for failure to obtain a 30% or greater increase cannot be simply dropped into the MCCP process. The CAAP program is designed to begin only **after** a lawsuit is filed. The MCCP program is designed to begin **before** a lawsuit is filed and strives to **prevent** the filing of lawsuits (and is remarkably effective in doing just that). The CAAP program allows full discovery and empowers the CAAP arbitrator to serve as discovery master in the case. The MCCP does not permit discovery

and thereby avoids the costs related to discovery and prevents the matter from escalating as typically occurs once the parties embark on full discovery. The MCCP's avoidance of protracted and costly discovery makes disposition of claims easier because the parties have not invested heavily in the claim at that stage. The MCCP relies on limited informal exchanges of information. The MCCP strives to dispose of claims without hearings, while the CAAP program is geared to hearings held after completion of discovery and shortly before trial. The MCCP does not dispose of substantive motions on the merits of claims. The CAAP program runs concurrently with Court litigation so the parties are able to obtain court rulings on substantive motions before the CAAP hearing and award. The CAAP sanctions work in the CAAP program only because the parties have gone through the litigation process with full discovery and resolution of legal issues by the court so CAAP arbitrators and the parties are in a position to effectively evaluate the claims. The MCCP hearings, for the few cases that proceed to hearing, on the other hand are informal and advisory because there has been no formal discovery, legal issues have not been resolved by the court, and the process is abbreviated and simplified. The underlying purpose and function of the MCCP is significantly different from the CAAP program. Transforming the MCCP from a conciliation model to a litigation model does not make sense given the data that confirm the MCCP's current effectiveness.

Certificate of Consultation

The plunge in claims directly coincides with the passage and implementation of the requirement for a Certificate of Consultation. That requirement took effect in 2003. Claims immediately fell from 173 and 166 (in 2001 and 2002) to 132 in 2003 and has since fallen to 65 in 2010. There is no question that requiring attorneys/pro se parties to

consult with a physician to evaluate the merits of a claim **before** filing suit has had the beneficial effect expected of the requirement. Several exceptions to the requirement were included in order to address hardship cases that could lead to successful legal challenges to the requirement as an impermissible impediment to filing a meritorious claim. These exceptions should not be repealed unless there is sufficient data to support their repeal. To do so will only expose the procedure to legal challenge and may result in the loss of the most effective single factor in the MCCP process to prevent the filing of non-meritorious claims. The data unquestionably proves that the certificate of consultation process, as it currently exists, is performing remarkably well. It should not be altered without compelling reason and data to show the need for change and expected results of such change.

Thank you for this opportunity to testify in OPPOSITION to S.B. No. 592.

MCCP Claims
Number of Claims Filed