



GOV. MSG. NO. 1413

EXECUTIVE CHAMBERS
HONOLULU

NEIL ABERCROMBIE
GOVERNOR

July 09, 2012

The Honorable Shan Tsutsui, President
and Members of the Senate
Twenty-Sixth State Legislature
State Capitol, Room 409
Honolulu, Hawaii 96813

The Honorable Calvin Say, Speaker
and Members of the House
Twenty-Sixth State Legislature
State Capitol, Room 431
Honolulu, Hawaii 96813

Dear President Tsutsui, Speaker Say and Members of the Legislature:

This is to inform you that on July 09, 2012, the following bill was signed into law:

HB1967 HD2 SD2

RELATING TO MEDICAL CLAIM CONCILIATION.
Act 296 (12)

Aloha
Sincerely,
Neil Abercrombie

NEIL ABERCROMBIE
Governor, State of Hawaii

Approved by the Governor.

ORIGINAL

on JUL 9 2012

HOUSE OF REPRESENTATIVES
TWENTY-SIXTH LEGISLATURE, 2012
STATE OF HAWAII

ACT 296
H.B. NO. 1967
H.D. 2
S.D. 2

A BILL FOR AN ACT

RELATING TO MEDICAL CLAIM CONCILIATION.

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

1 SECTION 1. The legislature finds that many claims now
2 filed with medical claim conciliation panels tend to function as
3 inquiries rather than actual claims, and patients or their
4 families tend to use these proceedings to seek information
5 regarding adverse events that they associate with medical
6 treatment. Most matters filed with medical claim conciliation
7 panels are eventually resolved in favor of the medical provider,
8 but they have unintended consequences for health professionals
9 because the proceedings are treated as claims rather than
10 inquiries for the purposes of reporting incidents to medical
11 malpractice insurers.

12 The legislature further finds that provisions in the Hawaii
13 Revised Statutes relating to medical claims conciliation should
14 be amended to reflect that many filings, particularly by pro se
15 parties, are inquisitive in nature and are based on a lack of
16 information rather than claims based on substantive analysis of
17 the applicable standard of care. Proceedings with medical claim
18 conciliation panels should be conducted in a non-adversarial way



1 and structured to facilitate the conveying of information rather
2 than assigning blame. Increased transparency and education for
3 those who perceive fault on the part of medical providers will
4 assist in the amicable resolution of their concerns without the
5 need for formal claims. Medical claim conciliation panels
6 should endeavor to provide a prompt exchange of information and
7 serve a facilitation and conciliation role for these inquiries.
8 However, these panel proceedings are intended to provide a forum
9 of last resort and are not intended as a substitute for informal
10 direct communications between patients and providers.
11 Accordingly, statutory provisions relating to filing fees and
12 certificates of consultations should be retained to assure that
13 the panel process is not taken lightly and to encourage patients
14 and providers to attempt informal resolution of their concerns.
15 The legislature further finds that making medical claim
16 conciliation panel proceedings advisory in nature would allow
17 the panels' role to become more conciliatory rather than
18 adjudicatory. To this end, this Act amends the current law to
19 reflect this practice by deleting the decision-making function
20 of the panels and instead emphasizing conciliation and mediation
21 to resolve matters that are before them.



1 The legislature further finds that there is much that the
2 medical claim conciliation panel process may do to narrow and
3 define claims when complete resolution cannot be achieved during
4 panel proceedings and litigation subsequently must be commenced.
5 The legislature does not intend to eliminate panels' ability to
6 consider and discuss liability, causation, or damages with the
7 parties, but rather, it intends to focus discussion of those
8 issues in the context of conciliation or mediation that better
9 reflects the panels' advisory nature. This conciliatory
10 approach will better assist parties in fully understanding the
11 nature of claims, defenses, and damages and encourage parties to
12 reach a voluntary settlement. Medical claim conciliation panels
13 should continue to express their opinions on liability,
14 causation, and damages to the parties to assist the parties in
15 evaluating the parties' positions. However, panels should no
16 longer render formal decisions in order to give the panels
17 greater flexibility in handling true claims.

18 Panels should continue to have the authority to require
19 adversarial proceedings when adversarial proceedings would be
20 more helpful for the ultimate resolution of claims, but only
21 after consultation with or agreement by the parties and only



1 upon a finding that further proceedings would be helpful to the
2 resolution of important claim issues.

3 The legislature also finds that resolution of medical
4 claims will be encouraged by allowing parties to agree to engage
5 in alternative dispute resolution without the need to first file
6 a claim with a medical claim conciliation panel. This will
7 allow the parties to use moneys for alternative dispute
8 resolution that otherwise would have been spent to pay filing
9 fees. In addition, filing fees for those inquiries initially
10 filed with the panel would be refunded, less a nominal
11 administrative fee, if all parties agree to alternative dispute
12 resolution instead of the medical claim conciliation panel
13 process.

14 The legislature also finds that medical malpractice
15 insurers should be prohibited from increasing premiums based on
16 medical claim conciliation panel filings since these filings
17 should be properly recognized as inquiries rather than true
18 claims. In addition, panel records should be expunged if there
19 is an insufficient basis to support a finding of a medical tort
20 against a provider.

21 The purpose of this Act is to amend part II of chapter 671,
22 Hawaii Revised Statutes, relating to medical claim conciliation,



1 to more closely reflect actual practice and the original intent
2 for panels to serve in a conciliatory role.

3 SECTION 2. Section 453-5, Hawaii Revised Statutes, is
4 amended by amending subsection (b) to read as follows:

5 "(b) The department shall employ, not subject to chapter
6 76, an executive secretary to administer the board's activities
7 and an employee to administer the medical ~~[claim]~~ inquiry and
8 conciliation panels established under chapter 671. The employee
9 responsible for administration of the medical ~~[claim]~~ inquiry
10 and conciliation panels shall have no duties in administration
11 of the board's activities."

12 SECTION 3. Section 453-7.5, Hawaii Revised Statutes, is
13 amended by amending subsection (a) to read as follows:

14 "(a) The department of commerce and consumer affairs shall
15 review each complaint, inquiry, and information, as applicable,
16 received under sections 92-17, 329-44, 453-8.7, 663-1.7, and
17 671-5 [~~and 671-15~~]. The department shall investigate the
18 complaint, inquiry, or information if it appears that the
19 physician or osteopathic physician who is the subject of the
20 complaint, inquiry, or information has violated this chapter.
21 If the department determines that the physician or osteopathic
22 physician has violated this chapter, the department shall



1 present the results of its investigation to the Hawaii medical
2 board for appropriate disciplinary proceedings."

3 SECTION 4. Chapter 671, part II, Hawaii Revised Statutes,
4 is amended to read as follows:

5 "PART II. MEDICAL [~~CLAIM~~] INQUIRY AND CONCILIATION

6 §671-11 Medical [~~claim~~] inquiry and conciliation panels;
7 composition, selection, compensation. (a) There are
8 established medical [~~claim~~] inquiry and conciliation panels
9 which shall [~~review and render findings and advisory opinions on~~
10 ~~the issues of liability and damages in medical tort claims~~
11 ~~against health care providers.~~] facilitate the resolution of
12 inquiries regarding the rendering of professional services by
13 health care providers that involve injury, death, or other
14 damages to a patient.

15 (b) A medical [~~claim~~] inquiry and conciliation panel shall
16 be formed for each [~~claim~~] inquiry filed pursuant to section
17 671-12 and [~~after each panel renders its decision or the claim~~
18 is otherwise disposed of it] shall be disbanded[.] after an
19 inquiry is resolved, a notice of termination is filed, or a suit
20 based on the circumstances of the injury is filed in a court of
21 competent jurisdiction. Each medical [~~claim~~] inquiry and
22 conciliation panel shall consist of one chairperson [~~selected~~



1 ~~from among persons who are familiar with and experienced in the~~
2 ~~personal injury claims settlement process, one]~~ who shall be an
3 attorney licensed to practice in the courts of the State and
4 experienced in trial practice[~~7]~~ and the personal injury claims
5 settlement process and one physician, osteopathic physician, or
6 surgeon licensed to practice under chapter 453. The chairperson
7 shall be appointed by the director of [~~the department of]~~
8 commerce and consumer affairs from a list of eligible persons
9 approved by the chief justice of the supreme court of Hawaii.
10 [~~The attorney shall be appointed by the chairperson from a list~~
11 ~~of not less than thirty five attorneys experienced in trial~~
12 ~~practice submitted annually by the supreme court.] The~~
13 physician, osteopathic physician, or surgeon shall be appointed
14 by the chairperson and shall be [~~currently]~~ licensed and in good
15 standing under chapter 453.

16 (c) The chairperson shall preside at the meetings of the
17 panel. The chairperson, [~~all panel members,~~] second panel
18 member, and any consultant called by the panel to appear before
19 the panel shall be compensated at the rate of [~~\$300]~~ \$450 per
20 [~~claim]~~ inquiry which will become payable [~~when the decision of~~
21 ~~the panel is submitted.]~~ at the conclusion of panel proceedings.
22 At the discretion of the director, the chairperson, second panel



1 ~~[members,]~~ member, and any consultant called by the panel to
2 appear before the panel, may be compensated at one-half the
3 amount of compensation specified in this section, if the ~~[claim]~~
4 inquiry is disposed of by any means prior to ~~[the hearing by]~~ a
5 meeting of the panel~~[.]~~ and the parties or their legal
6 representatives. The chairperson, ~~[all panel members,]~~ second
7 panel member, and any consultant called by the panel to appear
8 before the panel also shall be paid allowances for travel and
9 living expenses which may be incurred as a result of the
10 performance of their duties on or for the panel. These costs
11 shall be paid by the department of commerce and consumer affairs
12 from the filing fees paid by the parties.

13 (d) The ~~[claimant]~~ party initiating an inquiry shall pay a
14 filing fee of \$450 to the department upon the filing of the
15 ~~[claim]~~ inquiry, and the failure to do so shall result in the
16 ~~[claim]~~ inquiry being rejected for filing. Each health care
17 provider and other parties to the ~~[claim]~~ inquiry shall pay a
18 filing fee of \$450 to the department within twenty days of being
19 served with the ~~[claim-]~~ inquiry. Each party to ~~[a-claim]~~ an
20 inquiry shall be assessed a non-refundable processing fee by the
21 department in the amount of \$50. The non-refundable processing
22 fee shall be retained from each party's filing fee, and shall be



1 used to defray the administrative costs of the medical [claims]
2 inquiry and conciliation panel program.

3 (e) After the panel has [~~made a final decision on a~~
4 ~~claim,~~] filed a notice of termination, or after a final
5 disposition of the [claim] inquiry has been made without [a
6 ~~hearing~~] proceedings before the panel, the department shall
7 return any moneys remaining after all panel costs have been
8 paid, to the respective parties on a pro rata basis.

9 (f) The office and meeting space, secretarial and clerical
10 assistance, office equipment, and office supplies for the panel
11 shall be furnished by the department. The chairperson may
12 designate any alternative meeting place or site for the
13 [~~hearing-~~] proceedings.

14 (g) The Hawaii medical board shall prepare a list of
15 physicians, osteopathic physicians, surgeons, and podiatrists,
16 as the case may be, along with their respective specialties.
17 These physicians, osteopathic physicians, [~~and~~] surgeons, and
18 podiatrists shall be eligible to serve as consultants to the
19 medical inquiry and conciliation panel in their respective
20 fields. Panel members may consult with other legal, medical,
21 and insurance specialists.



1 [+]§671-11.5[+] **Waiver of filing fee.** (a) If any party
2 to [~~a-claim~~] an inquiry cannot pay the required filing fee, the
3 party may file with the director a motion to waive the filing
4 fee. The motion to waive the filing fee shall be accompanied by
5 an affidavit in a format prescribed by the department, showing
6 in detail:

- 7 (1) The party's inability to pay the filing fee;
8 (2) The party's belief that the party is entitled to
9 redress; and
10 (3) A statement of the issues that the party intends to
11 present at [~~the hearing~~] proceedings before a medical
12 [~~claims~~] inquiry and conciliation panel.

13 (b) The director shall decide on the motion to waive the
14 filing fee as expeditiously as possible, and no oral arguments
15 shall be permitted.

16 (c) If the director grants the motion to waive the filing
17 fee, the party may proceed without further application to the
18 director or panel, and without payment of the filing fee. If
19 the motion is denied, the director shall state the reasons for
20 the denial in writing. The director shall promptly provide the
21 party with a filed copy of the director's order granting or
22 denying the motion.



1 (d) If a motion to waive the filing fee is denied by the
2 director, the party may seek judicial review under section 91-
3 14.

4 (e) If the director denies a party's motion to waive the
5 filing fee, the party shall pay the filing fee within thirty
6 days after the denial of the motion, unless the party has filed
7 an appeal under section 91-14. If the party has filed an appeal
8 under section 91-14, the party may proceed without payment of
9 the filing fee, until [~~such time as~~] the time that a final
10 judicial determination is rendered.

11 (f) If the party files an appeal under section 91-14, and
12 the court upholds the director's denial of the aggrieved party's
13 motion to waive the filing fee, the party shall pay the filing
14 fee within thirty days after the court's affirmation of the
15 denial. If the court determines that the party's motion for
16 waiver of the filing fee was improperly denied, the party shall
17 be entitled to proceed without payment of the filing fee.

18 §671-12 Review by panel required; notice; presentation of
19 [~~claims;~~] inquiry; request for a more definite statement of the
20 [~~claim-~~] inquiry. (a) [~~Effective July 1, 1976, any~~] Any person
21 or the person's representative [~~claiming that a medical tort has~~
22 ~~been committed~~] having concerns regarding the existence of a



1 medical tort shall submit ~~[a statement of the claim]~~ an inquiry
2 to the medical ~~[claim]~~ inquiry and conciliation panel before a
3 suit based on the ~~[claim]~~ circumstances of the inquiry may be
4 commenced in any court of this State. ~~[Claims]~~ Inquiries shall
5 be submitted to the medical ~~[claim]~~ inquiry and conciliation
6 panel in writing~~[- The claimant shall set forth]~~ and shall
7 include the facts upon which the ~~[claim]~~ inquiry is based and
8 ~~[shall include]~~ the names of all parties against whom the
9 ~~[claim]~~ inquiry is or may be made who are then known to the
10 ~~[claimant-]~~ person or the person's representative.

11 (b) Within five business days ~~[thereafter]~~ after receipt
12 of an inquiry the panel shall give notice of the ~~[claim]~~ inquiry
13 and the statement of the ~~[claim-]~~ inquiry, by certified mail, to
14 all health care providers and others who are or may be parties
15 to the ~~[claim]~~ inquiry and shall furnish copies of written
16 ~~[claims]~~ inquiries to ~~[such]~~ those persons. ~~[Such]~~ The notice
17 shall set forth a date, not more than twenty days after the
18 mailing of the notice, within which any health care provider
19 against whom ~~[a claim]~~ an inquiry is made shall file a written
20 response ~~[to the claim-]~~ and a date and time, not less than five
21 days following the last date for filing a response, for [a
22 ~~hearing of]~~ a proceeding upon the inquiry by the panel[- Such]



1 and the parties. The notice shall describe the nature and
2 purpose of the panel's proceedings and shall designate the place
3 of the meeting. The times originally set forth in the notice
4 may be enlarged by the chairperson, on due notice to all
5 parties, for good cause.

6 (c) If the statement of the [~~claim~~] inquiry in the notice
7 is so vague or ambiguous that any party receiving notice of the
8 [~~claim~~] inquiry cannot reasonably be required to frame a written
9 response, the party may submit a written request to the director
10 of commerce and consumer affairs for a more definite statement
11 before filing the written response. Copies of the request shall
12 be provided to the panel[~~, the claimant,~~] and [~~either~~] all
13 affected parties. The request, which shall be ex parte and stay
14 the proceedings of the panel until notice of the director's
15 decision is given to the panel and all parties, shall specify
16 the defects complained of and the details desired. The director
17 may deny, grant, or modify the request at the director's own
18 discretion, without the necessity of a hearing, although the
19 director may reach a decision after consulting with the panel or
20 [~~the claimant,~~] any party or parties. The director shall
21 provide notice of the decision to the panel[~~, the claimant,~~] and
22 [~~either~~] all affected parties. If the request is granted and



1 ~~[the claimant]~~ any party so directed fails to provide a more
2 definite statement of the ~~[claim]~~ inquiry within five days after
3 notice of the decision, the panel may make ~~[such]~~ an order as it
4 deems just. This subsection shall not be used as a tactic to
5 delay the proceedings.

6 ~~[H]~~**\$671-12.5**~~[I]~~ **Certificate of consultation.** (a) Any
7 ~~[claim]~~ inquiry filed with the medical ~~[claim]~~ inquiry and
8 conciliation panel under this chapter shall be accompanied by a
9 certificate ~~[which]~~ that declares one of the following:

10 (1) That the ~~[claimant or the claimant's]~~ party initiating
11 the inquiry or the party's attorney has consulted with
12 at least one physician who is licensed to practice in
13 this State or any other state, and who is
14 knowledgeable or experienced in the same medical
15 specialty as the health care professional against whom
16 the ~~[claim]~~ inquiry is made, and that the ~~[claimant or~~
17 ~~claimant's]~~ party or the party's attorney has
18 concluded on the basis of ~~[such]~~ the consultation that
19 there is a reasonable and meritorious cause for filing
20 the ~~[claim-]~~ inquiry. If the ~~[claimant or the~~
21 ~~claimant's]~~ party initiating the inquiry or the
22 party's attorney is not able to consult with a



1 physician in the same medical specialty as the health
2 care professional against whom the ~~[claim]~~ inquiry is
3 made, ~~[the claimant or claimant's]~~ that party or the
4 party's attorney may consult with a physician who is
5 licensed in this State or in any other state who is
6 knowledgeable and experienced in a medical specialty
7 that is as closely related as practicable to the
8 medical specialty of the health care professional
9 against whom the ~~[claim]~~ inquiry is made. The
10 physician or physicians consulted ~~[by the claimant or~~
11 ~~the claimant's attorney]~~ may not be a party to the
12 ~~[case,]~~ inquiry, nor be compelled to testify or
13 otherwise participate in ~~[the hearing before]~~
14 proceedings related to the medical [claim] inquiry and
15 conciliation panel;

- 16 (2) That the ~~[claimant or the claimant's]~~ party initiating
17 the inquiry or the party's attorney was unable to
18 obtain the consultation required by paragraph (1)
19 because a statute of limitations would impair the
20 action and that the certificate required by paragraph
21 (1) could not be obtained before the impairment of the
22 action. If a certificate is executed pursuant to this



1 paragraph, the certificate required by paragraph (1)
2 shall be filed by the [~~claimant or the claimant's~~]
3 party initiating the inquiry or the party's attorney
4 within ninety days after filing the [~~claim~~] inquiry;
5 or

- 6 (3) That the [~~claimant or the claimant's~~] party initiating
7 the inquiry or the party's attorney was unable to
8 obtain the consultation required by paragraph (1)
9 after the [~~claimant or the claimant's~~] party or the
10 party's attorney had made a good faith attempt to
11 obtain [~~such~~] the consultation and the physician
12 contacted would not agree to [~~such a~~] the
13 consultation. For purposes of this paragraph, "good
14 faith attempt" refers to the responsibility of a
15 [~~claimant or claimant's~~] party initiating an inquiry
16 or the party's attorney to make reasonable efforts to
17 contact a physician for the purpose of reviewing the
18 circumstances upon which [~~a claim~~] an inquiry is
19 based. The [~~claimant or claimant's~~] party initiating
20 the inquiry or the party's attorney may contact
21 physicians by letter, telephone, facsimile, or other
22 electronic means of communication. If the physician



1 does not respond within a reasonable time, the
2 ~~[claimant or claimant's]~~ party initiating the inquiry
3 or the party's attorney may submit ~~[its claim]~~ the
4 inquiry to the medical ~~[claim]~~ inquiry and
5 conciliation panel along with a certificate declaring
6 ~~[such]~~ the nonresponse to ~~[claimant's]~~ the party or
7 the party's attorney's good faith attempt. A "good
8 faith attempt" shall ultimately be evaluated in light
9 of the goal of having a qualified physician assist the
10 ~~[claimant or claimant's]~~ party initiating the inquiry
11 or the party's attorney in understanding the basis of
12 the ~~[claim,]~~ inquiry and ~~[such]~~ the determination
13 shall depend upon the circumstances of each individual
14 case.

15 (b) Where a ~~[claimant or the claimant's]~~ party initiating
16 an inquiry or the party's attorney intends to rely solely on a
17 failure to inform of the consequences of a procedure (informed
18 consent), this section shall be inapplicable. The ~~[claimant or~~
19 ~~the claimant's]~~ party initiating an inquiry or the party's
20 attorney shall certify upon filing of the ~~[claim]~~ inquiry that
21 ~~[the claimant or the claimant's attorney is]~~ the party or the
22 party's attorney is relying solely on the failure to inform of



1 the consequences of a procedure and for that reason is not
2 filing a certificate as required by this section.

3 (c) For the purposes of this section, the ~~[claimant or the~~
4 ~~claimant's]~~ party initiating an inquiry or the party's attorney
5 shall not be required to disclose the names of any physician
6 consulted to fulfill the requirements of subsection (a) to any
7 of the other parties to the ~~[claim-]~~ inquiry. The medical
8 ~~[claim]~~ inquiry and conciliation panel may require the ~~[claimant~~
9 ~~or the claimant's]~~ party initiating an inquiry or the party's
10 attorney to disclose the name of any physician consulted to
11 fulfill the requirements of subsection (a). No disclosure of
12 the name of any physician consulted to fulfill the requirements
13 of subsection (a) shall be made to any of the other parties to
14 the ~~[claim-]~~ inquiry; provided that the medical ~~[claim]~~ inquiry
15 and conciliation panel may contact ~~[any such]~~ the physician to
16 determine if the requirements of subsection (a) were met.

17 (d) Unless a certificate is filed pursuant to subsection
18 (a) or (b), the ~~[claim]~~ inquiry shall not be received for filing
19 by the medical ~~[claim]~~ inquiry and conciliation panel.

20 **§671-13 Medical ~~[claim]~~ inquiry and conciliation panel**
21 **~~[hearing, fact finding, evidence,]~~ proceedings, voluntary**
22 **settlement.** Every ~~[claim of]~~ inquiry regarding a medical tort



1 shall be ~~heard~~ processed by the medical ~~claim~~ inquiry and
2 conciliation panel within thirty days after the last date for
3 filing a response. No persons other than the panel, witnesses,
4 and consultants called by the panel, and the persons listed in
5 section 671-14 shall be present except with the permission of
6 the chairperson. The panel may, in its discretion, conduct an
7 inquiry of a party, witness, or consultant without the presence
8 of any or all parties.

9 The ~~hearing~~ proceedings shall be informal. Chapters 91
10 and 92 shall not apply. The panel may require a stenographic
11 record of all or part of its proceedings for the use of the
12 panel, but ~~such~~ the record shall not be made available to the
13 parties. The panel may receive any oral or documentary
14 evidence. ~~Questioning of parties, witnesses, and consultants~~
15 ~~may be conducted by the panel, and the panel may, in its~~
16 ~~discretion, permit any party, or any counsel for a party to~~
17 ~~question other parties, witnesses, or consultants. The panel~~
18 ~~may designate who, among the parties, shall have the burden of~~
19 ~~going forward with the evidence with respect to such issues as~~
20 ~~it may consider, and unless otherwise designated by the panel,~~
21 ~~when medical and hospital records have been provided to the~~
22 ~~claimant for the claimant's proper review, such burden shall~~



1 ~~initially rest with the claimant at the commencement of the~~
2 ~~hearing.]~~ The panel shall conduct proceedings in a manner
3 appropriate to the circumstances of the inquiry and to
4 facilitate resolution of the matter. The panel shall conduct
5 proceedings in a non-adversarial manner consistent with the
6 primary purpose of conciliation.

7 The panel shall have the power to require by subpoena the
8 appearance and testimony of witnesses and the production of
9 documentary evidence. When [~~such~~] the subpoena power is
10 utilized, notice shall be given to all parties. The testimony
11 of witnesses may be taken either orally before the panel or by
12 deposition. In cases of refusal to obey a subpoena issued by
13 the panel, the panel may invoke the aid of any circuit court in
14 the State, which may issue an order requiring compliance with
15 the subpoena. Failure to obey [~~such~~] an order may be punished
16 by the court as a contempt thereof. Any member of the panel,
17 the director of [~~the department,~~] commerce and consumer affairs,
18 or any person designated by the director [~~of the department~~] may
19 sign subpoenas. Any member of the panel may administer oaths
20 and affirmations, examine witnesses, and receive evidence.
21 Notwithstanding [~~such~~] these powers, the panel shall attempt to



1 secure the voluntary appearance, testimony, and cooperation of
2 parties, witnesses, and consultants without coercion.

3 At ~~[the hearing of the]~~ panel proceedings and ~~[in arriving~~
4 ~~at its opinion]~~ to assist its conciliation role, the panel
5 ~~[shall]~~ may consider, but not be limited to, statements or
6 testimony of witnesses, hospital and medical records, nurses'
7 notes, x-rays, and other records kept in the usual course of the
8 practice of the health care provider without the necessity for
9 other identification or authentication, statement of fact, or
10 opinion on a subject contained in a published treatise,
11 periodical, book, or pamphlet, or statements of experts without
12 the necessity of the experts appearing at the ~~[hearing.]~~
13 proceeding. The panel may upon the application of any party or
14 upon its own decision appoint as a consultant, an impartial and
15 qualified physician, surgeon, physician and surgeon, or other
16 professional person or expert to testify before the panel or to
17 conduct any necessary professional or expert examination of the
18 ~~[claimant]~~ party initiating the inquiry or relevant evidentiary
19 matter and to report to or testify as a witness thereto. ~~[Such~~
20 ~~a]~~ The consultant shall not be compensated or reimbursed except
21 for travel and living expenses to be paid as provided in section
22 671-11. Except for the production of hospital and medical



1 records, nurses' notes, x-rays, and other records kept in the
2 usual course of the practice of the health care provider,
3 discovery by the parties shall not be allowed.

4 During the [~~hearing and at any time prior to the rendition~~
5 ~~of an advisory decision pursuant to section 671-15,~~] proceedings
6 or at any time before termination, the panel may encourage the
7 parties to settle or otherwise dispose of the [~~case~~] inquiry
8 voluntarily.

9 **§671-14 Same; persons attending [~~hearings~~] proceedings of**
10 **panel.** Unless excluded or excused by the panel, the following
11 persons shall attend [~~hearings~~] proceedings before the panel:

- 12 (1) The party or parties [~~making the claim,~~] submitting
13 the inquiry;
- 14 (2) The health care provider or providers against whom the
15 [~~claim is made~~] inquiry is submitted or
16 representatives thereof, other than counsel,
17 authorized to act for [~~such~~] the health care provider
18 or providers; and
- 19 (3) Counsel for the parties, if any.

20 **§671-15 [~~Same, decisions.~~] Panel termination. [(a)**
21 ~~Within thirty days after the completion of a hearing, the~~
22 ~~medical claim conciliation panel shall file a written advisory~~



1 ~~decision with the insurance commissioner who shall thereupon~~
2 ~~mail copies to all parties concerned, their counsel, and the~~
3 ~~representative of each health care provider's liability~~
4 ~~insurance carrier authorized to act for such carrier, as~~
5 ~~appropriate. The insurance commissioner also shall mail copies~~
6 ~~of the advisory decision to the department of commerce and~~
7 ~~consumer affairs, if the claim is against a physician,~~
8 ~~osteopathic physician, or surgeon licensed under chapter 453 or~~
9 ~~a podiatrist licensed under chapter 463E. The panel shall~~
10 ~~decide the issue of liability and shall state its conclusions in~~
11 ~~substantially the following language: "We find the health care~~
12 ~~provider was actionably negligent in his or her care and~~
13 ~~treatment of the patient and we, therefore, find for the~~
14 ~~claimant"; or "We find the health care provider was not~~
15 ~~actionably negligent in his or her care and treatment of the~~
16 ~~patient and we, therefore, find for the health care provider".~~

17 ~~(b) After a finding of liability, the medical claim~~
18 ~~conciliation panel shall decide the amount of damages, if any,~~
19 ~~which should be awarded in the case. The decision as to damages~~
20 ~~shall include in simple, concise terms a division as to which~~
21 ~~portion of the damages recommended are attributable to economic~~



1 ~~losses and which to noneconomic losses; provided the panel may~~
2 ~~not recommend punitive damages.~~

3 ~~(c) The decisions shall be signed by all members of the~~
4 ~~medical claim conciliation panel; provided that any member of~~
5 ~~the panel may file a written concurring or dissenting opinion.~~

6 ~~(d) The advisory decision required by this section need~~
7 ~~not be filed if the claim is settled or otherwise disposed of~~
8 ~~before the decision is written or filed.] The director of~~
9 ~~commerce and consumer affairs or the panel shall notify all~~
10 ~~affected parties upon termination of panel proceedings. At the~~
11 ~~discretion of the director or the panel, a notice of termination~~
12 ~~may state whether any party or parties to the matter failed to~~
13 ~~meet the requirements of this part or meaningfully participate~~
14 ~~in panel proceedings.~~

15 **[+]§671-15.5[+] Expungement of records; malpractice**
16 **insurance rates.** (a) ~~[Upon a decision by the medical claim~~
17 ~~conciliation panel finding for the health care provider pursuant~~
18 ~~to section 671-15(a), the] A health care provider may apply to~~
19 ~~the panel for expungement of all records of the related~~
20 ~~proceedings. The panel shall expunge all records if [a majority~~
21 ~~of] the panel [~~finds that the complaint is fraudulent or~~~~
22 ~~~~frivolous.] agrees that the inquiry did not provide a sufficient~~~~



1 basis to support the finding of a medical tort against the
2 health care provider applying for expungement.

3 (b) No insurer providing professional liability insurance
4 for a health care provider shall increase any premium rate for
5 the health care provider on the basis of the filing of [a
6 ~~medical tort claim against~~] an inquiry involving the health care
7 provider [that is determined by] with the medical [claim]
8 inquiry and conciliation panel [to be fraudulent or frivolous.]
9 unless an indemnity payment is made to the party initiating the
10 inquiry or the party initiating the inquiry institutes
11 litigation in a court of competent jurisdiction based on the
12 circumstances of the inquiry.

13 **§671-16 Subsequent litigation; excluded evidence.** The
14 ~~[claimant]~~ party initiating the inquiry may institute litigation
15 based upon the ~~[claim]~~ circumstances of the inquiry in an
16 appropriate court only after ~~[a party to a]~~ the medical [claim]
17 inquiry and conciliation panel [hearing rejects the decision of
18 the panel,] proceedings were terminated pursuant to section
19 671-15; a party has participated in alternative dispute
20 resolution pursuant to section 671-16.6; or [after] the twelve-
21 month period under section 671-18 has expired.



1 No statement made in the course of the ~~[hearing]~~
2 proceedings of the medical ~~[claim]~~ inquiry and conciliation
3 panel shall be admissible in evidence either as an admission, to
4 impeach the credibility of a witness, or for any other purpose
5 in any trial of the action; provided that ~~[such]~~ the statements
6 may be admissible for the purpose of section 671-19~~[, hereof]~~.
7 No decision, conclusion, finding, statement, or recommendation
8 of the medical ~~[claim]~~ inquiry and conciliation panel on the
9 issue of liability or on the issue of damages shall be admitted
10 into evidence in any subsequent trial, nor shall any party to
11 the medical ~~[claim]~~ inquiry and conciliation panel ~~[hearing,]~~
12 proceeding, or the counsel or other representative of ~~[such]~~ a
13 party, refer or comment thereon in an opening statement, an
14 argument, or at any other time, to the court or jury; provided
15 that ~~[such]~~ the decision, conclusion, finding, or recommendation
16 may be admissible for the purpose of section 671-19~~[, hereof]~~.

17 **[+]§671-16.5[+] Arbitration; subsequent litigation.** Any
18 person or the person's representative claiming that a medical
19 tort has been committed or any health care provider against whom
20 ~~[a claim]~~ an inquiry has been made may elect to bypass the court
21 annexed arbitration program under section 601-20 after the
22 ~~[claim]~~ inquiry has been submitted to the medical ~~[claim]~~



1 inquiry and conciliation panel and the panel has [~~rendered a~~
2 ~~decision or~~] been terminated pursuant to section 671-15 if the
3 party meaningfully participated in panel proceedings, an
4 alternative dispute resolution process has been terminated
5 pursuant to section 671-16.6, or the panel or alternative
6 dispute resolution process has not [~~reached a decision~~]
7 completed proceedings within the tolling period of the statute
8 of limitations under section 671-18.

9 [+]§671-16.6[+] **Submission of [~~claim~~] inquiry to an**
10 **alternative dispute resolution provider.** (a) Any [~~claim~~]
11 inquiry initially filed with the medical [~~claim~~] inquiry and
12 conciliation panel may be subsequently submitted to an
13 alternative dispute resolution provider upon the written
14 agreement of all of the parties [~~to the claim~~] and with the
15 written approval of the director[-] of commerce and consumer
16 affairs. The director shall approve the alternative dispute
17 resolution provider and the alternative dispute resolution
18 procedures. All filing fees, less a processing fee of \$50,
19 shall be refunded to the appropriate parties if the panel was
20 not constituted or had not taken any action related to the
21 inquiry prior to the submission of the inquiry to an alternative
22 dispute resolution provider. If the panel was constituted or



1 took any action prior to the submission of the inquiry to an
2 alternative dispute resolution provider, the remaining balance
3 of any filing fees shall be refunded to the appropriate parties,
4 less a processing fee of \$50 and a pro-rata amount to be
5 determined by the director.

6 (b) The parties shall comply with the procedures
7 established by the alternative dispute resolution provider and
8 approved by the director. If a party does not comply with those
9 procedures, any other party may file a motion with the director
10 to have the [~~claim~~] inquiry resubmitted to the medical [~~claim~~]
11 inquiry and conciliation panel. The director may collect any
12 filing fees that were refunded pursuant to subsection (a) from a
13 party that resubmits its inquiry.

14 (c) Notwithstanding section 671-12, any inquiry may be
15 submitted directly to an alternative dispute resolution process
16 upon the written agreement of all parties without first
17 submitting the inquiry to a medical inquiry and conciliation
18 panel. A written agreement shall be effective as of the date of
19 its execution by the parties. Any inquiry submitted directly to
20 alternative dispute resolution need not be subsequently
21 submitted to a medical inquiry and conciliation panel and shall



1 not be subject to filing fees assessed by the director for the
2 medical inquiry and conciliation panel.

3 ~~[(e)]~~ (d) Within thirty days after the completion of the
4 alternative dispute resolution process, the alternative dispute
5 resolution provider shall notify all parties concerned, their
6 counsel, and the representative of each health care provider's
7 liability insurance carrier authorized to act for the carrier,
8 as appropriate, that the alternative dispute resolution process
9 has been completed.

10 ~~[(d)]~~ (e) The ~~[claimant]~~ party submitting the inquiry may
11 institute litigation based upon the ~~[claim]~~ inquiry in an
12 appropriate court only if:

- 13 (1) The parties were not able to resolve the entire
14 ~~[claim]~~ matter through the alternative dispute
15 resolution process and the matter has not been
16 resubmitted to the medical ~~[claim]~~ inquiry and
17 conciliation panel pursuant to subsection (b) of this
18 section; or
- 19 (2) The ~~[claim]~~ matter has not been resolved through the
20 alternative dispute resolution process after twelve
21 months from the date the ~~[claim]~~ matter was filed with



1 the approved or agreed upon alternative dispute
2 resolution provider.

3 [~~e~~] (f) No statement made in the course of the approved
4 or agreed upon alternative dispute resolution process shall be
5 admissible in evidence as an admission, to impeach the
6 credibility of a witness, or for any other purpose in any trial
7 of the action. No decision, conclusion, finding, or
8 recommendation of the approved or agreed upon alternative
9 dispute resolution provider on the issue of liability or on the
10 issue of damages shall be admitted into evidence in any
11 subsequent trial, nor shall any party to the approved or agreed
12 upon alternative dispute resolution hearing, their counsel, or
13 other representative of [~~such~~] the party, refer or comment
14 thereon in an opening statement, in an argument, or at any time,
15 to the court or jury.

16 [+]§671-17[+] **Immunity of panel members from liability.**

17 No member of a medical [~~claim~~] inquiry and conciliation panel
18 shall be liable in damages for libel, slander, or other
19 defamation of character of any party to a medical [~~claim~~]
20 inquiry and conciliation panel proceeding for any action taken
21 or any decision, conclusion, finding, or recommendation made by
22 the member while acting within the member's capacity as a member



1 of a medical [~~claim~~] inquiry and conciliation panel under this
2 [~~Act.~~] part.

3 **§671-18 Statute of limitations tolled.** The filing of the
4 [~~claim~~] inquiry with the medical [~~claim~~] inquiry and
5 conciliation panel or with an approved or agreed upon
6 alternative dispute resolution provider shall toll any
7 applicable statute of limitations, and [~~any such~~] the statute of
8 limitations shall remain tolled until sixty days after the [~~date~~
9 ~~the decision~~] termination of the panel or the notification of
10 completion from the approved or agreed upon alternative dispute
11 resolution provider is mailed or delivered to the parties. If
12 [~~a decision by the medical claim conciliation panel is not~~
13 ~~reached~~] panel proceedings are not completed within twelve
14 months, or the alternative dispute resolution process is not
15 completed within twelve months, the statute of limitations shall
16 resume running and the party filing the [~~claim~~] inquiry may
17 commence a suit based on the [~~claim~~] circumstances related to
18 the inquiry in any appropriate court of this State. The panel
19 or the approved or agreed upon alternative dispute resolution
20 provider shall notify all parties in writing of this provision.

21 **§671-19 Duty to cooperate; assessment of costs and fees.**

22 It shall be the duty of every person who files [~~a claim~~] an



1 inquiry with the medical [~~claim~~] inquiry and conciliation panel,
2 every health care provider against whom the [~~claim~~] inquiry is
3 made, and every insurance carrier or other person providing
4 medical tort liability insurance for the health care provider,
5 to cooperate with the medical [~~claim~~] inquiry and conciliation
6 panel and meaningfully participate in panel proceedings for the
7 purpose of achieving a prompt, fair, and just resolution,
8 disposition, or settlement of the [~~claim~~] inquiry, provided
9 that cooperation and participation shall not prejudice the
10 substantive rights of those persons.

11 Any party may apply to the panel to have the costs of the
12 action assessed against any party for failure to cooperate with
13 the panel[~~-~~] or meaningfully participate in panel proceedings.
14 The panel may award costs, or a portion thereof, including
15 attorney's fees, witness fees[~~-~~] including those of expert
16 witnesses, filing fees, and costs of the medical [~~claim~~] inquiry
17 and conciliation panel [~~hearing~~] proceedings to the party
18 applying therefor.

19 In determining whether any person has failed to cooperate
20 or meaningfully participate in good faith, the panel shall
21 consider, but is not limited to, the following:



- 1 (1) The attendance of the persons at [~~the hearing~~]
2 proceedings of the medical [~~claim~~] inquiry and
3 conciliation panel;
- 4 (2) The extent to which representatives of parties and
5 counsel representing parties came to panel [~~hearings~~]
6 proceedings with knowledge of the claims and defenses
7 and authority to negotiate a settlement or other
8 disposition of the [~~claim~~] matter;
- 9 (3) The testimony of members of the panel as to the facts
10 of the person's participation in the panel [~~hearing~~]
11 proceeding;
- 12 (4) The extent of the person's cooperation in providing
13 the panel with documents and testimony called for by
14 the panel;
- 15 (5) The reasons advanced by the person so charged for not
16 fully cooperating, participating, or negotiating; and
- 17 (6) The failure of the person to submit any required fees
18 to the department of commerce and consumer affairs, as
19 required by this chapter.

20 The party against whom costs are awarded may appeal the
21 award to the circuit court. The court may affirm or remand the
22 case with instructions for further proceedings; or it may



1 reverse or modify the award if the substantial rights of the
2 petitioners may have been prejudiced because the award is
3 characterized as abuse of discretion.

4 [+]§671-20[+] **Annual report.** The director of commerce and
5 consumer affairs shall prepare and submit to the legislature
6 annually, twenty days prior to the convening of each regular
7 session, a report containing the director's evaluation of the
8 operation and effects of this chapter. The report shall include
9 a summary of the [~~claims~~] inquiries brought before the medical
10 [~~claim~~] inquiry and conciliation panel and the disposition of
11 [~~such claims,~~] those inquiries, a description and summary of the
12 work of the panel under this chapter, an appraisal of the
13 effectiveness of this chapter in securing prompt and fair
14 disposition of [~~medical tort claims,~~] inquiries regarding the
15 rendering of professional services by health care providers that
16 involved injury, death, or other damages to a patient, a review
17 of the number and outcomes of [~~claims~~] inquiries brought under
18 section 671-12, and recommendations for changes, modifications,
19 or repeal of this chapter or parts thereof with accompanying
20 reasons and data."

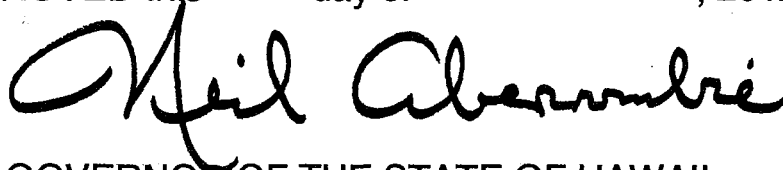


1 SECTION 5. This Act does not affect rights and duties that
2 matured, penalties that were incurred, and proceedings that were
3 begun before its effective date.

4 SECTION 6. Statutory material to be repealed is bracketed
5 and stricken. New statutory material is underscored.

6 SECTION 7. This Act shall take effect on January 1, 2013.

APPROVED this 9 day of JUL , 2012



GOVERNOR OF THE STATE OF HAWAII

