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## 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  
3 more as inquiries rather than actual claims, and patients or  
4 their 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 the actual nature of many filings,  
15 particularly by pro se parties, are inquisitive in nature, and  
16 based on lack of information rather than claims based on  
17 substantive analysis of the applicable standard of care. The  
18 legislature finds that proceedings with medical claim



1 conciliation panels should be conducted in a non-adversarial way  
2 and structured to facilitate conveying information rather than  
3 assigning blame. The legislature believes that increased  
4 transparency and education for those who perceive fault on the  
5 part of medical providers will assist in the amicable resolution  
6 of their concerns without the need for formal claims. Medical  
7 claim conciliation panels should endeavor to provide a prompt  
8 exchange of information and serve a facilitation and  
9 conciliation role for these inquiries. However, these panel  
10 proceedings are intended to provide a forum of last resort and  
11 are not intended as a substitute for informal direct  
12 communications between patients and providers. Accordingly,  
13 statutory provisions relating to filing fees and certificates of  
14 consultations should be retained to assure that the panel  
15 process is not taken lightly and to encourage patients and  
16 providers to attempt informal resolution of their concerns.

17 The legislature further finds that making medical claim  
18 conciliation panel proceedings advisory in nature would allow  
19 the panels' role to become more conciliatory rather than  
20 adjudicatory. To this end, the current law would be amended to  
21 reflect this practice by deleting the decision-making function



1 of the panels and, instead, emphasizing conciliation and  
2 mediation to resolve matters that are before them.

3       The legislature further finds that there is much that the  
4 medical claim conciliation panel process may do to narrow and  
5 define claims when complete resolution cannot be achieved during  
6 panel proceedings and litigation subsequently must be commenced.  
7 The legislature does not intend for deletion of the panels'  
8 decision-making function to eliminate panels' ability to  
9 consider and discuss liability, causation, or damages with the  
10 parties, but rather, it is intended to focus discussion of those  
11 issues in the context of conciliation or mediation that better  
12 reflects the panels' advisory nature. Rather, the legislature  
13 foresees that this conciliatory approach would better assist  
14 parties in fully understanding the nature of claims, defenses,  
15 and damages and encourage parties to reach a voluntary  
16 settlement. Medical claim conciliation panels should continue  
17 to express their opinions on liability, causation, and damages  
18 to the parties to assist them in evaluating their positions,  
19 however, panels would no longer render formal decisions in order  
20 to give the panels' greater flexibility in handling true claims.  
21 Panels would continue to have the authority to require  
22 adversarial proceedings when adversarial proceedings would be



1 more helpful for the ultimate resolution of claims, but only  
2 after consultation with or agreement by the parties and only if  
3 the panel finds that further proceedings would be helpful to the  
4 resolution of important issues of the claim.

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

15 The legislature also finds that medical malpractice  
16 insurers should be prohibited from increasing premiums based on  
17 medical claim conciliation panel filings since these filings  
18 would be properly recognized as inquiries rather than true  
19 claims, and panel records would be expunged if when there is an  
20 insufficient basis to support findings of medical torts against  
21 providers.



1           The purpose of this Act is to amend part II of chapter 671,  
2 Hawaii Revised Statutes, relating to medical claim conciliation,  
3 to more closely reflect actual practice and the original intent  
4 that the panels serve in a conciliation role.

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

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

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

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



1 department determines that the physician or osteopathic  
2 physician has violated this chapter, the department shall  
3 present the results of its investigation to the Hawaii medical  
4 board for appropriate disciplinary proceedings."

5 SECTION 4. Part II of chapter 671, Hawaii Revised  
6 Statutes, is amended to read as follows:

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

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

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



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

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



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

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





1 fee shall be retained from each party's filing fee, and shall be  
2 used to defray the administrative costs of the medical [~~claims~~]  
3 inquiry and conciliation panel program.

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

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

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



1           [+]§671-11.5[+]   **Waiver of filing fee.** (a) If any party  
2   [~~to a claim~~] cannot pay the required filing fee, the party may  
3   file with the director a motion to waive the filing fee. The  
4   motion to waive the filing fee shall be accompanied by an  
5   affidavit in a format prescribed by the department, showing in  
6   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 person or  
21 the person's representative [~~claiming that a medical tort has~~  
22 ~~been committed~~] having concerns regarding the existence or



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

12 (b) Within five business days thereafter the panel shall  
13 give notice of the ~~[claim]~~ inquiry and the statement of the  
14 ~~[claim-]~~ inquiry, by certified mail, to all health care  
15 providers and others who are or may be parties ~~[to the claim]~~  
16 and shall furnish copies of written ~~[claims]~~ inquiries to ~~[such]~~  
17 those persons. ~~[Such]~~ The notice shall set forth a date, not  
18 more than twenty days after mailing the notice, within which any  
19 health care provider against whom ~~[a claim]~~ an inquiry is made  
20 shall file a written response ~~[to the claim-]~~ and a date and  
21 time, not less than five days following the last date for filing  
22 a response, for ~~[a hearing of]~~ an 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 [~~other~~] 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 [~~other~~] 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 ~~[†]~~§671-12.5~~[†]~~ **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 their attorney has consulted with at  
 12 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 their attorney has concluded on  
 18 the basis of ~~[such]~~ the consultation that there is a  
 19 reasonable and meritorious cause for filing the  
 20 ~~[claim-]~~ inquiry. If the ~~[claimant or the claimant's]~~  
 21 party initiating the inquiry or their attorney is not  
 22 able to consult with a physician in the same medical



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

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



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





1           the inquiry to the medical [~~claim~~] inquiry and  
2           conciliation panel along with a certificate declaring  
3           ~~[such]~~ the nonresponse to [claimant's] the party or  
4           their attorney's good faith attempt. A "good faith  
5           attempt" shall ultimately be evaluated in light of the  
6           goal of having a qualified physician assist the  
7           ~~[claimant or claimant's]~~ party initiating the inquiry  
8           or their attorney in understanding the basis of the  
9           ~~[claim,~~] inquiry and ~~[such]~~ the determination shall  
10          depend upon the circumstances of each individual case.

11          (b) Where a ~~[claimant or the claimant's]~~ party initiating  
12          an inquiry or their attorney intends to rely solely on a failure  
13          to inform of the consequences of a procedure (informed consent),  
14          this section shall be inapplicable. The ~~[claimant or the~~  
15          ~~claimant's]~~ party initiating an inquiry or their attorney shall  
16          certify upon filing of the [~~claim~~] inquiry that [~~the claimant or~~  
17          ~~the claimant's attorney is]~~ they are relying solely on the  
18          failure to inform of the consequences of a procedure and for  
19          that reason is not filing a certificate as required by this  
20          section.

21          (c) For the purposes of this section, the ~~[claimant or the~~  
22          ~~claimant's]~~ party initiating an inquiry or their attorney shall



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

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

16 §671-13 Medical ~~[claim]~~ inquiry and conciliation panel  
 17 ~~[hearing; fact-finding; evidence;]~~ proceedings; voluntary  
 18 settlement. Every ~~[claim of]~~ inquiry regarding a medical tort  
 19 shall be ~~[heard]~~ processed by the medical ~~[claim]~~ inquiry and  
 20 conciliation panel within thirty days after the last date for  
 21 filing a response. No persons other than the panel, witnesses,  
 22 and consultants called by the panel, and the persons listed in



1 section 671-14 shall be present except with the permission of  
2 the chairperson. The panel may, in its discretion, conduct an  
3 inquiry of a party, witness, or consultant without the presence  
4 of any or all parties.

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



1 proceedings in a non-adversarial manner consistent with the  
2 primary purpose of conciliation.

3       The panel shall have the power to require by subpoena the  
4 appearance and testimony of witnesses and the production of  
5 documentary evidence. When [~~such~~] the subpoena power is  
6 utilized, notice shall be given to all parties. The testimony  
7 of witnesses may be taken either orally before the panel or by  
8 deposition. In cases of refusal to obey a subpoena issued by  
9 the panel, the panel may invoke the aid of any circuit court in  
10 the State, which may issue an order requiring compliance with  
11 the subpoena. Failure to obey [~~such~~] an order may be punished  
12 by the court as a contempt thereof. Any member of the panel,  
13 the director of [~~the department,~~] commerce and consumer affairs,  
14 or any person designated by the director [~~of the department~~] may  
15 sign subpoenas. Any member of the panel may administer oaths  
16 and affirmations, examine witnesses, and receive evidence.  
17 Notwithstanding [~~such~~] these powers, the panel shall attempt to  
18 secure the voluntary appearance, testimony, and cooperation of  
19 parties, witnesses, and consultants without coercion.

20       At [~~the hearing of the~~] panel proceedings and [~~in arriving~~  
21 ~~at its opinion~~] to assist its conciliation role, the panel  
22 [~~shall~~] may consider, but not be limited to, statements or



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

21 During the [~~hearing and at any time prior to the rendition~~  
22 ~~of an advisory decision pursuant to section 671-15,~~] proceedings



1 or at any time before termination, the panel may encourage the  
2 parties to settle or otherwise dispose of the case voluntarily.

3 §671-14 ~~Same; persons attending [hearings]~~ proceedings of  
4 panel. Unless excluded or excused by the panel, the following  
5 persons shall attend ~~[hearings]~~ proceedings before the panel:

- 6 (1) The party or parties ~~[making the claim;]~~ submitting  
7 the inquiry;
- 8 (2) The health care provider or providers against whom the  
9 ~~[claim is made]~~ inquiry is submitted or  
10 representatives thereof, other than counsel,  
11 authorized to act for ~~[such]~~ the health care provider  
12 or providers; and
- 13 (3) Counsel for the parties, if any.

14 §671-15 ~~[Same, decisions.]~~ Panel termination. ~~[(a)~~  
15 ~~Within thirty days after the completion of a hearing, the~~  
16 ~~medical claim conciliation panel shall file a written advisory~~  
17 ~~decision with the insurance commissioner who shall thereupon~~  
18 ~~mail copies to all parties concerned, their counsel, and the~~  
19 ~~representative of each health care provider's liability~~  
20 ~~insurance carrier authorized to act for such carrier, as~~  
21 ~~appropriate. The insurance commissioner also shall mail copies~~  
22 ~~of the advisory decision to the department of commerce and~~



1 ~~consumer affairs, if the claim is against a physician,~~  
2 ~~osteopathic physician, or surgeon licensed under chapter 453 or~~  
3 ~~a podiatrist licensed under chapter 463E. The panel shall~~  
4 ~~decide the issue of liability and shall state its conclusions in~~  
5 ~~substantially the following language: "We find the health care~~  
6 ~~provider was actionably negligent in his or her care and~~  
7 ~~treatment of the patient and we, therefore, find for the~~  
8 ~~claimant"; or "We find the health care provider was not~~  
9 ~~actionably negligent in his or her care and treatment of the~~  
10 ~~patient and we, therefore, find for the health care provider".~~

11 ~~(b) After a finding of liability, the medical claim~~  
12 ~~conciliation panel shall decide the amount of damages, if any,~~  
13 ~~which should be awarded in the case. The decision as to damages~~  
14 ~~shall include in simple, concise terms a division as to which~~  
15 ~~portion of the damages recommended are attributable to economic~~  
16 ~~losses and which to noneconomic losses; provided the panel may~~  
17 ~~not recommend punitive damages.~~

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

21 ~~(d) The advisory decision required by this section need~~  
22 ~~not be filed if the claim is settled or otherwise disposed of~~



1 ~~before the decision is written or filed.]~~ The director of  
2 commerce and consumer affairs or the panel shall notify all  
3 affected parties upon termination of panel proceedings. At the  
4 discretion of the director or the panel, a notice of termination  
5 may state whether any party or parties to the matter failed to  
6 meet the requirements of this part or meaningfully participate  
7 in panel proceedings.

8 **[+]§671-15.5[+] Expungement of records; malpractice**  
9 **insurance rates.** (a) [~~Upon a decision by the medical claim~~  
10 ~~conciliation panel finding for the health care provider pursuant~~  
11 ~~to section 671-15(a), the]~~ A health care provider may apply to  
12 the panel for expungement of all records of the related  
13 proceedings. The panel shall expunge all records if [a majority  
14 ~~of] the panel [finds that the complaint is fraudulent or~~  
15 ~~frivolous.]~~ agrees that the inquiry did not provide a sufficient  
16 basis to support the finding of a medical tort against the  
17 health care provider applying for expungement.

18 (b) No insurer providing professional liability insurance  
19 for a health care provider shall increase any premium rate for  
20 the health care provider on the basis of the filing of [a  
21 ~~medical tort claim against]~~ an inquiry involving the health care  
22 provider [that is determined by] with the medical [claim]





1 inquiry and conciliation panel [~~to be fraudulent or frivolous.~~]  
2 unless an indemnity payment is made to the party initiating the  
3 inquiry or the party initiating the inquiry institutes  
4 litigation in a court of competent jurisdiction based on the  
5 circumstances of the inquiry.

6       **§671-16 Subsequent litigation; excluded evidence.** The  
7 [~~claimant~~] party initiating the inquiry may institute litigation  
8 based upon the [~~claim~~] circumstances of the inquiry in an  
9 appropriate court only after: a party [~~to a~~] has meaningfully  
10 participated in medical [~~claim~~] inquiry and conciliation panel  
11 [~~hearing rejects the decision of the panel,~~] proceedings that  
12 were terminated pursuant to section 671-15; a party has  
13 participated in alternative dispute resolution pursuant to  
14 section 671-16.6; or [~~after~~] the twelve-month period under  
15 section 671-18 has expired.

16       No statement made in the course of the [~~hearing~~]  
17 proceedings of the medical [~~claim~~] inquiry and conciliation  
18 panel shall be admissible in evidence either as an admission, to  
19 impeach the credibility of a witness, or for any other purpose  
20 in any trial of the action; provided that [~~such~~] the statements  
21 may be admissible for the purpose of section 671-19[~~, hereof~~].  
22 No decision, conclusion, finding, statement, or recommendation



1 of the medical [~~claim~~] inquiry and conciliation panel on the  
 2 issue of liability or on the issue of damages shall be admitted  
 3 into evidence in any subsequent trial, nor shall any party to  
 4 the medical [~~claim~~] inquiry and conciliation panel [~~hearing,~~  
 5 proceeding, or the counsel or other representative of [~~such~~] a  
 6 party, refer or comment thereon in an opening statement, an  
 7 argument, or at any other time, to the court or jury; provided  
 8 that [~~such~~] the decision, conclusion, finding, or recommendation  
 9 may be admissible for the purpose of section 671-19[~~, hereof~~].

10       [+]§671-16.5[+] **Arbitration; subsequent litigation.** Any  
 11 person or the person's representative claiming that a medical  
 12 tort has been committed or any health care provider against whom  
 13 [~~a claim~~] an inquiry has been made may elect to bypass the court  
 14 annexed arbitration program under section 601-20 after the  
 15 [~~claim~~] inquiry has been submitted to the medical [~~claim~~]  
 16 inquiry and conciliation panel and the panel has [~~rendered a~~  
 17 decision] been terminated pursuant to section 671-15 if the  
 18 party meaningfully participated in panel proceedings, an  
 19 alternative dispute resolution process has been terminated  
 20 pursuant to section 671-16.6, or the panel or alternative  
 21 dispute resolution process has not [~~reached a decision~~]



1 completed proceedings within the tolling period of the statute  
2 of limitations under section 671-18.

3 ~~[+]~~§671-16.6~~[+]~~ **Submission of ~~[claim]~~ inquiry to an**  
4 **alternative dispute resolution provider.** (a) Any ~~[claim]~~  
5 inquiry initially filed with the medical ~~[claim]~~ inquiry and  
6 conciliation panel may be subsequently submitted to an  
7 alternative dispute resolution provider upon the written  
8 agreement of all of the parties ~~[to the claim]~~ and with the  
9 written approval of the director~~[-]~~ of commerce and consumer  
10 affairs. The director shall approve the alternative dispute  
11 resolution provider and the alternative dispute resolution  
12 procedures. All filing fees, less a processing fee of \$50,  
13 shall be refunded to the appropriate parties if the panel was  
14 not constituted or had not taken any action related to the  
15 inquiry prior to the submission of the inquiry to an alternative  
16 dispute resolution provider. If the panel was constituted or  
17 took any action prior to the submission of the inquiry to an  
18 alternative dispute resolution provider, the remaining balance  
19 of any filing fees shall be refunded to the appropriate parties,  
20 less a processing fee of \$50 and a pro-rata amount to be  
21 determined by the director.



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

9 (c) Notwithstanding section 671-12, any inquiry may be  
10 submitted directly to an alternative dispute resolution process  
11 upon the written agreement of all parties without first  
12 submitting the inquiry to a medical inquiry and conciliation  
13 panel. A written agreement shall be effective as of the date of  
14 its execution by the parties. Any inquiry submitted directly to  
15 alternative dispute resolution need not be subsequently  
16 submitted to a medical inquiry and conciliation panel and no  
17 filing fees shall be assessed by the director for the medical  
18 inquiry and conciliation panel.

19 (d) Within thirty days after the completion of the  
20 alternative dispute resolution process, the alternative dispute  
21 resolution provider shall notify all parties concerned, their  
22 counsel, and the representative of each health care provider's



1 liability insurance carrier authorized to act for the carrier,  
2 as appropriate, that the alternative dispute resolution process  
3 has been completed.

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

7 (1) The parties were not able to resolve the entire  
8 ~~[claim]~~ matter through the alternative dispute  
9 resolution process and the matter has not been  
10 resubmitted to the medical ~~[claim]~~ inquiry and  
11 conciliation panel pursuant to subsection (b) of this  
12 section; or

13 (2) The ~~[claim]~~ matter has not been resolved through the  
14 alternative dispute resolution process after twelve  
15 months from the date the ~~[claim]~~ matter was filed with  
16 the approved or agreed upon alternative dispute  
17 resolution provider.

18 ~~[(e)]~~ (f) No statement made in the course of the approved  
19 or agreed upon alternative dispute resolution process shall be  
20 admissible in evidence as an admission, to impeach the  
21 credibility of a witness, or for any other purpose in any trial  
22 of the action. No decision, conclusion, finding, or



1 recommendation of the approved or agreed upon alternative  
 2 dispute resolution provider on the issue of liability or on the  
 3 issue of damages shall be admitted into evidence in any  
 4 subsequent trial, nor shall any party to the approved or agreed  
 5 upon alternative dispute resolution hearing, their counsel, or  
 6 other representative of [~~such~~] the party, refer or comment  
 7 thereon in an opening statement, in an argument, or at any time,  
 8 to the court or jury.

9 **[~~f~~]§671-17[~~f~~] Immunity of panel members from liability.**

10 No member of a medical [~~e~~claim] inquiry and conciliation panel  
 11 shall be liable in damages for libel, slander, or other  
 12 defamation of character of any party to a medical [~~e~~claim]  
 13 inquiry and conciliation panel proceeding for any action taken  
 14 or any decision, conclusion, finding, or recommendation made by  
 15 the member while acting within the member's capacity as a member  
 16 of a medical [~~e~~claim] inquiry and conciliation panel under this  
 17 [~~Act.~~] part.

18 **§671-18 Statute of limitations tolled.** The filing of the  
 19 [~~e~~claim] inquiry with the medical [~~e~~claim] inquiry and  
 20 conciliation panel or with an approved or agreed upon  
 21 alternative dispute resolution provider shall toll any  
 22 applicable statute of limitations, and [~~any such~~] the statute of



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

14       **§671-19 Duty to cooperate; assessment of costs and fees.**

15 It shall be the duty of every person who files [~~a claim~~] an  
16 inquiry with the medical [~~claim~~] inquiry and conciliation panel,  
17 every health care provider against whom the [~~claim~~] inquiry is  
18 made, and every insurance carrier or other person providing  
19 medical tort liability insurance for the health care provider,  
20 to cooperate with the medical [~~claim~~] inquiry and conciliation  
21 panel and meaningfully participate in panel proceedings for the  
22 purpose of achieving a prompt, fair, and just resolution,



1 disposition, or settlement of the [~~claim,~~] inquiry, provided  
2 that cooperation and participation shall not prejudice the  
3 substantive rights of those persons.

4 Any party may apply to the panel to have the costs of the  
5 action assessed against any party for failure to cooperate with  
6 the panel[-] or meaningfully participate in panel proceedings.  
7 The panel may award costs, or a portion thereof, including  
8 attorney's fees, witness fees, including those of expert  
9 witnesses, filing fees, and costs of the medical [~~claim]~~ inquiry  
10 and conciliation panel [hearing] proceedings to the party  
11 applying therefor.

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

- 15 (1) The attendance of the persons at [~~the hearing]~~  
16 proceedings of the medical [~~claim]~~ inquiry and  
17 conciliation panel;
- 18 (2) The extent to which representatives of parties and  
19 counsel representing parties came to panel [~~hearings]~~  
20 proceedings with knowledge of the claims and defenses  
21 and authority to negotiate a settlement or other  
22 disposition of the [~~claim,~~] matter;





1 (3) The testimony of members of the panel as to the facts  
2 of the person's participation in the panel [~~hearing;~~  
3 proceeding;

4 (4) The extent of the person's cooperation in providing  
5 the panel with documents and testimony called for by  
6 the panel;

7 (5) The reasons advanced by the person so charged for not  
8 fully cooperating, participating, or negotiating; and

9 (6) The failure of the person to submit any required fees  
10 to the department of commerce and consumer affairs, as  
11 required by this chapter.

12 The party against whom costs are awarded may appeal the  
13 award to the circuit court. The court may affirm or remand the  
14 case with instructions for further proceedings; or it may  
15 reverse or modify the award if the substantial rights of the  
16 petitioners may have been prejudiced because the award is  
17 characterized as abuse of discretion.

18 [†]§671-20[†] **Annual report.** The director of commerce and  
19 consumer affairs shall prepare and submit to the legislature  
20 annually, twenty days prior to the convening of each regular  
21 session, a report containing the director's evaluation of the  
22 operation and effects of this chapter. The report shall include



1 a summary of the [~~claims~~] inquiries brought before the medical  
2 [~~claim~~] inquiry and conciliation panel and the disposition of  
3 [~~such claims,~~] those inquiries, a description and summary of the  
4 work of the panel under this chapter, an appraisal of the  
5 effectiveness of this chapter in securing prompt and fair  
6 disposition of [~~medical tort claims,~~] inquiries regarding the  
7 rendering of professional services by health care providers that  
8 involved injury, death, or other damages to a patient, a review  
9 of the number and outcomes of [~~claims~~] inquiries brought under  
10 section 671-12 and recommendations for changes, modifications or  
11 repeal of this chapter or parts thereof with accompanying  
12 reasons and data."

13 SECTION 5. This Act does not affect rights and duties that  
14 matured, penalties that were incurred, and proceedings that were  
15 begun before its effective date.

16 SECTION 6. Statutory material to be repealed is bracketed  
17 and stricken. New statutory material is underscored.



1 SECTION 7. This Act shall take effect upon its approval.

2

INTRODUCED BY:

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*[Handwritten signature]*  
*[Handwritten signature]*

JAN 17 2012



# H.B. NO. 1967

**Report Title:**

Medical Claims Conciliation

**Description:**

Makes numerous amendments to part II of chapter 671, HRS, to make the medical claims conciliation process less adversarial and to emphasize inquiry, conciliation, and settlement. Renames the panels as medical inquiry and conciliation panels.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

