

# **TESTIMONY**

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# **HB1967, HD2**

**HTH  
Committee Hearing  
03-16-2012**



NEIL ABERCROMBIE  
GOVERNOR

BRIAN SCHATZ  
LT. GOVERNOR

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KEALI'I S. LOPEZ  
DIRECTOR

**PRESENTATION OF  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
OFFICE OF ADMINISTRATIVE HEARINGS**

**TO THE SENATE COMMITTEE ON  
HEALTH  
TWENTY-SIXTH STATE LEGISLATURE  
REGULAR SESSION, 2012**

Date: Friday, March 16, 2012

Time: 1:30 p.m.

Conference Room: 229

**TESTIMONY FOR HEARING ON HB 1967, HD2  
RELATING TO MEDICAL CLAIM CONCILIATION**

TO THE HONORABLE JOSH GREEN, M.D., CHAIR, & THE HONORABLE  
CLARENCE K. NISHIHARA, VICE CHAIR, AND MEMBERS OF THE COMMITTEE:

The Office of Administrative Hearings ("OAH") of the Department of Commerce and Consumer Affairs ("DCCA") appreciates the opportunity to offer comments for the Committee's Hearing on HB 1967, HD 2, relating to Medical Claim Conciliation. My name is David Karlen, and I am the Senior Hearings Officer of the OAH.

The OAH has administered the Medical Claims Conciliation Panel (MCCP) since it was initiated by the Legislature in 1976 as part of Chapter 671 of the Hawaii Revised Statutes. Its perspective on this proposed major revamping of the MCCP Program is important to the success of the anticipated "new look" of the Program.

The OAH is supportive of the primary goal of the proposed legislation to move MCCP proceedings away from the connotations of an adversarial process and towards an emphasis on communication and conciliation. OAH supports HB 1967, HD 2.

In a previous hearing before the House Committee on Judiciary, the OAH proposed an amendment to HD 1 of this bill to make its provisions more even handed between potential plaintiffs and potential defendants. This modification was adopted by that Committee and incorporated into HD 2 which is presently before this Committee. The OAH respectfully refers this Committee to Stand. Com. Rep. No. 579-12 which explains the basis for the amendment by the House Committee on Judiciary.

The proponents of this legislation agree with HD 2 in this regard and stated so in hearing before the House Committee on Finance on February 28, 2012, as well as in a hearing on companion bill SB 2469 before the Senate Committee on Commerce and Consumer Protection on February 23, 2012. The Senate Committee passed its bill with amendments which make it virtually the same as HB 1967, HD 2, currently before you..

HB 1967, HD 2, leaves the effective date of the legislation open for discussion. OAH respectfully requests, for the reasons stated below, that the effective date be January 2, 2013. The proponents of the legislation have endorsed this proposal in prior hearings before the House Committee on Judiciary and the Senate Committee on Commerce and Consumer Protection.

Previous written testimony in support of HB 1967 recognized that the major shift into conciliation functions will place "a heavy burden" to "educate doctors, patients and legal representatives of the new role of the MCCP." As the legislation's proponents

recognize, mediation and conciliation skills are not the same as those involved with evaluating claims in an adversarial setting.

However, the proposed legislation does not make any provision for training present MCCP panel participants or obtaining new MCCP panel members who are attuned to conciliation. In addition, the proposed legislation proposes no funding for this training. Instead, the proponents appear to rely on a mere hope that volunteerism will somehow materialize to take care of this crucial factor. The OAH believes that the recruitment and training activities cannot be left to an unorganized hope that somehow it will all work out.

The OAH has recently been in the forefront of developing the mechanics of a dispute resolution process for the Mortgage Foreclosure Dispute Resolution Program (MFDRP) established by Act 48 of the 2011 Legislature. Our experience has shown that it takes time, and money, to organize the training of the dispute resolution neutrals for that program even though all participants were already attorneys and/or real estate professionals familiar with the basics of mortgages and foreclosures. The OAH was able to organize such training on both Oahu and the island of Hawaii, but it took time and money to do so. The new MCCP will need a similar program to prepare its panels for the conciliation process.

Accordingly, the OAH proposes that the present legislation be amended to delay the effective date of the legislation to January 1, 2013 to allow the OAH to ascertain the renewed or new panel members interested in the conciliation process. During that time, OAH will work with the bill's sponsors to administer and fund a training program in conciliation.

Testimony on House Bill No. 1967, HD2  
March 16, 2012  
Page 4

Thank you for the opportunity for OAH to provide its comments on this proposed legislation.



## **HAWAII MEDICAL ASSOCIATION**

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### **COMMITTEE ON HEALTH**

**Senator Josh Green, M.D., Chair**

**Senator Clarence K. Nishihara, Vice Chair**

**DATE: Friday, March 16, 2012**

**TIME: 1:30 p.m.**

**PLACE: Conference Room 229**

From: Hawaii Medical Association

Dr. Roger Kimura, MD, President

Linda Rasmussen, MD, Legislative Co-Chair

Dr. Joseph Zobian, MD, Legislative Co-Chair

Dr. Christopher Flanders, DO, Executive Director

Lauren Zirbel, Community and Government Relations

Re: **HB 1967 HD 1 RELATING TO MEDICAL CLAIM CONCILIATION**

In Support

Chairs & Committee Members:

For over a decade HMA has been attempting to legislatively address the fact that our doctor shortage in Hawaii is caused in part by high malpractice insurance costs and an unfriendly liability system. This bill represents a compromise that all parties can agree to. HMA supports this measure and is hopeful that it will reduce Hawaii's medical liability costs and thus help aid the effort to provide greater access to care to Hawaii's residents.

Thank you for the opportunity to testify.

#### **OFFICERS**

**PRESIDENT - ROGER KIMURA, MD, PRESIDENT ELECT - STEVE KEMBLE, MD**

**IMMEDIATE PAST PRESIDENT – MORRIS MITSUNAGA, MD, SECRETARY - THOMAS KOSASA, MD, TREASURER –  
WALTON SHIM, MD, EXECUTIVE DIRECTOR – CHRISTOPHER FLANDERS, DO**

**TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) IN SUPPORT OF H.B. NO. 1967, HD 2**

To: Chairman Josh Green and Members of the Senate Committee on Health:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in support of H.B. No. 1967, HD 2, relating to Medical Claim Conciliation.

Beginning in late 2010, individuals interested in improving Hawaii's health care claims environment began meeting at the John A. Burns School of Medicine. Participants included faculty from the medical and law schools, attorneys representing both plaintiffs and defense, and representatives of the Hawaii Medical Association. The meetings were initiated and led by Dr. David Sakamoto, Deputy Director of Health, and Dr. Kelly Withy, associate professor of medicine and Director of the Hawaii/Pacific Basin Area Health Education Center (AHEC). I was one of the participants representing the plaintiff's perspective.

H.B. No. 1967, HD 2 is a consensus proposal for amendments to the current Medical Claims Conciliation Panel (MCCP) law to reduce the current adversarial nature of the process and instead to emphasize its originally intended conciliation role. These amendments will make the process of addressing and resolving questions related to medical treatment that is associated with patient injuries or deaths more efficient and less intimidating for both patients and doctors, while reducing unintended consequences created by the current adversarial process. These consequences include the emotional toll that the adversarial process extracts from its participants, the perception on the part of doctors that the process is unfriendly, the potential that an adversarial proceeding early in

the claim process may make it harder to resolve claims amicably between doctors and patients, and the unnecessary need for doctors to live with the stigma of malpractice claims when such claims are actually in the nature of inquiries. The proposed amendments therefore emphasize communication and conciliation, rather than adversarial proceedings which tend to polarize the parties and their positions.

Recent years have seen the development of alternative dispute resolution (ADR) procedures, such as mediation and arbitration, into an important means of resolving claims in place of or in conjunction with traditional litigation. These amendments recognize that many, if not most, major medical claims now involve mediation or arbitration as an integral part of the process and permits the use of ADR in lieu of participation in the MCCP process. In part this is because there is now a well developed and highly trained supply of skilled mediators available in Hawaii. As a result, many parties now prefer to use professional mediators instead of volunteer MCCP panelists who tend to lack specialized ADR training. This recognizes what is happening in actual practice and eliminates the need for DCCA to administer and conduct MCCP proceedings where they are redundant and unnecessary because the parties will utilize ADR to accomplish the same purpose.

The successful use of mediation principles to resolve legal claims supports the change in emphasis of the MCCP to conciliation. The focus of the MCCP will no longer be as a decision-maker, but will instead be as a peace-maker. The decision-making function of the MCCP is replaced with a conciliation function. The purpose of the MCCP will no longer be to determine blame, but instead to facilitate communication and encourage amicable resolution of disputes between doctors and patients.



The participants in the meetings which culminated in these proposed changes recognize that a heavy burden will fall on them to educate doctors, patients and legal representatives of the new role of the MCCC and reduced burden on DCCA. They have already begun to discuss what the Hawaii Medical Association, medical and law school faculty, private attorneys and administration must do to assure successful implementation of these amendments.

Much time, thought and effort has been put into these amendments and your favorable consideration in hearing this matter is appreciated. We look forward to working with you in improving the MCCC process. Thank you very much for allowing me to testify in Support of this measure. Please feel free to contact me should you have any questions or desire additional information.

**LATE**

**TESTIMONY OF BERT SAKUDA  
IN SUPPORT OF H.B. NO. 1967 HD2**

Date: Friday, March 16, 2012

Time: 1:30 pm

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

My name is Bert Sakuda and I am submitting testimony in support of H.B. No. 1967, relating to Medical Claim Conciliation. I am an attorney who has represented plaintiffs in personal injury cases for over 30 years.

Beginning in late 2010, individuals interested in improving Hawaii's health care claims environment began meeting at the John A. Burns School of Medicine. Participants included faculty from the medical and law schools, attorneys representing both plaintiffs and defense, and representatives of the Hawaii Medical Association. The meetings were initiated and led by Dr. David Sakamoto, Deputy Director of Health, and Dr. Kelly Withy, associate professor of medicine and Director of the Hawaii/Pacific Basin Area Health Education Center (AHEC). I was one of the participants representing the plaintiff's perspective along with Bob Toyofuku.

This measure improves the Medical Claims Conciliation Panel (MCCP) procedure by making it less adversarial for physicians and by shifting the focus of the MCCP from placing blame to encouraging conciliation between doctors and their patients.

Much time, thought and effort has been put into these amendments and your favorable consideration in hearing this matter is appreciated. We look forward to working with you in improving the MCCP process. Thank you very much for allowing

me to testify in Support of this measure. Please feel free to contact me should you have any questions or desire additional information.