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S.B. 2469, TWENTY-SIXTH LEGISLATURE, 2012, STATE OF HAWAII

Testimony of Karen A. Essene, regarding S.B. 2469, re medical claim conciliation panels.

INTRODUCTION. I am an attorney, and I have served on numerous medical claim conciliation panels (MCCPs) for more than twenty years. In the last eight years alone, there were about 120 panels where I was either the chairperson or the attorney member of the panel.

As the MCCP program is presently structured, it benefits our state court system by weeding out potential medical malpractice cases that lack merit but might otherwise land in circuit court. The program gives claimants an opportunity to be heard in a meaningful forum. The claimant in each case has a chance to learn about the pertinent medical issues from the respondent doctor, as well as from the panel doctor, who serves as an independent expert. (The chairperson selects the panel doctor according to the medical specialty involved in a particular case.) Another benefit is that true conciliation can occur at the hearing, such as when the claimant and respondent doctor resolve their differences upon seeing that a failure of communication was really the only source of their dispute.

POSITION: OPPOSE.

REASONING. The drafters of S.B. 2469 would have the legislature find that (under the existing statute) an MCCP proceeding is "intended as a forum of last resort." S.B. 2469 § 1, ¶ 2. This is simply false. *See* HRS § 671-16 (re subsequent litigation). Actually, filing a claim at the MCCP is a prerequisite to being able to file a medical malpractice lawsuit in circuit court (although many claimants at the MCCP decide not to file in court afterward). If such a suit is filed in circuit court without having been through the MCCP, the would-be plaintiff is redirected to the MCCP. After an MCCP claim is heard and the panel renders its decision, the claimant is in a better position to decide whether to proceed. If the claimant does have a strong case at the MCCP, the respondent will also be in a better position to know whether to consider settlement talks or other litigation alternatives.

The drafters also would have the legislature find that current MCCP proceedings are "adjudicatory" in nature, but under this bill, proceedings would be changed to "advisory in nature." S.B. 2469 § 1, ¶ 3. In truth, MCCPs are already advisory. What the drafters apparently missed is that after an MCCP hearing, the panel "shall file a written *advisory* decision. HRS § 671-15(a) (emphasis added). The "adjudicatory" idea is simply false.

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Under S.B. 2469, the MCCP program would be revised to eliminate all panel decisions and thereby eliminate any findings or conclusions by a panel. (*See* HRS § 671-15(a) and (b), which would be deleted by S.B. 2469.) I strongly object to this because the chief purpose of the proceeding is to let the parties know what panel has decided. Why have a panel doctor acting as an independent expert (one of the benefits offered to the claimant, in particular), if in the end the panel cannot communicate its decision to the parties? It seems absurd. How will a claimant know if the case is medically sound and whether it may be worth pursuing? The claimant may think his or her case was persuasive when in fact the claimant failed to understand the medical facts or procedures underlying the case.

Instead of having panel decisions (presently at HRS § 671-15), the proposed bill would have the MCCP merely notify the parties of the "termination of panel proceedings" with the panel optionally stating whether any party "failed to ... meaningfully participate" in the process. *See* S.B. 2469 § 671-15. Again I strongly object, because a rating of a party's participation is so trivial, and it is no substitute for real findings.

This rating of a party's participation is optional (to be done "at the discretion of the director or the panel," *id.*). Nonetheless, the drafters treat it as mandatory, for they require that unless "a party has meaningfully participated in panel proceedings," certain subsequent steps cannot be taken. *See* S.B. 2469 § 671-16 and -16.5.

Even though S.B. 2469 would eliminate decisions and findings by the panels, the drafters would nonetheless require panels to decide whether "the inquiry did not provide a sufficient basis to support the *finding* of a medical tort against the health care provider" in the event that, after the proceeding, the health care provider applies for expungement of the records. S.B. 2469, § 671-15.5. It appears the drafters of S.B. 2469 are (i) asking the panel to certify whether it would have found actionable negligence if it could have held a meaningful hearing to make such a determination and (ii) only raising the issue after the panel's role in the case has functionally ended, i.e., when the panel members will no longer have a copy of the medical records or their own notes on the case.

The drafters state that "medical malpractice insurers should be prohibited from increasing premiums based on medical claims conciliation panel *findings* ...." S.B. 2469 § 1, ¶ 7 (emphasis added); *see also* S.B. 2469 § 671-15.5(a). This may be a good idea in part, but once again, the drafters ignore the fact that they eliminated any finding by any panel while they continue to rely on (non-existent) findings.

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CONCLUSION. Aside from being ill-drafted, S.B. 2469 appears to be an attempt to gut the Medical Claims Conciliation Panel program. Adversarial questions would be banned, malpractice is not to be mentioned because it might look like assigning "blame" (which the drafters deplore, *id.*, § 1, ¶ 2), and decision-making is eliminated. The MCCP program would be reduced to a series of trivial proceedings. The legislature should reject the bill in its entirety.

I would suggest that a competent person (perhaps at LRB) draft an amendment to the current statute to have the MCCP inform the insurance commissioner of a particular decision only in the event of a finding of actionable negligence. It is unfair for insurers to raise premiums on respondent practitioners against whom no negligence was found at the MCCP level. Sometimes the only reason a given doctor was named is because a claimant is particularly paranoid or fixated on an irrational belief, but even a quite rational claimant has a legitimate right to raise the question of medical malpractice. In the alternative, insurers could be forbidden from raising medical malpractice premiums based on any decision at the MCCP level, unless an indemnity payment is made to the claimant. *Cf.* S.B. 2469 § 671-15.5(b).