



LATE

LINDA LINGLE
GOVERNOR
JAMES R. AIONA, JR.
LT. GOVERNOR

STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
335 MERCHANT STREET, ROOM 310
P.O. Box 541
HONOLULU, HAWAII 96809
Phone Number: 586-2850
Fax Number: 586-2856
www.hawaii.gov/dcca

LAWRENCE M. REIFURTH
DIRECTOR

RONALD BOYER
DEPUTY DIRECTOR

TO THE HOUSE COMMITTEE ON HEALTH

TWENTY-FIFTH LEGISLATURE
Regular Session of 2009

Tuesday, February 10, 2009
8:30 a.m.

Written Testimony Only

TESTIMONY ON HOUSE BILL NO. 310, RELATING TO MEDICAL TORTS

TO THE HONORABLE RYAN I. YAMANE, CHAIR,
AND MEMBERS OF THE COMMITTEE:

My name is Rod Maile, and I am the Senior Hearings Officer for the Office of Administrative Hearings, Department and Commerce and Consumer Affairs ("DCCA"). Thank you for the opportunity to present testimony on House Bill No. 310, Relating to Medical Torts.

DCCA supports the concept of having the courts consider the advisory decision of the Medical Claim Conciliation Panel ("MCCP") in regards to imposing sanctions on parties that have rejected the decision of the MCCP, pursued judicial proceedings, and failed to improve their respective positions by more

than thirty percent. However, there are several areas that we believe require further consideration.

First, for a variety of reasons, not all claims filed with the M CCP complete the M CCP hearing process. In some cases, the claimants are not able to service the notice of claim on one or more of the parties. In other cases, the hearing is continued upon the mutual agreement of the parties because of scheduling conflicts, the need for further preparation, or because of ongoing settlement discussions. In such situations, pursuant to Hawai`i Revised Statutes ("HRS") §671-18, if a decision by the M CCP is not reached within twelve months, or the alternative dispute resolution process is not completed within twelve months, the statute of limitations resumes running and the party filing the claim may commence a suit based on the claim in any appropriate State court. Given the potential sanctions that could be imposed pursuant to House Bill No. 310, there is a possibility that more M CCP claims would seek to have the hearing delayed in order to avoid having the M CCP issue a decision within the twelve-month period.

Next, in some cases in which one or more of the respondents are found to be actionably negligent by the M CCP, the parties have not presented sufficient evidence upon which the M CCP can make an advisory determination as to damages. Under these circumstances, it is unclear how the provisions of House Bill No. 310 would be applied when no damages have been specifically awarded the parties. As to the cases in which advisory determinations of damages have

been awarded by the M CCP, we would point out that HRS Chapter 671 does not contain a requirement that the parties settle their respective claims after they receive the decision of the M CCP. As such, House Bill No. 310 could have the unintended effect of making the claimants seek artificially low damage awards (i.e., 30% less than the actual damages that claimants believe that they could prove at trial) from the M CCP in order for claimants to preserve their ability to pursue judicial action if the case is not settled.

Lastly, as a pragmatic consideration, we have significant concerns regarding the financial and logistical impact that House Bill No. 310 will have on the M CCP process. The M CCP process has been advisory and non-binding since the M CCP was first created in 1976. Over the years, the M CCP process has continued to be successful in large part because the current process allows the parties to have their respective cases reviewed by the panel through an informal hearing process, and in turn, the M CCP issues advisory decisions which cannot be utilized in subsequent litigation, except under specific circumstances.

Logistically, most of the cases that are heard by the M CCP are completed in one day. Panel members spend many hours prior to the hearing reviewing the pleadings and exhibits submitted by the parties, so that the actual M CCP hearing is very focused, and extraneous and procedural matters are kept to an absolute minimum. It must be kept in mind that under the provisions of HRS §671-13, except for the production of hospital and medical records, nurses' notes, x-rays,

and other records kept in the usual course of the practice of the health care provider, discovery by the parties is not allowed in MCCP proceedings, and in many cases, the first time the parties are able to hear the details from witnesses is at the MCCP hearing.

Consequently, if House Bill No. 310 forces the parties to be more exhaustive in the presentation of their respective cases to the MCCP in order for the MCCP decisions to be more precise as to damages, we would anticipate that the length of the MCCP hearings will increase substantially. Because each MCCP panel member only receives \$300.00 per hearing, asking MCCP panel members to serve on hearings lasting between two (2) to five (5) days, will in all likelihood make it more difficult for MCCP panel members to serve on panels, particularly the physician members. One alternative would be to increase the stipend for each MCCP panel member from \$300.00 to \$900.00 per claim heard, and increase the MCCP filing fee to \$1,350.00, with any balances remaining after paying the panel costs refunded to the parties. However, the increase in the filing fees would then create a financial hardship on parties that would not be able to afford to pay such filing fees, causing the MCCP to pay the balance of the MCCP panel costs and thereby partially underwrite the cost of the MCCP proceedings.

As a final observation, we would note that the number of claims filed with the MCCP has steadily decreased from 166 claims in 2002, to 100 claims in

Testimony on House Bill No. 310
Tuesday, February 10, 2009
Page 5

2008 (as of November 25, 2008), and during that time, there have only been a handful of claims that the MCCP has determined to be palpably without merit. Consequently, we believe that the MCCP continues to serve the function that the Legislature originally intended, and we would be very reticent to support any substantive changes to the MCCP process.

For these reasons, DCCA would request that House Bill No. 310 be further reviewed so that these concerns can be considered and addressed.

Thank you for the opportunity to testify on this bill.