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TO THE HOUSE COMMITTEE ON HEALTH

TWENTY-FIFTH LEGISLATURE  
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8:30 a.m.

Written Testimony Only

**TESTIMONY ON HOUSE BILL NO. 575, 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. 575, Relating to Medical Torts.

Although 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, for the reasons set forth below, DCCA cannot support the passage of this bill.

First, 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. 575, 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, 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. 575 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. 575 does not impose a concomitant obligation on the part of respondents to offer to settle the case for the amount of damages recommended by the M CCP, before the claimants can institute judicial proceedings. Under the provisions of House Bill 575, claimants would be precluded from bringing a lawsuit to recover only the amount of damages recommended by the M CCP. The alternative would be for the claimants to initially seek excessively minimal amounts in damages (i.e., proportionately less than 200% of the damages that claimants believe they could prove in court) from the M CCP in order to preserve the option of pursuing judicial proceedings.

Lastly, as a pragmatic consideration, we have significant concerns regarding the financial and logistical impact that House Bill No. 575 will have on the M CCP process.

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. Pursuant to 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, House Bill No. 575 will force the parties to be absolutely exhaustive in the presentation of their respective cases to the MCCP in order for the MCCP decisions to be more precise as to damages, and because it will be extremely difficult for a claimant to increase a legitimate award of damages from the MCCP by 200%, the practical effect is that claimants will not be able to seek judicial redress and will only have the MCCP proceedings to fully adjudicate their claims. In terms of the MCCP however, 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. 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 MCCC has steadily decreased from 166 claims in 2002, to 100 claims in 2008 (as of November 25, 2008), and during that time, there have only been a handful of claims that the MCCC has determined to be palpably without merit. Consequently, we believe that the MCCC continues to serve the function that the Legislature originally intended, and we would be very reticent to support any substantive changes to the MCCC process.

For these reasons, DCCA cannot support the passage of House Bill No. 575. Thank you for the opportunity to testify on this bill.