
A BILL FOR AN ACT

RELATING TO THE MEDICAL CLAIM CONCILIATION PANEL.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Over the years, Hawaii's medical industry has
2 experienced rising medical malpractice insurance rates, low
3 reimbursement rates, and an alarming exodus of qualified
4 doctors. According to recent reports released by the American
5 Medical Association, Hawaii is one of many states either showing
6 signs of a medical liability insurance crisis or that is already
7 in a full-blown crisis.

8 "Health courts" have been described as a way to address
9 their state's mounting medical malpractice insurance issues.
10 Common Good, a nonprofit, nonpartisan legal reform coalition,
11 has conducted polls, hosted forums, and engaged with leaders in
12 health care, education, law, business, and public policy on this
13 subject. With financial funding and support from the Robert
14 Wood Johnson Foundation and the Harvard School of Public Health,
15 Common Good proposed the establishment of health courts with
16 expert decision makers as a way to improve patient safety and
17 allow plaintiffs to quickly receive reasonable compensation.



1 Health courts are gaining bipartisan support from medical,
2 patient safety, and public policy groups.

3 If properly constructed, health courts may result in a fair
4 and fast resolution of medical liability claims, verdicts based
5 on fact rather than emotion, and a reduction in the number of
6 frivolous lawsuits.

7 The purpose of this Act, which shall be known as the Hawaii
8 Health Court Act of 2009, is to revise part II of chapter 671 to
9 establish a health court. This is one of eight proposals
10 introduced in the twenty-fifth Hawaii state legislature designed
11 to address the increasingly problematic medical environment in
12 Hawaii. Collectively, these eight bills shall be known as the
13 Hawaii doctor recruitment and retention action plan of 2009.

14 SECTION 2. Section 671-1, Hawaii Revised Statutes, is
15 amended to read as follows:

16 "§671-1 Definitions. As used in this chapter:

17 "Claimant" means the primary party who brings charges
18 against another party.

19 "Commissioner" means the state insurance commissioner.

20 "Department" means the department of commerce and consumer
21 affairs.



1 "Director" means the director of commerce and consumer
2 affairs.

3 "Expert witness" means an individual or organization that
4 specializes in the legal, medical, or insurance industry.

5 [~~1~~] "Health care provider" means a physician or surgeon
6 licensed under chapter 453, [~~a physician and surgeon licensed~~
7 ~~under chapter 460,~~] a podiatrist licensed under chapter 463E, a
8 health care facility as defined in section 323D-2, and the
9 employees of any of them. Health care provider shall not mean
10 any nursing institution or nursing service conducted by and for
11 those who rely upon treatment by spiritual means through prayer
12 alone, or employees of such institution or service.

13 [~~2~~] "Medical tort" means professional negligence, the
14 rendering of professional service without informed consent, or
15 an error or omission in professional practice[~~7~~] by a health
16 care provider[~~7, which~~] that proximately causes death, injury, or
17 other damage to a patient.

18 "Panel" means the medical claims conciliation panel."

19 SECTION 3. Section 671-11, Hawaii Revised Statutes, is
20 amended to read as follows:

21 "**§671-11 Medical claim conciliation panels; composition,**
22 **selection, compensation.** (a) [~~There are established~~] A medical



1 claim conciliation [~~panels which~~] panel is established and shall
2 review and render findings and advisory opinions on the issues
3 of liability and damages in medical tort claims against health
4 care providers.

5 (b) [A] The medical claim conciliation panel shall [~~be~~
6 ~~formed for~~] review and render findings and advisory opinions on
7 each claim filed pursuant to section 671-12 [~~and after each~~
8 ~~panel renders its decision or the claim is otherwise disposed of~~
9 ~~it shall be disbanded. Each~~]. The medical claim conciliation
10 panel shall consist of [~~one chairperson selected from among~~
11 ~~persons who are familiar with and experienced in the personal~~
12 ~~injury claims settlement process, one attorney licensed to~~
13 ~~practice in the courts of the State and experienced in trial~~
14 ~~practice, and one physician or surgeon licensed to practice~~
15 ~~under chapter 453 or chapter 460. The chairperson shall be~~
16 ~~appointed by the director of the department of commerce and~~
17 ~~consumer affairs from a list of eligible persons approved by the~~
18 ~~chief justice of the supreme court of Hawaii. The attorney~~
19 ~~shall be appointed by the chairperson from a list of not less~~
20 ~~than thirty five attorneys experienced in trial practice~~
21 ~~submitted annually by the supreme court. The physician or~~
22 ~~surgeon shall be appointed by the chairperson and shall be~~



1 ~~currently licensed and in good standing under chapter 453 or~~
2 ~~under chapter 460.] :~~

3 (1) Three health care providers licensed to practice under
4 chapter 453. The governor, president of the senate,
5 and speaker of the house of representatives shall each
6 appoint one health care provider from a list submitted
7 by the Hawaii Medical Association;

8 (2) Three attorneys licensed to practice in the courts of
9 the State and experienced in trial practice. The
10 governor, president of the senate, and speaker of the
11 house of representatives shall each appoint one
12 attorney from a list submitted by the Hawaii State Bar
13 Association;

14 (3) Three individuals who are familiar with and
15 experienced in the personal injury claims settlement
16 process or who are representatives of the insurance
17 industry. The governor, president of the senate, and
18 speaker of the house of representatives shall each
19 appoint one member from a list submitted by the Hawaii
20 Insurers Council;

21 (4) Four members of the public. The majority leader of
22 the senate, minority leader of the senate, majority



1 leader of the house of representatives, and minority
2 leader of the house of representatives shall each
3 appoint one member of the member of the public;

4 (5) The state insurance commissioner or the commissioner's
5 designee; and

6 (6) The director of commerce and consumer affairs or the
7 director's designee, who shall serve as a non-voting,
8 ex-officio member and chairperson of the panel.

9 (c) The chairperson shall preside at the meetings of the
10 panel. The chairperson, all panel members, and any consultant
11 called by the panel to appear before the panel shall be
12 compensated at the rate of \$300 per claim, which will become
13 payable when the decision of the panel is submitted. [~~At the~~
14 ~~discretion of the director, the chairperson, panel members, and~~
15 ~~any consultant called by the panel to appear before the panel,~~
16 ~~may be compensated at one half the amount of compensation~~
17 ~~specified in this section, if the claim is disposed of by any~~
18 ~~means prior to the hearing by the panel.] The chairperson, all
19 panel members, and any consultant called by the panel to appear
20 before the panel also shall be paid allowances for travel and
21 living expenses [which] that may be incurred as a result of the
22 performance of their duties on or for the panel. These costs~~



1 shall be paid by the department of commerce and consumer affairs
2 from the filing fees paid by the parties.

3 (d) The claimant shall pay a filing fee of [~~\$450~~] \$500 to
4 the department upon the filing of the claim, and the failure to
5 do so shall result in the claim being rejected for filing. Each
6 health care provider and other parties to the claim shall pay a
7 filing fee of [~~\$450~~] \$500 to the department within twenty days
8 of being served with the claim. Each party to a claim shall be
9 assessed a non-refundable processing fee by the department in
10 the amount of [~~\$50-~~] \$100. The non-refundable processing fee
11 shall be retained from each party's filing fee[~~7~~] and shall be
12 used to defray the administrative costs of the medical claims
13 conciliation panel program.

14 (e) After the panel has made a final decision on a claim,
15 or after a final disposition of the claim has been made without
16 a hearing before the panel, the department shall return any
17 moneys remaining, after all panel costs have been paid, to the
18 respective parties on a pro rata basis.

19 (f) The office and meeting space, secretarial and clerical
20 assistance, office equipment, and office supplies for the panel
21 shall be furnished by the department. The chairperson may
22 designate any alternative meeting place or site for the hearing.



1 (g) ~~[The Hawaii medical board and board of osteopathic~~
2 ~~examiners shall each prepare a list of physicians, surgeons, and~~
3 ~~pediatrists, as the case may be, along with their respective~~
4 ~~specialties. These physicians and surgeons shall be eligible to~~
5 ~~serve as consultants to the panel in their respective fields.]~~
6 Panel members may consult with other legal, medical, and
7 insurance specialists."

8 SECTION 4. Section 671-12, Hawaii Revised Statutes, is
9 amended by amending subsection (a) to read as follows:

10 "(a) ~~[Effective July 1, 1976, any]~~ Any person or the
11 person's representative claiming that a medical tort has been
12 committed shall submit a statement of the claim to the medical
13 claim conciliation panel before a suit based on the claim may be
14 commenced in any court of this State. Claims shall be submitted
15 to the medical claim conciliation panel in writing. The
16 claimant shall set forth facts upon which the claim is based and
17 shall include the names of all parties against whom the claim is
18 or may be made who are then known to the claimant."

19 SECTION 5. Section 671-13, Hawaii Revised Statutes, is
20 amended to read as follows:

21 "**§671-13 Medical claim conciliation panel hearing; fact-**
22 **finding; evidence; voluntary settlement.** (a) Every claim of a



1 medical tort shall be heard by the medical claim conciliation
2 panel within thirty days after the last date for filing a
3 response. No persons other than the panel, expert witnesses,
4 and [~~consultants~~] any other persons deemed necessary and called
5 upon by the panel, and the persons listed in section 671-14
6 shall be present [~~except with the permission of the chairperson.~~
7 ~~The panel may, in its discretion, conduct an inquiry of a party,~~
8 ~~witness, or consultant without the presence of any or all~~
9 ~~parties~~].

10 [~~The hearing shall be informal.~~] (b) Chapters 91 and 92
11 shall [~~not~~] apply[~~-~~] to all panel hearings. The panel [~~may~~]
12 shall require a stenographic record of all or part of its
13 proceedings for the use of the panel[~~, but such~~] and the record
14 shall [~~not~~] be made available to [~~the~~] all parties. The panel
15 may receive any oral or documentary evidence. Questioning of
16 parties, expert witnesses, and [~~consultants~~] any other persons
17 deemed necessary may be conducted by the panel, and the panel
18 [~~may~~], in its discretion, may permit any party[~~-~~] or any counsel
19 for a party to question other parties, expert witnesses, or
20 [~~consultants-~~] any other persons deemed necessary and called
21 upon by the panel. The panel may designate who, among the
22 parties, shall have the burden of going forward with the



1 evidence with respect to such issues as it may consider, and
2 unless otherwise designated by the panel, when medical and
3 hospital records have been provided to the claimant for the
4 claimant's proper review, such burden shall initially rest with
5 the claimant at the commencement of the hearing.

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



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



1 discovery by the parties shall not be allowed. Any expressions
2 of sympathy to a patient, the patient's relatives, or
3 representatives for any unanticipated outcome, including but not
4 limited to any conduct, gesture, or any other expression of
5 apology, regret, mistake, or error made to the patient or the
6 patient's relatives or representatives shall not be considered
7 as admissions of liability and therefore shall be inadmissible
8 in any proceeding.

9 During the hearing and at any time prior to the rendition
10 of [~~an advisory~~] a decision pursuant to section 671-15, the
11 panel may encourage the parties to settle or otherwise dispose
12 of the case voluntarily."

13 SECTION 6. Section 671-15, Hawaii Revised Statutes, is
14 amended to read as follows:

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



1 copies of the [advisory] decision to the department of commerce
2 and consumer affairs, if the claim is against a physician or
3 surgeon licensed under chapter 453 [~~or an osteopathic physician~~
4 ~~and surgeon licensed under chapter 460~~] or a podiatrist licensed
5 under chapter 463E. The panel shall decide the issue of
6 liability and shall state its conclusions in substantially the
7 following language: "We find the health care provider was
8 actionably negligent in his or her care and treatment of the
9 patient and we, therefore, find for the claimant"; or "We find
10 the health care provider was not actionably negligent in his or
11 her care and treatment of the patient and we, therefore, find
12 for the health care provider".

13 (b) After a finding of liability, the medical claim
14 conciliation panel shall decide the amount of damages, if any,
15 [which] that should be awarded in the case. The decision as to
16 damages shall be based upon the guidelines established by the
17 panel and include in simple, concise terms a division as to
18 which portion of the damages recommended are attributable to
19 economic losses and which to noneconomic losses; provided the
20 panel may not recommend punitive damages.



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

4 (d) The [~~advisory~~] decision required by this section need
5 not be filed if the claim is settled or otherwise disposed of
6 before the decision is written or filed."

7 SECTION 7. Section 671-16, Hawaii Revised Statutes, is
8 amended to read as follows:

9 "**§671-16 Subsequent litigation; excluded evidence.** (a)
10 The claimant may institute litigation based upon the claim in an
11 appropriate court only after a party to a medical claim
12 conciliation panel hearing rejects the decision of the panel [~~7~~]
13 or after the twelve-month period under section 671-18 has
14 expired.

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



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

9 (c) Statements not introduced during the hearings of the
10 medical claim conciliation panel shall not be admissible in
11 evidence either as an admission, to impeach the credibility of a
12 witness, or for any other purpose in any trial of the action."

13 SECTION 8. Section 671-19, Hawaii Revised Statutes, is
14 amended to read as follows:

15 "**§671-19 Duty to cooperate; assessment of costs and fees.**
16 [~~It shall be the duty of every~~] Every person who files a claim
17 with the medical claim conciliation panel, every health care
18 provider against whom the claim is made, and every insurance
19 carrier or other person providing medical tort liability
20 insurance for the health care provider[7-~~to~~] shall cooperate
21 with the medical claim conciliation panel for the purpose of
22 achieving a prompt, fair, and just disposition or settlement of



1 the claim, provided that cooperation shall not prejudice the
2 substantive rights of those persons.

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

9 In determining whether any person has failed to cooperate
10 in good faith, the panel shall consider, but is not limited to,
11 the following:

- 12 (1) The attendance of the persons at the hearing of the
13 medical claim conciliation panel;
- 14 (2) The extent to which representatives of parties and
15 counsel representing parties came to panel hearings
16 with knowledge of the claims and defenses and
17 authority to negotiate a settlement or other
18 disposition of the claim;
- 19 (3) The testimony of members of the panel as to the facts
20 of the person's participation in the panel hearing;



- 1 (4) The extent of the person's cooperation in providing
- 2 the panel with documents and testimony called for by
- 3 the panel;
- 4 (5) The reasons advanced by the person so charged for not
- 5 fully cooperating or negotiating; and
- 6 (6) The failure of the person to submit any required fees
- 7 to the department of commerce and consumer affairs, as
- 8 required by this chapter.

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

15 SECTION 9. Section 671-20, Hawaii Revised Statutes, is
16 amended to read as follows:

17 "~~[+] §671-20 [+] Annual report.~~ The director of commerce
18 and consumer affairs shall prepare and submit to the legislature
19 annually, twenty days prior to the convening of each regular
20 session, a report containing ~~[the director's evaluation of the~~
21 ~~operation and effects of this chapter. The report shall~~
22 include] a summary of the claims brought before the medical



1 claim conciliation panel and the disposition of such claims, a
 2 description and summary of the work of the panel under this
 3 chapter, an appraisal of the effectiveness of this chapter in
 4 securing prompt and fair disposition of medical tort claims, a
 5 review of the number and outcomes of claims brought under
 6 section 671-12 and recommendations for changes, modifications,
 7 or repeal of this chapter or parts thereof with accompanying
 8 reasons and data."

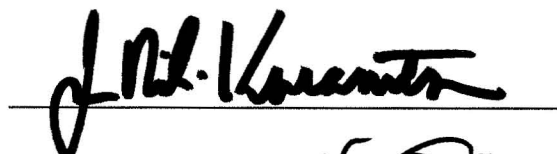
9 SECTION 10. Statutory material to be repealed is bracketed
 10 and stricken. New statutory material is underscored.

11 SECTION 11. This Act shall take effect on July 1, 2009;
 12 provided that section 7 shall take effect on July 1, 2010.

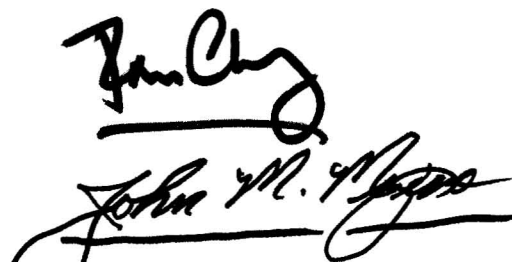
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INTRODUCED BY:


 Tom Brown










 JAN 28 2009



Report Title:

Medical Claim Compensation Panel

Description:

Amends provisions relating to the medical claim compensation panel by establishing a health court. Increases the number of panel members and amends the manner in which they are appointed.

