

JAN 25 2012

A BILL FOR AN ACT

RELATING TO MEDICAL CLAIM CONCILIATION.

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

1 SECTION 1. The legislature finds that many claims now
2 filed with medical claim conciliation panels tend to function
3 more as inquiries rather than actual claims, and patients or
4 their families tend to use these proceedings to seek information
5 regarding adverse events that they associate with medical
6 treatment. Most matters filed with medical claim conciliation
7 panels are eventually resolved in favor of the medical provider,
8 but they have unintended consequences for health professionals
9 because the proceedings are treated as claims rather than
10 inquiries for the purposes of reporting incidents to medical
11 malpractice insurers.

12 The legislature further finds that provisions in the Hawaii
13 Revised Statutes relating to medical claims conciliation should
14 be amended to reflect that the actual nature of many filings,
15 particularly by pro se parties, are inquisitive in nature, and
16 based on lack of information rather than claims based on
17 substantive analysis of the applicable standard of care. The
18 legislature finds that proceedings with medical claim



1 conciliation panels should be conducted in a non-adversarial way
2 and structured to facilitate conveying information rather than
3 assigning blame. The legislature believes that increased
4 transparency and education for those who perceive fault on the
5 part of medical providers will assist in the amicable resolution
6 of their concerns without the need for formal claims. Medical
7 claim conciliation panels should endeavor to provide a prompt
8 exchange of information and serve a facilitation and
9 conciliation role for these inquiries. However, these panel
10 proceedings are intended to provide a forum of last resort and
11 are not intended as a substitute for informal direct
12 communications between patients and providers. Accordingly,
13 statutory provisions relating to filing fees and certificates of
14 consultations should be retained to assure that the panel
15 process is not taken lightly and to encourage patients and
16 providers to attempt informal resolution of their concerns.

17 The legislature further finds that making medical claim
18 conciliation panel proceedings advisory in nature would allow
19 the panels' role to become more conciliatory rather than
20 adjudicatory. To this end, the current law would be amended to
21 reflect this practice by deleting the decision-making function



1 of the panels and, instead, emphasizing conciliation and
2 mediation to resolve matters that are before them.

3 The legislature further finds that there is much that the
4 medical claim conciliation panel process may do to narrow and
5 define claims when complete resolution cannot be achieved during
6 panel proceedings and litigation subsequently must be commenced.

7 The legislature does not intend for deletion of the panels'
8 decision-making function to eliminate panels' ability to
9 consider and discuss liability, causation, or damages with the
10 parties, but rather, it is intended to focus discussion of those
11 issues in the context of conciliation or mediation that better
12 reflects the panels' advisory nature. Rather, the legislature
13 foresees that this conciliatory approach would better assist
14 parties in fully understanding the nature of claims, defenses,
15 and damages and encourage parties to reach a voluntary
16 settlement. Medical claim conciliation panels should continue
17 to express their opinions on liability, causation, and damages
18 to the parties to assist them in evaluating their positions,
19 however, panels would no longer render formal decisions in order
20 to give the panels' greater flexibility in handling true claims.

21 Panels would continue to have the authority to require
22 adversarial proceedings when adversarial proceedings would be



1 more helpful for the ultimate resolution of claims, but only
2 after consultation with or agreement by the parties and only if
3 the panel finds that further proceedings would be helpful to the
4 resolution of important issues of the claim.

5 The legislature also finds that resolution of medical
6 claims will be encouraged by allowing parties to agree to engage
7 in alternative dispute resolution without the need to first file
8 a claim with a medical claim conciliation panel. This will
9 allow the parties to use moneys for alternative dispute
10 resolution that otherwise would have been spent on filing fees.
11 In addition, filing fees for those inquiries initially filed
12 with the panel would be refunded, less a nominal administrative
13 fee, if all parties agree to alternative dispute resolution
14 instead of the medical claim conciliation panel process.

15 The legislature also finds that medical malpractice
16 insurers should be prohibited from increasing premiums based on
17 medical claim conciliation panel filings since these filings
18 would be properly recognized as inquiries rather than true
19 claims, and panel records would be expunged if when there is an
20 insufficient basis to support findings of medical torts against
21 providers.



1 The purpose of this Act is to amend part II of chapter 671,
2 Hawaii Revised Statutes, relating to medical claim conciliation,
3 to more closely reflect actual practice and the original intent
4 that the panels serve in a conciliation role.

5 SECTION 2. Section 453-5, Hawaii Revised Statutes, is
6 amended by amending subsection (b) to read as follows:

7 "(b) The department shall employ, not subject to chapter
8 76, an executive secretary to administer the board's activities
9 and an employee to administer the medical ~~[claim]~~ inquiry and
10 conciliation panels established under chapter 671. The employee
11 responsible for administration of the medical ~~[claim]~~ inquiry
12 and conciliation panels shall have no duties in administration
13 of the board's activities."

14 SECTION 3. Section 453-7.5, Hawaii Revised Statutes, is
15 amended by amending subsection (a) to read as follows:

16 "(a) The department of commerce and consumer affairs shall
17 review each complaint, inquiry, and information, as applicable,
18 received under sections 92-17, 329-44, 453-8.7, 663-1.7, 671-5,
19 and 671-15. The department shall investigate the complaint,
20 inquiry, or information if it appears that the physician or
21 osteopathic physician who is the subject of the complaint,
22 inquiry, or information has violated this chapter. If the



1 department determines that the physician or osteopathic
2 physician has violated this chapter, the department shall
3 present the results of its investigation to the Hawaii medical
4 board for appropriate disciplinary proceedings."

5 SECTION 4. Part II of chapter 671, Hawaii Revised
6 Statutes, is amended to read as follows:

7 "PART II. MEDICAL [CLAIM] INQUIRY AND CONCILIATION

8 §671-11 Medical [claim] inquiry and conciliation panels;
9 composition, selection, compensation. (a) There are
10 established medical [claim] inquiry and conciliation panels
11 which shall [review and render findings and advisory opinions on
12 the issues of liability and damages in medical tort claims
13 against health care providers.] facilitate the resolution of
14 inquiries regarding the rendering of professional services by
15 health care providers that involve injury, death, or other
16 damages to a patient.

17 (b) A medical [claim] inquiry and conciliation panel shall
18 be formed for each [claim] inquiry filed pursuant to section
19 671-12 and [after each panel renders its decision or the claim
20 is otherwise disposed of it] shall be disbanded[-] after an
21 inquiry is resolved, a notice of termination is filed, or a suit
22 based on the circumstances of the injury is filed in a court of



1 competent jurisdiction. Each medical [~~claim~~] inquiry and
2 conciliation panel shall consist of one chairperson [~~selected~~
3 ~~from among persons who are familiar with and experienced in the~~
4 ~~personal injury claims settlement process, one]~~ who shall be an
5 attorney licensed to practice in the courts of the State and
6 experienced in trial practice[~~7~~] and the personal injury claims
7 settlement process and one physician, osteopathic physician, or
8 surgeon licensed to practice under chapter 453. The chairperson
9 shall be appointed by the director of [~~the department of~~]
10 commerce and consumer affairs from a list of eligible persons
11 approved by the chief justice of the supreme court of Hawaii.
12 [~~The attorney shall be appointed by the chairperson from a list~~
13 ~~of not less than thirty five attorneys experienced in trial~~
14 ~~practice submitted annually by the supreme court.]~~ The
15 physician, osteopathic physician, or surgeon shall be appointed
16 by the chairperson and shall be [~~currently~~] licensed and in good
17 standing under chapter 453.

18 (c) The chairperson shall preside at the meetings of the
19 panel. The chairperson, all panel members, and any consultant
20 called by the panel to appear before the panel shall be
21 compensated at the rate of [~~\$300~~] \$450 per claim which will
22 become payable [~~when the decision of the panel is submitted.~~] at



1 the conclusion of panel proceedings. At the discretion of the
2 director, the chairperson, panel members, and any consultant
3 called by the panel to appear before the panel, may be
4 compensated at one-half the amount of compensation specified in
5 this section, if the [elaim] inquiry is disposed of by any means
6 prior to ~~[the hearing by]~~ a meeting of the panel ~~[and the~~
7 parties or their legal representatives. The chairperson, all
8 panel members, and any consultant called by the panel to appear
9 before the panel also shall be paid allowances for travel and
10 living expenses which may be incurred as a result of the
11 performance of their duties on or for the panel. These costs
12 shall be paid by the department of commerce and consumer affairs
13 from the filing fees paid by the parties.

14 (d) The [elaimant] party initiating an inquiry shall pay a
15 filing fee of \$450 to the department upon the filing of the
16 [elaim] inquiry, and the failure to do so shall result in the
17 [elaim] inquiry being rejected for filing. Each health care
18 provider and other parties to the [elaim] inquiry shall pay a
19 filing fee of \$450 to the department within twenty days of being
20 served with the ~~[elaim-]~~ inquiry. Each party to ~~[a-claim]~~ an
21 inquiry shall be assessed a non-refundable processing fee by the
22 department in the amount of \$50. The non-refundable processing



1 fee shall be retained from each party's filing fee, and shall be
2 used to defray the administrative costs of the medical [~~claims~~]
3 inquiry and conciliation panel program.

4 (e) After the panel has [~~made a final decision on a~~
5 ~~claim,~~] filed a notice of termination, or after a final
6 disposition of the [~~claim~~] inquiry has been made without [a
7 ~~hearing~~] proceedings before the panel, the department shall
8 return any moneys remaining after all panel costs have been
9 paid, to the respective parties on a pro rata basis.

10 (f) The office and meeting space, secretarial and clerical
11 assistance, office equipment, and office supplies for the panel
12 shall be furnished by the department. The chairperson may
13 designate any alternative meeting place or site for the
14 [~~hearing.~~] proceedings.

15 (g) The Hawaii medical board shall prepare a list of
16 physicians, osteopathic physicians, surgeons, and podiatrists,
17 as the case may be, along with their respective specialties.
18 These physicians, osteopathic physicians, and surgeons shall be
19 eligible to serve as consultants to the medical inquiry and
20 conciliation panel in their respective fields. Panel members
21 may consult with other legal, medical, and insurance
22 specialists.



1 [+]§671-11.5[+] **Waiver of filing fee.** (a) If any party
2 ~~[to a claim]~~ cannot pay the required filing fee, the party may
3 file with the director a motion to waive the filing fee. The
4 motion to waive the filing fee shall be accompanied by an
5 affidavit in a format prescribed by the department, showing in
6 detail:

7 (1) The party's inability to pay the filing fee;

8 (2) The party's belief that the party is entitled to
9 redress; and

10 (3) A statement of the issues that the party intends to
11 present at ~~[the hearing]~~ proceedings before a medical
12 ~~[claims]~~ inquiry and conciliation panel.

13 (b) The director shall decide on the motion to waive the
14 filing fee as expeditiously as possible, and no oral arguments
15 shall be permitted.

16 (c) If the director grants the motion to waive the filing
17 fee, the party may proceed without further application to the
18 director or panel, and without payment of the filing fee. If
19 the motion is denied, the director shall state the reasons for
20 the denial in writing. The director shall promptly provide the
21 party with a filed copy of the director's order granting or
22 denying the motion.



1 (d) If a motion to waive the filing fee is denied by the
2 director, the party may seek judicial review under section 91-
3 14.

4 (e) If the director denies a party's motion to waive the
5 filing fee, the party shall pay the filing fee within thirty
6 days after the denial of the motion, unless the party has filed
7 an appeal under section 91-14. If the party has filed an appeal
8 under section 91-14, the party may proceed without payment of
9 the filing fee, until ~~[such time as]~~ the time that a final
10 judicial determination is rendered.

11 (f) If the party files an appeal under section 91-14, and
12 the court upholds the director's denial of the aggrieved party's
13 motion to waive the filing fee, the party shall pay the filing
14 fee within thirty days after the court's affirmation of the
15 denial. If the court determines that the party's motion for
16 waiver of the filing fee was improperly denied, the party shall
17 be entitled to proceed without payment of the filing fee.

18 §671-12 Review by panel required; notice; presentation of
19 ~~[claims;]~~ inquiry; request for a more definite statement of the
20 ~~[claim.]~~ inquiry. (a) Effective July 1, 1976, any person or
21 the person's representative ~~[claiming that a medical tort has~~
22 ~~been committed]~~ having concerns regarding the existence or



1 nonexistence of a medical tort shall submit ~~[a statement of the~~
2 ~~claim]~~ an inquiry to the medical ~~[claim]~~ inquiry and
3 conciliation panel before a suit based on the ~~[claim]~~
4 circumstances of the inquiry may be commenced in any court of
5 this State. ~~[Claims]~~ Inquiries shall be submitted to the
6 medical ~~[claim]~~ inquiry and conciliation panel in writing~~[-The~~
7 ~~claimant shall set forth]~~ and shall include the facts upon which
8 the ~~[claim]~~ inquiry is based and ~~[shall include]~~ the names of
9 all parties against whom the ~~[claim]~~ inquiry is or may be made
10 who are then known to the ~~[claimant-]~~ person or the person's
11 representative.

12 (b) Within five business days thereafter the panel shall
13 give notice of the ~~[claim]~~ inquiry and the statement of the
14 ~~[claim,]~~ inquiry, by certified mail, to all health care
15 providers and others who are or may be parties ~~[to the claim]~~
16 and shall furnish copies of written ~~[claims]~~ inquiries to ~~[such]~~
17 those persons. ~~[Such]~~ The notice shall set forth a date, not
18 more than twenty days after mailing the notice, within which any
19 health care provider against whom ~~[a claim]~~ an inquiry is made
20 shall file a written response ~~[to the claim,]~~ and a date and
21 time, not less than five days following the last date for filing
22 a response, for ~~[a hearing of]~~ an inquiry by the panel~~[-Such]~~



1 and the parties. The notice shall describe the nature and
2 purpose of the panel's proceedings and shall designate the place
3 of the meeting. The times originally set forth in the notice
4 may be enlarged by the chairperson, on due notice to all
5 parties, for good cause.

6 (c) If the statement of the ~~[claim]~~ inquiry in the notice
7 is so vague or ambiguous that any party receiving notice of the
8 ~~[claim]~~ inquiry cannot reasonably be required to frame a written
9 response, the party may submit a written request to the director
10 of commerce and consumer affairs for a more definite statement
11 before filing the written response. Copies of the request shall
12 be provided to the panel~~[, the claimant,]~~ and ~~[either]~~ all
13 affected parties. The request, which shall be ex parte and stay
14 the proceedings of the panel until notice of the director's
15 decision is given to the panel and all parties, shall specify
16 the defects complained of and the details desired. The director
17 may deny, grant, or modify the request at the director's own
18 discretion, without the necessity of a hearing, although the
19 director may reach a decision after consulting with the panel or
20 ~~[the claimant.]~~ any party or parties. The director shall
21 provide notice of the decision to the panel~~[, the claimant,]~~ and
22 ~~[either]~~ all affected parties. If the request is granted and



1 ~~[the claimant]~~ any party so directed fails to provide a more
2 definite statement of the ~~[claim]~~ inquiry within five days after
3 notice of the decision, the panel may make ~~[such]~~ an order as it
4 deems just. This subsection shall not be used as a tactic to
5 delay the proceedings.

6 ~~[§]~~§671-12.5~~[§]~~ **Certificate of consultation.** (a) Any
7 ~~[claim]~~ inquiry filed with the medical ~~[claim]~~ inquiry and
8 conciliation panel under this chapter shall be accompanied by a
9 certificate ~~[which]~~ that declares one of the following:

- 10 (1) That the ~~[claimant or the claimant's]~~ party initiating
11 the inquiry or their attorney has consulted with at
12 least one physician who is licensed to practice in
13 this State or any other state, and who is
14 knowledgeable or experienced in the same medical
15 specialty as the health care professional against whom
16 the ~~[claim]~~ inquiry is made, and that the ~~[claimant or~~
17 ~~claimant's]~~ party or their attorney has concluded on
18 the basis of ~~[such]~~ the consultation that there is a
19 reasonable and meritorious cause for filing the
20 ~~[claim.]~~ inquiry. If the ~~[claimant or the claimant's]~~
21 party initiating the inquiry or their attorney is not
22 able to consult with a physician in the same medical



1 specialty as the health care professional against whom
2 the [claim] inquiry is made, [~~the claimant or~~
3 ~~claimant's~~] that party or their attorney may consult
4 with a physician who is licensed in this State or in
5 any other state who is knowledgeable and experienced
6 in a medical specialty that is as closely related as
7 practicable to the medical specialty of the health
8 care professional against whom the [claim] inquiry is
9 made. The physician or physicians consulted [~~by the~~
10 ~~claimant or the claimant's attorney~~] may not be a
11 party to the [~~case,~~] inquiry, nor be compelled to
12 testify or otherwise participate in [~~the hearing~~
13 ~~before~~] proceedings related to the medical [claim]
14 inquiry and conciliation panel;

- 15 (2) That the [~~claimant or the claimant's~~] party initiating
16 the inquiry or their attorney was unable to obtain the
17 consultation required by paragraph (1) because a
18 statute of limitations would impair the action and
19 that the certificate required by paragraph (1) could
20 not be obtained before the impairment of the action.
21 If a certificate is executed pursuant to this
22 paragraph, the certificate required by paragraph (1)



1 shall be filed by the ~~[claimant or the claimant's]~~
2 party initiating the inquiry or their attorney within
3 ninety days after filing the ~~[claim,]~~ inquiry; or
4 (3) That the ~~[claimant or the claimant's]~~ party initiating
5 the inquiry or their attorney was unable to obtain the
6 consultation required by paragraph (1) after the
7 ~~[claimant or the claimant's]~~ party or their attorney
8 had made a good faith attempt to obtain ~~[such]~~ the
9 consultation and the physician contacted would not
10 agree to ~~[such a]~~ the consultation. For purposes of
11 this paragraph, "good faith attempt" refers to the
12 responsibility of a ~~[claimant or claimant's]~~ party
13 initiating an inquiry or their attorney to make
14 reasonable efforts to contact a physician for the
15 purpose of reviewing the circumstances upon which [a
16 ~~claim~~] an inquiry is based. The ~~[claimant or~~
17 ~~claimant's]~~ party initiating the inquiry or their
18 attorney may contact physicians by letter, telephone,
19 facsimile, or other electronic means of communication.
20 If the physician does not respond within a reasonable
21 time, the ~~[claimant or claimant's]~~ party initiating
22 the inquiry or their attorney may submit ~~[its claim]~~



1 the inquiry to the medical ~~[claim]~~ inquiry and
2 conciliation panel along with a certificate declaring
3 ~~[such]~~ the nonresponse to ~~[claimant's]~~ the party or
4 their attorney's good faith attempt. A "good faith
5 attempt" shall ultimately be evaluated in light of the
6 goal of having a qualified physician assist the
7 ~~[claimant or claimant's]~~ party initiating the inquiry
8 or their attorney in understanding the basis of the
9 ~~[claim,]~~ inquiry and ~~[such]~~ the determination shall
10 depend upon the circumstances of each individual case.

11 (b) Where a ~~[claimant or the claimant's]~~ party initiating
12 an inquiry or their attorney intends to rely solely on a failure
13 to inform of the consequences of a procedure (informed consent),
14 this section shall be inapplicable. The ~~[claimant or the~~
15 ~~claimant's]~~ party initiating an inquiry or their attorney shall
16 certify upon filing of the ~~[claim]~~ inquiry that ~~[the claimant or~~
17 ~~the claimant's attorney is]~~ they are relying solely on the
18 failure to inform of the consequences of a procedure and for
19 that reason is not filing a certificate as required by this
20 section.

21 (c) For the purposes of this section, the ~~[claimant or the~~
22 ~~claimant's]~~ party initiating an inquiry or their attorney shall



1 not be required to disclose the names of any physician consulted
2 to fulfill the requirements of subsection (a) to any of the
3 other parties to the ~~[claim]~~ inquiry. The medical ~~[claim]~~
4 inquiry and conciliation panel may require the ~~[claimant or the~~
5 ~~claimant's]~~ party initiating an inquiry or their attorney to
6 disclose the name of any physician consulted to fulfill the
7 requirements of subsection (a). No disclosure of the name of
8 any physician consulted to fulfill the requirements of
9 subsection (a) shall be made to any of the other parties to the
10 ~~[claim]~~ inquiry; provided that the medical ~~[claim]~~ inquiry and
11 conciliation panel may contact ~~[any such]~~ the physician to
12 determine if the requirements of subsection (a) were met.

13 (d) Unless a certificate is filed pursuant to subsection
14 (a) or (b), the ~~[claim]~~ inquiry shall not be received for filing
15 by the medical ~~[claim]~~ inquiry and conciliation panel.

16 §671-13 Medical ~~[claim]~~ inquiry and conciliation panel
17 ~~[hearing; fact-finding; evidence;]~~ proceedings; voluntary
18 settlement. Every ~~[claim of]~~ inquiry regarding a medical tort
19 shall be ~~[heard]~~ processed by the medical ~~[claim]~~ inquiry and
20 conciliation panel within thirty days after the last date for
21 filing a response. No persons other than the panel, witnesses,
22 and consultants called by the panel, and the persons listed in



1 section 671-14 shall be present except with the permission of
2 the chairperson. The panel may, in its discretion, conduct an
3 inquiry of a party, witness, or consultant without the presence
4 of any or all parties.

5 The ~~[hearing]~~ proceedings shall be informal. Chapters 91
6 and 92 shall not apply. The panel may require a stenographic
7 record of all or part of its proceedings for the use of the
8 panel, but ~~[such]~~ the record shall not be made available to the
9 parties. The panel may receive any oral or documentary

10 evidence. ~~[Questioning of parties, witnesses, and consultants
11 may be conducted by the panel, and the panel may, in its
12 discretion, permit any party, or any counsel for a party to
13 question other parties, witnesses, or consultants. The panel
14 may designate who, among the parties, shall have the burden of
15 going forward with the evidence with respect to such issues as
16 it may consider, and unless otherwise designated by the panel,
17 when medical and hospital records have been provided to the
18 claimant for the claimant's proper review, such burden shall
19 initially rest with the claimant at the commencement of the
20 hearing.]~~ The panel shall conduct proceedings in a manner

21 appropriate to the circumstances of the inquiry and to
22 facilitate resolution of the matter. The panel shall conduct



1 proceedings in a non-adversarial manner consistent with the
2 primary purpose of conciliation.

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

20 At ~~[the hearing of the]~~ panel proceedings and ~~[in arriving~~
21 ~~at its opinion]~~ to assist its conciliation role, the panel
22 ~~[shall]~~ may consider, but not be limited to, statements or



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

21 During the ~~[hearing and at any time prior to the rendition~~
22 ~~of an advisory decision pursuant to section 671-15,]~~ proceedings



1 or at any time before termination, the panel may encourage the
2 parties to settle or otherwise dispose of the case voluntarily.

3 §671-14 Same; persons attending ~~[hearings]~~ proceedings of
4 panel. Unless excluded or excused by the panel, the following
5 persons shall attend ~~[hearings]~~ proceedings before the panel:

6 (1) The party or parties ~~[making the claim,]~~ submitting
7 the inquiry;

8 (2) The health care provider or providers against whom the
9 ~~[claim is made]~~ inquiry is submitted or
10 representatives thereof, other than counsel,
11 authorized to act for ~~[such]~~ the health care provider
12 or providers; and

13 (3) Counsel for the parties, if any.

14 §671-15 ~~[Same, decisions.]~~ Panel termination. ~~[(a)~~
15 ~~Within thirty days after the completion of a hearing, the~~
16 ~~medical claim conciliation panel shall file a written advisory~~
17 ~~decision with the insurance commissioner who shall thereupon~~
18 ~~mail copies to all parties concerned, their counsel, and the~~
19 ~~representative of each health care provider's liability~~
20 ~~insurance carrier authorized to act for such carrier, as~~
21 ~~appropriate. The insurance commissioner also shall mail copies~~
22 ~~of the advisory decision to the department of commerce and~~



~~consumer affairs, if the claim is against a physician,
osteopathic physician, or surgeon licensed under chapter 453 or
a podiatrist licensed under chapter 463E. The panel shall
decide the issue of liability and shall state its conclusions in
substantially the following language: "We find the health care
provider was actionably negligent in his or her care and
treatment of the patient and we, therefore, find for the
claimant"; or "We find the health care provider was not
actionably negligent in his or her care and treatment of the
patient and we, therefore, find for the health care provider".~~

~~(b) After a finding of liability, the medical claim
conciliation panel shall decide the amount of damages, if any,
which should be awarded in the case. The decision as to damages
shall include in simple, concise terms a division as to which
portion of the damages recommended are attributable to economic
losses and which to noneconomic losses; provided the panel may
not recommend punitive damages.~~

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

~~(d) The advisory decision required by this section need
not be filed if the claim is settled or otherwise disposed of~~



1 ~~before the decision is written or filed.]~~ The director of
2 commerce and consumer affairs or the panel shall notify all
3 affected parties upon termination of panel proceedings. At the
4 discretion of the director or the panel, a notice of termination
5 may state whether any party or parties to the matter failed to
6 meet the requirements of this part or meaningfully participate
7 in panel proceedings.

8 **[+]§671-15.5[+] Expungement of records; malpractice**
9 **insurance rates.** (a) ~~[Upon a decision by the medical claim~~
10 ~~conciliation panel finding for the health care provider pursuant~~
11 ~~to section 671-15(a), the]~~ A health care provider may apply to
12 the panel for expungement of all records of the related
13 proceedings. The panel shall expunge all records if [a majority
14 of] the panel [finds that the complaint is fraudulent or
15 frivolous.] agrees that the inquiry did not provide a sufficient
16 basis to support the finding of a medical tort against the
17 health care provider applying for expungement.

18 (b) No insurer providing professional liability insurance
19 for a health care provider shall increase any premium rate for
20 the health care provider on the basis of the filing of [a
21 ~~medical tort claim against]~~ an inquiry involving the health care
22 provider [that is determined by] with the medical [claim]



1 inquiry and conciliation panel ~~[to be fraudulent or frivolous.]~~
2 unless an indemnity payment is made to the party initiating the
3 inquiry or the party initiating the inquiry institutes
4 litigation in a court of competent jurisdiction based on the
5 circumstances of the inquiry.

6 **§671-16 Subsequent litigation; excluded evidence.** The
7 ~~[claimant]~~ party initiating the inquiry may institute litigation
8 based upon the ~~[claim]~~ circumstances of the inquiry in an
9 appropriate court only after: a party ~~[to a]~~ has meaningfully
10 participated in medical ~~[claim]~~ inquiry and conciliation panel
11 ~~[hearing rejects the decision of the panel,]~~ proceedings that
12 were terminated pursuant to section 671-15; a party has
13 participated in alternative dispute resolution pursuant to
14 section 671-16.6; or ~~[after]~~ the twelve-month period under
15 section 671-18 has expired.

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



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

10 [+]§671-16.5[+] **Arbitration; subsequent litigation.** Any
11 person or the person's representative claiming that a medical
12 tort has been committed or any health care provider against whom
13 [~~a claim~~] an inquiry has been made may elect to bypass the court
14 annexed arbitration program under section 601-20 after the
15 [~~claim~~] inquiry has been submitted to the medical [~~claim~~]
16 inquiry and conciliation panel and the panel has [~~rendered a~~
17 ~~decision~~] been terminated pursuant to section 671-15 if the
18 party meaningfully participated in panel proceedings, an
19 alternative dispute resolution process has been terminated
20 pursuant to section 671-16.6, or the panel or alternative
21 dispute resolution process has not [~~reached a decision~~]



1 completed proceedings within the tolling period of the statute
2 of limitations under section 671-18.

3 [+]§671-16.6[+] Submission of [elaim] inquiry to an
4 alternative dispute resolution provider. (a) Any [elaim]
5 inquiry initially filed with the medical [elaim] inquiry and
6 conciliation panel may be subsequently submitted to an
7 alternative dispute resolution provider upon the written
8 agreement of all of the parties [to the claim] and with the
9 written approval of the director[-] of commerce and consumer
10 affairs. The director shall approve the alternative dispute
11 resolution provider and the alternative dispute resolution
12 procedures. All filing fees, less a processing fee of \$50,
13 shall be refunded to the appropriate parties if the panel was
14 not constituted or had not taken any action related to the
15 inquiry prior to the submission of the inquiry to an alternative
16 dispute resolution provider. If the panel was constituted or
17 took any action prior to the submission of the inquiry to an
18 alternative dispute resolution provider, the remaining balance
19 of any filing fees shall be refunded to the appropriate parties,
20 less a processing fee of \$50 and a pro-rata amount to be
21 determined by the director.



1 (b) The parties shall comply with the procedures
2 established by the alternative dispute resolution provider and
3 approved by the director. If a party does not comply with those
4 procedures, any other party may file a motion with the director
5 to have the ~~[claim]~~ inquiry resubmitted to the medical ~~[claim]~~
6 inquiry and conciliation panel. The director may collect any
7 filing fees that were refunded pursuant to subsection (a) from a
8 party that resubmits its inquiry.

9 (c) Notwithstanding section 671-12, any inquiry may be
10 submitted directly to an alternative dispute resolution process
11 upon the written agreement of all parties without first
12 submitting the inquiry to a medical inquiry and conciliation
13 panel. A written agreement shall be effective as of the date of
14 its execution by the parties. Any inquiry submitted directly to
15 alternative dispute resolution need not be subsequently
16 submitted to a medical inquiry and conciliation panel and no
17 filing fees shall be assessed by the director for the medical
18 inquiry and conciliation panel.

19 (d) Within thirty days after the completion of the
20 alternative dispute resolution process, the alternative dispute
21 resolution provider shall notify all parties concerned, their
22 counsel, and the representative of each health care provider's



1 liability insurance carrier authorized to act for the carrier,
2 as appropriate, that the alternative dispute resolution process
3 has been completed.

4 ~~[(d)]~~ (e) The ~~[claimant]~~ party submitting the inquiry may
5 institute litigation based upon the claim in an appropriate
6 court only if:

7 (1) The parties were not able to resolve the entire
8 ~~[claim]~~ matter through the alternative dispute
9 resolution process and the matter has not been
10 resubmitted to the medical ~~[claim]~~ inquiry and
11 conciliation panel pursuant to subsection (b) of this
12 section; or

13 (2) The ~~[claim]~~ matter has not been resolved through the
14 alternative dispute resolution process after twelve
15 months from the date the ~~[claim]~~ matter was filed with
16 the approved or agreed upon alternative dispute
17 resolution provider.

18 ~~[(e)]~~ (f) No statement made in the course of the approved
19 or agreed upon alternative dispute resolution process shall be
20 admissible in evidence as an admission, to impeach the
21 credibility of a witness, or for any other purpose in any trial
22 of the action. No decision, conclusion, finding, or



1 recommendation of the approved or agreed upon alternative
2 dispute resolution provider on the issue of liability or on the
3 issue of damages shall be admitted into evidence in any
4 subsequent trial, nor shall any party to the approved or agreed
5 upon alternative dispute resolution hearing, their counsel, or
6 other representative of [~~such~~] the party, refer or comment
7 thereon in an opening statement, in an argument, or at any time,
8 to the court or jury.

9 **[+]§671-17[+]** Immunity of panel members from liability.

10 No member of a medical [~~claim~~] inquiry and conciliation panel
11 shall be liable in damages for libel, slander, or other
12 defamation of character of any party to a medical [~~claim~~]
13 inquiry and conciliation panel proceeding for any action taken
14 or any decision, conclusion, finding, or recommendation made by
15 the member while acting within the member's capacity as a member
16 of a medical [~~claim~~] inquiry and conciliation panel under this
17 [~~Act.~~] part.

18 **§671-18 Statute of limitations tolled.** The filing of the
19 [~~claim~~] inquiry with the medical [~~claim~~] inquiry and
20 conciliation panel or with an approved or agreed upon
21 alternative dispute resolution provider shall toll any
22 applicable statute of limitations, and [~~any such~~] the statute of



1 limitations shall remain tolled until sixty days after the [date
2 ~~the decision~~] termination of the panel or the notification of
3 completion from the approved or agreed upon alternative dispute
4 resolution provider is mailed or delivered to the parties. If
5 ~~[a decision by the medical claim conciliation]~~ panel proceedings
6 are not completed ~~[is not reached]~~ within twelve months, or the
7 alternative dispute resolution process is not completed within
8 twelve months, the statute of limitations shall resume running
9 and the party filing the ~~[claim]~~ inquiry may commence a suit
10 based on the ~~[claim]~~ circumstances related to the inquiry in any
11 appropriate court of this State. The panel or the approved or
12 agreed upon alternative dispute resolution provider shall notify
13 all parties in writing of this provision.

14 **§671-19 Duty to cooperate; assessment of costs and fees.**

15 It shall be the duty of every person who files ~~[a claim]~~ an
16 inquiry with the medical ~~[claim]~~ inquiry and conciliation panel,
17 every health care provider against whom the ~~[claim]~~ inquiry is
18 made, and every insurance carrier or other person providing
19 medical tort liability insurance for the health care provider,
20 to cooperate with the medical ~~[claim]~~ inquiry and conciliation
21 panel and meaningfully participate in panel proceedings for the
22 purpose of achieving a prompt, fair, and just resolution,



1 disposition, or settlement of the [~~claim~~], inquiry, provided
2 that cooperation and participation shall not prejudice the
3 substantive rights of those persons.

4 Any party may apply to the panel to have the costs of the
5 action assessed against any party for failure to cooperate with
6 the panel[~~-~~] or meaningfully participate in panel proceedings.

7 The panel may award costs, or a portion thereof, including
8 attorney's fees, witness fees, including those of expert
9 witnesses, filing fees, and costs of the medical [~~claim~~] inquiry
10 and conciliation panel [~~hearing~~] proceedings to the party
11 applying therefor.

12 In determining whether any person has failed to cooperate
13 or meaningfully participate in good faith, the panel shall
14 consider, but is not limited to, the following:

15 (1) The attendance of the persons at [~~the hearing~~]
16 proceedings of the medical [~~claim~~] inquiry and
17 conciliation panel;

18 (2) The extent to which representatives of parties and
19 counsel representing parties came to panel [~~hearings~~]
20 proceedings with knowledge of the claims and defenses
21 and authority to negotiate a settlement or other
22 disposition of the [~~claim~~], matter;



(3) The testimony of members of the panel as to the facts of the person's participation in the panel ~~[hearing,]~~ proceeding;

(4) The extent of the person's cooperation in providing the panel with documents and testimony called for by the panel;

(5) The reasons advanced by the person so charged for not fully cooperating, participating, or negotiating; and

(6) The failure of the person to submit any required fees to the department of commerce and consumer affairs, as required by this chapter.

The party against whom costs are awarded may appeal the award to the circuit court. The court may affirm or remand the case with instructions for further proceedings; or it may reverse or modify the award if the substantial rights of the petitioners may have been prejudiced because the award is characterized as abuse of discretion.

[+]**§671-20**[+] **Annual report.** The director of commerce and consumer affairs shall prepare and submit to the legislature annually, twenty days prior to the convening of each regular session, a report containing the director's evaluation of the operation and effects of this chapter. The report shall include



1 a summary of the [~~elaims~~] inquiries brought before the medical
2 [~~elaim~~] inquiry and conciliation panel and the disposition of
3 [~~such elaims,~~] those inquiries, a description and summary of the
4 work of the panel under this chapter, an appraisal of the
5 effectiveness of this chapter in securing prompt and fair
6 disposition of [~~medical tort elaims,~~] inquiries regarding the
7 rendering of professional services by health care providers that
8 involved injury, death, or other damages to a patient, a review
9 of the number and outcomes of [~~elaims~~] inquiries brought under
10 section 671-12 and recommendations for changes, modifications or
11 repeal of this chapter or parts thereof with accompanying
12 reasons and data."

13 SECTION 5. This Act does not affect rights and duties that
14 matured, penalties that were incurred, and proceedings that were
15 begun before its effective date.

16 SECTION 6. Statutory material to be repealed is bracketed
17 and stricken. New statutory material is underscored.



S.B. NO. 3021

1 SECTION 7. This Act shall take effect upon its approval.

2

INTRODUCED BY:

John Lee

Shannon Chun Oakland

Ronald H. Beck

Clarence K. Smith

Michael



Report Title:

Medical Claims Conciliation

Description:

Makes numerous amendments to part II of chapter 671, HRS, to make the medical claims conciliation process less adversarial and to emphasize inquiry, conciliation, and settlement. Renames the panels as medical inquiry and conciliation panels.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

