ACT 219 H.B. NO. 2700-76

A Bill for an Act Relating to Medical Professional Liability.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. **Legislative findings and purposes.** (a) The legislature finds that:

(1) The national crisis in the area of medical malpractice affects Hawaii to the potential disadvantage of all recipients of health care;
(2) There is only one insurance carrier that is actively providing medical malpractice coverage in the State;
(3) Premium rates for medical malpractice insurance have increased substantially and are expected to continue to increase under existing conditions, both for physicians and surgeons and for hospitals; and
(4) Act 161, Session Laws of Hawaii 1975, was enacted as a temporary means to become effective in the event that no insurance carrier would provide medical malpractice insurance coverage in the State, and insurance provided under such joint underwriting plan would be subject to the cost pressures that have led to the existing increasingly high premium rates.

(b) The purposes of this Act are to:

(1) Stabilize the medical malpractice insurance situation by reintroducing some principles of predictability and spreading of risk;
(2) Decrease the costs of the legal system and improve the efficiency of its procedures to the end that awards are more rationally connected to actual damages;
(3) Impose appropriate sanctions on errant health care providers, recognizing the integral role in this process played by the licensing system; and
(4) Provide and improve the machinery for resolving patient grievances against health care providers by the addition of lay members to the board of medical examiners, the hiring of additional staff for the board, increasing the reporting requirements to the board, and changing the method of appointments to the board.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read:

"CHAPTER
MEDICAL TORTS

PART I. GENERAL PROVISIONS

Sec. -1 Definitions. As used in this chapter:

(1) "Health care provider" means a physician or surgeon licensed under the laws of the State, a health care facility as defined in section 323D-41(4), and its employees. Health care provider shall not mean any nursing institution or nursing service conducted by and for those who rely upon treatment by spiritual means through prayer alone, or employees of such institution or service.

(2) "Medical tort" means professional negligence, the rendering of professional service without informed consent, or an error or omission in professional practice, by a health care provider, which proximately causes death, injury, or other damage to a patient.

Sec. -2 Attorney's contingent fees arrangements. In any action for medical tort in which the plaintiff's attorney and the plaintiff agree that the attorney is to be paid a fee only if the plaintiff recovers damages, payment to the attorney shall be limited to an amount not in excess of:

(1) 33 1/3 per cent of the amount recovered if the claim is settled prior to the filing of the statement of readiness for trial; or

(2) 40 per cent of any amount recovered after the statement of readiness for trial is filed to the time judgment is rendered by the trial court.

Such limitations shall apply regardless of whether the recovery is by settlement, arbitration, or judgment.

Sec. -3 Informed consent; board of medical examiners standards. (a) In any action for medical tort based on an incident that occurred after January 1, 1977, based on the rendering of professional service without informed consent, evidence may be introduced that the health care provider complied with standards established by the board of medical examiners governing the information required to be given by or at the direction of the health care provider to a patient, or the patient's guardian in the case of a patient who is not competent to give informed consent.

(b) The board of medical examiners shall, insofar as practicable, establish reasonable standards of medical practice, applicable to specific treatment and surgical procedures, for the substantive content of the information required to be given and the manner in which it is given and in which consent is received in order to constitute informed consent from a patient or a patient's guardian. The standards shall include provisions which are designed to reasonably inform and to be understandable by a patient or a patient's guardian of the probable risks and effects of the proposed treatment or surgical procedure, and of the probable risks of not receiving the proposed treatment or surgical procedure. The standards established by the board shall be prima facie evidence of the standards of care required but may be rebutted by either party.

(c) Nothing in this section shall require informed consent from a patient or a patient's guardian when emergency treatment or emergency surgical procedure is rendered by a health care provider and the obtaining of consent is not reasonably feasible under the circumstances without adversely affecting the condition of the patient's health.

Sec. -4 "Ad damnum" clause prohibited. (a) No complaint, counterclaim, or cross-claim in an action for medical tort shall specify the

amount of damages prayed for but shall contain a prayer for general relief, including a statement that the amount of damages is within the minimum jurisdictional limits of the court in which the action is brought.

(b) In any such medical tort action, the party against whom the complaint, counterclaim, or cross-claim is made may at any time request a statement setting forth the nature and amount of the damages sought. The request shall be served upon the complainant, counterclaim, or cross-claimant who shall serve a responsible statement as to the damages within fifteen days thereafter. In the event a response is not served, the requesting party may petition the court with notice to the other parties, to order the appropriate party to serve a responsive statement.

(c) If no request is made for a statement setting forth the nature and amount of damages sought, the complainant, counterclaimant, or cross-claimant, as the case may be, shall give notice to the other of the amount of special and general damages sought to be recovered, either before a default may be taken, or in the event an answer is filed, at least sixty days prior to the date set for trial.

Sec. -5 Reporting and reviewing medical tort claims. (a) Every self-insured health care provider, and every insurer providing professional liability insurance for a health care provider, shall report to the insurance commissioner the following information about any medical tort claim, known to the self-insured health care provider or insurer, that has been settled, arbitrated, or adjudicated to final judgment within ten working days following such disposition:

(1) The name and last known business and residential addresses of each plaintiff or claimant, whether or not each recovered anything;

(2) The name and last known business and residential addresses of each health care provider who was claimed or alleged to have committed a medical tort, whether or not each was a named defendant and whether or not any recovery was had against each;

(3) The name of the court in which any medical tort action, or any part thereof, was filed and the docket number;

(4) A brief description or summary of the facts upon which each claim was based, including the date of occurrence;

(5) The name and last known business and residential addresses of each attorney for any party to the settlement, arbitration, or adjudication, and identification of the party represented by each attorney;

(6) Funds expended for defense and plaintiff costs;

(7) The date and amount of each settlement, arbitration award, or judgment in any matter subject to this subsection.

(8) Actual dollar amount of award received by the injured party.

(b) The insurance commissioner shall forward the name of every health care provider, except a hospital, against whom a settlement is made, an arbitration award is made, or judgment is rendered to the appropriate board of professional registration and examination for review of the fitness of the health care provider to practice his profession.

(c) A failure on the part of any self-insured health care provider to report as requested by this section shall be grounds for disciplinary action by the board of

medical examiners or the state health planning agency. A violation by an insurer shall be grounds for suspension of its certificate of authority.

Sec. -6 Administration of chapter. The director of regulatory agencies shall be responsible for the implementation and administration of this chapter and shall adopt rules, in conformity with chapter 91, necessary for the purposes of this chapter.

PART II. MEDICAL CLAIM CONCILIATION

Sec. -11 Medical claim conciliation panels; composition, selection, compensation. (a) There are established medical claim conciliation panels which shall review and render findings and advisory opinions on the issues of liability and damages in medical tort claims against health care providers.

(b) Each medical claim conciliation panel shall consist of one chairperson selected from among persons who are familiar with and experienced in the personal injury claims settlement process, one active trial attorney licensed to practice in the courts of the State, and one physician or surgeon licensed to practice under the law of the State. The chairperson shall be appointed by the chief justice of the supreme court of Hawaii. The attorney shall be appointed by the chairperson from a list of twenty-five attorneys submitted annually by the supreme court. The physician or surgeon shall be appointed by the chairperson from a list of twenty-five physicians or surgeons submitted annually by the board of medical examiners. Each member of the panel shall serve on the panel for a period of one month to hear and decide all claims brought before the panel within that month; provided that a member of the panel who has demonstrated a high degree of effectiveness in finding facts or in conciliating claims brought before the panel may be reappointed to the panel for additional months.

The chairperson shall preside at the meetings of the panel. The chairperson and all panel members shall serve voluntarily and without compensation, but shall be paid allowances for travel and living expenses which may be incurred as a result of the performance of their duties on the panel. Such costs shall be paid by the department of regulatory agencies.

The office and meeting space, secretarial and clerical assistance, office equipment and office supplies for the panel shall be furnished by the department of regulatory agencies.

The board of medical examiners shall prepare a list of physicians and surgeons along with their respective specialties who shall then be considered consultants to the panel in their respective fields. Panel members may consult with other legal, medical and insurance specialists. Any consultant called by the panel to appear before the panel shall be paid an allowance for travel and living expenses which may be incurred as a result of such person's appearance before the panel. Such costs shall be paid by the department of regulatory agencies.

Sec. -12 Review by panel required; notice; presentation of claims. Effective July 1, 1976, any person or his representative claiming that a medical tort has been committed shall submit the claim to the medical claim conciliation panel before a suit based on the claim may be commenced in any court of this State. Claims shall be submitted to the medical claim conciliation panel orally or

in writing on forms provided by the panel. If the claim is presented orally, the panel shall reduce the claim to writing. The claimant shall set forth facts upon which the claim is based and shall include the names of all parties against whom the claim is or may be made who are then known to the claimant. Within five business days thereafter the panel shall give notice of the claim, by certified mail, to all health care providers and others who are or may be parties to the claim and shall furnish copies of written claims to such persons. Such notice shall set forth a date, not more than twenty days after mailing the notice, within which any health care provider against whom a claim is made may file a written response to the claim, and a date and time, not less than five days following the last date for filing a response, for hearing of the panel. Such notice shall describe the nature and purpose of the panel's proceedings and shall designate the place of the meeting. The times originally set forth in the notice may be enlarged by the chairperson, on due notice to all parties, for good cause.

Sec. -13 Medical claim conciliation panel hearing; fact-finding; evidence; voluntary settlement. Every claim of a medical tort shall be heard by the medical claim conciliation panel within thirty days after the last date for filing a response. No persons other than the panel, witnesses and consultants called by the panel, and the persons listed in section -14 shall be present except with the permission of the chairperson. The panel may, in its discretion, conduct an inquiry of a party, witness or consultant without the presence of any or all parties.

The hearing shall be informal. Chapters 91 and 92 shall not apply. The panel may require a stenographic record of all or part of its proceedings for the use of the panel, but such record shall not be made available to the parties. The panel may receive any oral or documentary evidence. Questioning of parties, witnesses and consultants shall be conducted by the panel, but the panel may, in its discretion, permit any party, or any counsel for a party to question other parties, witnesses or consultants.

The panel shall have the power to require by subpoena the appearance and testimony of witnesses and the production of documentary evidence. The testimony of witnesses may be taken either orally before the panel or by deposition. In cases of refusal to obey a subpoena issued by the panel, the panel may invoke the aid of any circuit court in the State, which may issue an order requiring compliance with the subpoena. Failure to obey such order may be punished by the court as a contempt thereof. Any member of the panel may sign subpoenas, administer oaths and affirmations, examine witnesses, and receive evidence. Notwithstanding such powers, the panel shall attempt to secure the voluntary appearance, testimony, and cooperation of parties, witnesses and consultants without coercion.

At the hearing of the panel and in arriving at its opinion the panel shall consider, but not be limited to, statements or testimony of witnesses, hospital and medical records, nurses' notes, x-rays and other records kept in the usual course of the practice of the health care provider without the necessity for other identification or authentication, statement of fact or opinion on a subject contained in a published treatise, periodical, book or pamphlet, or statements of experts without the necessity of the experts appearing at the hearing. The panel may upon the application of any party or upon its own decision appoint as a consul-

tant, an impartial and qualified physician or surgeon or other professional person or expert to testify before the panel or to conduct any necessary professional or expert examination of the claimant or relevant evidentiary matter and to report to or testify as a witness thereto. Such a consultant shall not be compensated or reimbursed except for travel and living expenses to be paid as provided in section -11. Discovery by the parties shall not be allowed.

During the hearing and at any time prior to the rendition of an advisory decision pursuant to section -15, the panel may encourage the parties to settle or otherwise dispose of the case voluntarily.

Sec. -14 Same; persons attending hearings of panel. Unless excluded or excused by the panel, the following persons shall attend hearings before the panel:

(1) The party or parties making the claim;
(2) The health care provider or providers against whom the claim is made or representatives thereof, other than counsel, authorized to act for such health care provider or providers;
(3) Counsel for the parties, if any, and
(4) A representative of each health care provider's liability insurance carrier authorized to act for such carrier.

Sec. -15 Same, decisions. (a) Within fifteen days after the completion of a hearing, the medical claim conciliation panel shall file a written advisory decision with the insurance commissioner who shall thereupon mail copies to all parties concerned, their counsel, and the representative of each health care provider's liability insurance carrier authorized to act for such carrier, and the board of medical examiners. 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 non-economic 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 before the decision is written or filed.

Sec. -16 Subsequent litigation; excluded evidence. The claimant may institute litigation based upon the claim in an appropriate court only after a party to a medical claim conciliation panel hearing rejects the decision of the panel.

No statement made in the course of the hearing of the medical claim conciliation panel shall be admissible in evidence either as an admission, to

impeach the credibility of a witness, or for any other purpose in any trial of the action, provided that such statements may be admissible for the purpose of section -19, hereof. No decision, conclusion, finding, or recommendation of the medical claim conciliation panel on the issue of liability or on the issue of damages shall be admitted into evidence in any subsequent trial, nor shall any party to the medical claim conciliation panel hearing, or the counsel or other representative of such party, refer or comment thereon in an opening statement, an argument, or at any other time, to the court or jury, provided that such decision, conclusion, finding, or recommendation may be admissible for the purpose of section -19, hereof.

Sec. -17 Immunity of panel members from liability. No member of a medical claim conciliation panel shall be liable in damages for libel, slander, or other defamation of character of any party to medical claim conciliation panel proceeding for any action taken or any decision, conclusion, finding, or recommendation made by the member while acting within his or her capacity as a member of a medical claim conciliation panel under this Act.

Sec. -18 Statute of limitations tolled. The filing of the claim with the medical claim conciliation panel shall toll any applicable statute of limitations, and any such statute of limitations shall remain tolled until sixty days after the date the decision of the panel is mailed or delivered to the parties.

Sec. -19 Duty to cooperate; assessment of costs and fees. It shall be the duty of every person who files a claim with the medical claim conciliation panel, every health care provider against whom such claim is made, and every insurance carrier or other person providing medical tort liability insurance for such health care provider, to cooperate with the medical claim conciliation panel for the purpose of achieving a prompt, fair and just disposition or settlement of such claim, provided that such cooperation shall not prejudice the substantive rights of said persons.

After trial of such claim or after settlement of such claim after suit has been filed, any party may apply to the court in which the suit was brought to have the costs of the action assessed against any party or any insurance carrier or other person providing medical tort liability insurance to a party health care provider, or both, for failure to cooperate with the medical claim conciliation panel. The court may award such costs, or a portion thereof, including attorney's fees, witness fees, including those of expert witnesses, costs of discovery and transcribing depositions, and court costs to the party applying therefor.

On application of the director of regulatory agencies, the court may award as a civil penalty against any party or any insurance carrier or other person providing medical tort liability insurance to a party health care provider, or all or any combination of such persons, all or a portion of the costs and expenses of the medical claim conciliation panel attributable to a claim involving such persons, if the court finds that such person or persons failed to cooperate with the medical claim conciliation panel. Such penalty shall be payable to the general fund.

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

(1) The attendance of the persons at the hearing of the medical claim

conciliation panel;

(2) The extent to which representatives of parties and counsel representing parties came to panel hearings with knowledge of the claims and defenses and authority to negotiate a settlement or other disposition of the claim;

(3) The testimony of members of the panel as to the facts of the person's participation in the panel hearing;

(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 or negotiating.

Sec. -20 Annual report. The director of regulatory agencies shall prepare and submit to the legislature annually, twenty days prior to the convening of each regular session, a report containing his evaluation of the operation and effects of this chapter. The report shall include a summary of the claims brought before the medical claim conciliation panel and the disposition of such claims, a description and summary of the work of the panel under this chapter, an appraisal of the effectiveness of this chapter in securing prompt and fair disposition of medical tort claims, a review of the number and outcomes of claims brought under section -12 and recommendations for changes, modifications or repeal of this chapter or parts thereof with accompanying reasons and data.

PART III. PATIENTS' COMPENSATION FUND

Sec. -31 Establishment of patients' compensation fund. (a) Effective September 1, 1976, there is established in the department of regulatory agencies, separate and apart from all other moneys or funds, a patient's compensation fund, hereinafter referred to as the "fund", which shall be collected, received, and administered by the insurance commissioner and held by him in trust exclusively for the purposes of this part. The fund may sue and be sued under its name. All amounts received and earned shall be paid into the fund and all claims payable shall be paid from the fund. The fund shall be the exclusive agency through which medical malpractice insurance in excess of $100,000 may be written in the state for health care providers as defined in section -1.

The fund shall consist of:

(1) An annual surcharge levied on every insured health care provider in Hawaii. The surcharge shall be determined by the insurance commissioner based upon actuarial principles and shall be levied in terms of a stated percentage of the annual premium cost to each health care provider for medical malpractice insurance. The surcharge shall be collected, on the same basis as premiums, by each insurer or surplus lines agent and paid over to the insurance commissioner;

(2) A reasonable annual amount, levied on every self insured health care provider in Hawaii. The amount shall be determined by the insurance commissioner and shall be comparable to that paid by an insured health care provider of the same risk category. The amount shall be paid by the self insured health care provider to the insurance commissioner;

(3) Any loan from the state general funds as provided by section -37; and

(4) Interest earned on any money in the fund.

(b) If on January 31 of any year, the amount of money in the fund exceeds the sum of $5,000,000 after payment of all claims and expenses and accumulation of appropriate, unencumbered loss reserves in an amount determined by the insurance commissioner, the insurance commissioner shall reduce or waive the surcharges provided for in this section in order to maintain the fund at an approximate level of $5,000,000.

(c) The insurance commissioner shall set the amounts payable to the fund and times of payment under subsection (a)(1) and (2) so that the fund shall reach the sum of $5,000,000 by September 1, 1981.

Sec. -32 Payment of claims from the patients' compensation fund. (a) The insurance commissioner shall pay an amount from the fund to a claimant for damages on account of a medical tort when and to the extent a final judgment, a binding arbitration award, or a settlement of the medical tort or alleged medical tort is in excess of $100,000 and the judgment award or settlement is against a health provider who was a participant in the patients' compensation fund at the time the medical tort or alleged medical tort occurred.

(b) All claims from the patients' compensation fund shall be paid on or before the end of each calendar quarter, but in no event later than the succeeding January 15. At the end of each calendar quarter, the insurance commissioner shall determine if the fund is in danger of being exhausted. If such determination is made, the amount paid to each claimant of all claims allowed thereafter shall be prorated. Any amounts due and unpaid shall be paid in the following calendar year.

(c) Expenditures of moneys in the fund shall not be subject to any provisions of law requiring specific appropriations or other formal release by state officers of money in their custody. All benefits shall be paid from the fund upon vouchers approved by the insurance commissioner.

Sec. -33 Insurance commissioner approval of payment from the fund. The insurance commissioner shall approve payment of a claim from the fund upon receipt of:

(1) A certified copy of a final judgment in excess of $100,000 for a claimant against a health care provider; or

(2) A certified copy of a binding arbitration award in excess of $100,000 for a claimant against a health care provider; or

(3) A certified copy of a settlement in excess of $100,000 for a claimant against a health care provider.

Sec. -34 Management of fund. The insurance commissioner shall be the treasurer and custodian of the fund. All moneys in the fund shall be held in trust for the purposes of this part only and shall not be expended, released, or appropriated or otherwise disposed of for any other purpose. Moneys in the fund may be deposited as provided in chapter 38 but such moneys shall not be commingled with other state funds and shall be maintained in separate accounts on the books of the depository. Such moneys shall be secured by the depository to

the same extent and in the same manner as required by the general depository law of the state; and collateral pledged to secure other funds of the state.

All expenses of collecting, protecting, and administering the fund shall be paid from the fund.

The insurance commissioner shall invest such moneys in the fund as are in excess of the amount deemed necessary for the payment of claims from the fund for a reasonable future period in investments authorized for insurers under sections 431-281 to 431-311; provided that the investments shall at all times be so made that all the assets of the fund shall always be readily convertible into cash when needed for the payment of claims.

Sec. -35 Powers of insurance commissioner. (a) Every insurer providing medical malpractice insurance to a health care provider defined in section -1 and every self-insured health care provider shall report to the insurance commissioner within ten working days any claim filed against a health care provider and shall make supplemental reports as required by the insurance commissioner. The reports shall not be subject to chapter 92.

(b) For any court action or arbitration action on a medical tort, the insurance commissioner may contract with an attorney to take action in the name of the health care provider if he finds such action is necessary to protect the interest of the fund.

(c) Settlement of a medical tort claim which may result in a recovery from the fund shall be made only with the agreement of the insurance commissioner.

(d) The insurance commissioner may employ, without regard to chapter 76 and 77, or contract for the services of professional staff without regard to section 103-3 to carry out the responsibilities of this part. Compensation for such services shall be paid from the fund.

(e) If the plaintiff in a medical tort claim offers in writing to settle at a sum of $100,000 or less, which offer is not accepted by the insurer or the self insured health care provider, and the claim subsequently results in a judgment or arbitration award that exceeds $100,000; and the offer to settle was rejected in bad faith, the fund shall have a cause of action against the insurer or self insured health care provider for the amount paid by the fund as a result of the bad faith failure to settle. The insurance commissioner, on behalf of the fund, may bring an action to recover on the cause of action and if the judgment is for the fund, it shall also recover reasonable attorneys fees and the costs of suit.

Sec. -36 Health care providers, proof of financial responsibility required. No health care provider shall be permitted to participate in the patients' compensation fund unless the health care provider gives evidence to the insurance commissioner of maintenance of financial responsibility through:

(1) Medical malpractice insurance in the amount of $100,000, or

(2) A surety bond, proof of qualifications as a self-insurer, or other securities affording financial responsibility substantially equivalent to that afforded under a medical malpractice insurance policy in the amount of $100,000 as approved by the insurance commissioner under rules adopted by the insurance commissioner.

Sec. -37 Loans by State to the fund. Until the amount of money in the

fund exceeds $5,000,000 calculated in the manner provided in section -31(b), the insurance commissioner may request a loan from the State general fund; provided that the aggregate amount of such loans that are unpaid shall not exceed $1,500,000 at any time. Every such loan shall be repaid by the fund within three years together with interest at a rate of one and one-half per cent more than that paid by the State at its last sale of its general obligation bonds. Upon receipt of a loan from the State to the fund, the insurance commissioner shall increase, in addition to any other actuarially required increases, the annual surcharge and the annual amounts provided for in section -31(a)(1) and (2), over the succeeding two years to a level that is calculated to provide a sum to repay the State loan and interest thereon. Loans from the State are authorized only during the period that the fund is accumulating through surcharges on health care providers. No loan shall be made after the amount in the fund reaches the sum of $5,000,000. The loan shall be made only upon a finding by the director of finance that there are moneys in the general fund which are in excess of the amounts necessary for the immediate state requirements."

SECTION 3. Section 323D-12, Hawaii Revised Statutes, is amended to read:

"**Sec. 323D-12 Functions; state agency.** The state agency shall:

(1) Conduct the health planning activities of the State and implement those parts of the state health plan and plans of the health systems agencies within the State which relate to state government.
(2) Prepare, review, and annually revise the preliminary state health plan pursuant to Public Law 93-641, section 1523(a) (2).
(3) Assist the statewide council in reviewing the state medical facilities plan pursuant to section 323D-31.
(4) Administer the state certificate of need program pursuant to part IV of this chapter and serve as designated planning agency under Title XI, Sec. 1122 of the Social Security Act, as amended.
(5) Determine the need for new institutional health services proposed by health systems agencies.
(6) Review on a periodic basis all institutional health services offered in the State respecting the appropriateness of such activities.
(7) Adopt rules to require maintenance of financial responsibility equal to that required for participation in the patients' compensation fund as provided in section -36.
(8) Do all things necessary as required by federal and state laws."

SECTION 4. Chapter 431, Hawaii Revised Statutes, is amended by adding two new sections to be appropriately designated and to read:

"**Sec. 431- Malpractice insurance for health care providers, reports required for denial, etc.** In addition to the reporting requirements imposed by section -5, every insurer providing professional liability insurance for health care providers, as defined in section -1, shall, within thirty days after denial, non-renewal, or termination of coverage for such insurance, report to the insurance commissioner the name of every health care provider in the State who

has been denied the insurance, whose insurance has not been renewed, or whose insurance has been terminated, and the reason for the denial, non-renewal, or termination.

Sec. 431- Defense of patients' compensation fund. (a) Every professional liability insurance policy for health care provider as defined in section -1 shall include coverage of all defense costs for medical torts. The defense costs shall include defense of the insurer and defense of the patients' compensation fund as established in section -31, notwithstanding the fact that the insurer's liability may be limited to the payment of the first $100,000 of the judgment, award, or settlement.

(b) If the insurance commissioner has taken action to protect the interest of the fund under section -35, and the insurer has been found to have been in bad faith in defending the fund, the court may order upon request by the insurance commissioner, that the defense costs incurred by the insurance commissioner be paid by the insurer."

SECTION 5. Section 435C-3, Hawaii Revised Statutes, is amended by amending subsection (b) to read:

"(b) The plan shall, pursuant to the provisions of this chapter and the plan of operation with respect to medical malpractice insurance, have the power on behalf of its members:

(1) To issue, or to cause to be issued policies of insurance to applicants, including incidental coverages and subject to limits as specified in the plan of operation but not to exceed $100,000 for each claimant under one policy in any one year, with any amount due on a judgment, arbitration award, or settlement in excess of $100,000 to be paid from the patients' compensation fund created by section -31;
(2) To appoint service companies to underwrite such insurance and to adjust and pay losses with respect thereto;
(3) To assume reinsurance from its members; and
(4) To cede reinsurance."

SECTION 6. Section 453-2, Hawaii Revised Statutes, is amended to read:

"**Sec. 453-2 License required; exceptions.** Except as otherwise provided by law, no person shall practice medicine or surgery in the State either gratuitously or for pay, or shall offer to so practice, or shall advertise or announce himself, either publicly or privately, as prepared or qualified to so practice, or shall append the letters "DR." or "M.D." to his name, with the intent thereby to imply that he is a practitioner of medicine or surgery, without having a valid unrevoked license or a limited and temporary license, obtained from the board of medical examiners, in form and manner substantially as hereinafter set forth.

No person shall be issued a license to practice medicine or surgery unless he maintains financial responsibility equal to that required for participating in the patients' compensation fund as provided in section -36.

Nothing herein shall (1) apply to so-called Christian Scientists so long as they merely practice the religious tenets of their church without pretending a knowledge of medicine or surgery; (2) prohibit service in the case of emergency or

the domestic administration of family remedies; (3) apply to any commissioned medical officer in the United States army, navy, marine corps, or public health service, engaged in the discharge of his official duty, nor to any practitioner of medicine and surgery from another state when in actual consultation with a licensed practitioner of this State if the practitioner from another state, at the time of such consultation, is licensed to practice in the state in which he resides; provided, that the practitioner from another state shall not open an office, or appoint a place to meet patients, or receive calls within the limits of the State; and provided further that the laws and regulations relating to contagious diseases are not violated; (4) prohibit services rendered by any physician-support personnel or any physician's assistant when such services are rendered under the direction and control of a physician licensed in this State, except for those specific functions and duties delegated by law to those persons licensed as optometrists under chapter 459. Such direction and control shall not be construed in every case to require the personal presence of the supervising and controlling physician. Any physician who employs or directs such support personnel or physician's assistant shall retain full professional and personal responsibility for any act which constitutes the practice of medicine when performed by such personnel or physician's assistant. The board of medical examiners shall, in conformity with chapter 91, promulgate rules and regulations regarding standards of medical education and training governing physician-support personnel and physician's assistants, such standards to equal but not be limited by existing national educational and training standards; and standards governing information to be given to patients as required by section -3."

SECTION 7. Section 453-4, Hawaii Revised Statutes, is amended to read:

"**Sec. 453-4 Qualifications for examination.** Except as otherwise provided by law, no person shall be licensed to practice medicine or surgery unless he has passed an examination and has been found to be possessed of the necessary qualifications.

Before any applicant shall be eligible for such examination he shall furnish proof satisfactory to the board that:

(1) He (A) is a citizen of the United States; or (B) if not a citizen of the United States, has declared his intention to become a citizen of the United States, as provided by law;
(2) He is of good moral character;
(3) (A) He is a graduate of a medical school or college approved by the council on medical education and hospitals of the American medical association; or (B) He is a graduate of a foreign medical school, who has had at least three years' medical experience or training in a hospital approved by the council on medical education and hospitals of the American medical association for the internship or residency, and has passed the qualifying examination of the educational council for foreign medical graduates or its successor;
(4) He has served an internship of at least one year in either a hospital which has been certified or approved for the training of interns and resident physicians by the American medical association, council on

medical education and hospitals, or if outside the United States, in a hospital which is shown by the applicant to the satisfaction of the board to possess standards substantially the equivalent of those required for such American medical association approval, or has completed one year of residency training in a program approved by the American medical association, council of medical education and hospitals;

Diplomates of the national board of medical examiners or those who have passed the federation licensing examination (FLEX) with scores deemed satisfactory by the board and who meet the requirements of paragraphs (1), (2), (3), and (4) above, shall be licensed without the necessity of any further examination; provided that with respect to any applicant the board may require letters of evaluation, professional evaluation forms, and interviews with chiefs of service or attending physicians who have been associated with an applicant or chief residents on a service who have been associated with an applicant during his training or during his practice to be used by the board in assessing the applicant's qualifications to practice medicine."

SECTION 8. Section 453-5, Hawaii Revised Statutes, is amended to read:

"**Sec. 453-5 Board of medical examiners; appointment, removal, qualifications.** For the purpose of carrying out this chapter the governor shall appoint in the manner prescribed in section 26-34, a board of medical examiners, whose duty it shall be to examine all applicants for license to practice medicine or surgery.

The board shall consist of nine persons, seven of whom shall be physicians or surgeons licensed under the laws of the State and two of whom shall be lay members appointed from the public at large. Of the seven physician or surgeon members, four shall be appointed from the city and county of Honolulu and one each from each of the other counties. Medical societies in the various counties may conduct elections periodically but no less frequently than every two years to determine nominees for the board to be submitted to the governor. In making appointments the governor may consider recommendations submitted to him by the medical societies and the public at large. Each member shall serve until his successor is appointed and qualified.

The members of the board shall serve without pay; provided that they shall be allowed their reasonable expenses for travel and other costs incurred in the discharge of their duties. A majority of the board shall constitute a quorum.

The department of regulatory agencies shall provide administrative support to the board. The department shall employ, not subject to chapters 76 and 77, an executive secretary to administer the board's activities."

SECTION 9. Section 453-6, Hawaii Revised Statutes, is amended to read:

"**Sec. 453-6 Fees; expenses.** No applicant shall be examined under this chapter until he has paid to the board of medical examiners a fee of $125. As a prerequisite to the issuance of a limited and temporary license under this chapter, the applicant shall pay to the board a fee of $75; provided that the fee to be paid by an applicant qualifying under section 453-3(4) shall be $37.50. Every person holding a license under this chapter shall re-register with the board biennially in each even-numbered year, not later than January 31 and for such registration

shall pay a fee of $150. At the time of re-registration, the physician or surgeon shall present to the board evidence of compliance with a program of continuing medical education adopted by the board. Failure to re-register and present such evidence shall constitute a forfeiture of license, which may be restored only upon written application therefor and payment to the board of a fee of $200. All such fees shall be deposited by the director of regulatory agencies with the director of finance to the credit of the general fund."

SECTION 10. Section 453-8, Hawaii Revised Statutes, is amended to read:

"**Sec. 453-8 Revocation, limitation or suspension of licenses.** Any license to practice medicine and surgery may be revoked, limited, or suspended by the board of medical examiners at any time in a proceeding before the board for any one or more of the following acts or conditions on the part of the holder of such license:

(1) Procuring, or aiding or abetting in procuring, a criminal abortion;
(2) Employing any person to solicit patients for him;
(3) Obtaining a fee on the assurance that a manifestly incurable disease can be permanently cured;
(4) Wilfully betraying a professional secret;
(5) Making any untruthful and improbable statement in advertising one's medical or surgical practice or business;
(6) False, fraudulent, or deceptive advertising;
(7) Being habituated to the excessive use of drugs or alcohol; or being or having been addicted to, dependent on, or an habitual user of a narcotic, barbiturate, amphetamine, hallucinogen, or other drug having similar effects;
(8) Practicing medicine while the ability to practice is impaired by alcohol, drugs, physical disability, or mental instability;
(9) Procuring a license through fraud, misrepresentation, or deceit or knowingly permitting an unlicensed person to perform activities requiring a license;
(10) Professional misconduct or gross carelessness or manifest incapacity in the practice of medicine or surgery;
(11) Conduct or practice contrary to recognized standards of ethics of the medical profession;
(12) Performing any surgical or medical treatment which is contrary to accepted medical standards;
(13) Consistently utilizing medical services or treatment which is inappropriate or unnecessary;
(14) Failure to maintain financial responsibility equal to that required for participation in the patients' compensation fund as provided in section -36;
(15) Violation of the conditions or limitations upon which a limited or temporary license is issued.

If any such license is revoked, limited, or suspended by the board for any act or condition listed in this section, the holder of the license shall be in writing notified by the board of the revocation or suspension. Any license to practice

medicine and surgery which has been revoked under this section may be restored by the board of medical examiners."

SECTION 11. Section 453-9, Hawaii Revised Statutes, is amended to read:

"**Sec. 453-9 Hearing; procedure.** In any proceeding before the board of medical examiners for the revocation, limitation, or suspension of a license to practice medicine and surgery for any act or condition listed in section 453-8, the person whose license is sought to be revoked, limited, or suspended shall be given notice and opportunity for hearing in conformity with chapter 91."

SECTION 12. Section 453-10, Hawaii Revised Statutes, is amended to read:

"**Sec. 453-10 Witnesses in such proceeding.** In any such proceeding the board may subpoena, administer oaths to, and examine witnesses on any relevant matter in such proceeding. The board may subpoena physicians or surgeons as specialists, on the recommendation of the appropriate specialist society. The board may order a mental, physical, or medical competency examination to determine the capacity or ability of a licensee to continue to practice medicine or surgery and order appropriate specialist societies to conduct such examinations. The person whose license is sought in such proceeding to be revoked, limited, or suspended shall be entitled to require the board or any member thereof to subpoena and to administer oaths to any witness or witnesses who may be able to present evidence relevant in such proceeding, and shall be entitled to examine any such witness and any other witness in such proceeding. The circuit court of the circuit in which the proceeding is held may enforce by proper proceeding the attendance and testimony of witnesses in such proceeding."

SECTION 13. Section 453-11, Hawaii Revised Statutes, is amended to read:

"**Sec. 453-11 Recalcitrant witnesses; contempt.** If any person called before the board as a witness in any such proceeding, whether under subpoena or otherwise, except as privileged by law, refuses to answer any question which is relevant to the proceeding and is put to him by the board, a member thereof or the person whose license is sought to be revoked, limited, or suspended in such proceeding, or disobeys any order of the circuit court relating to the proceeding, the board shall report the matter in writing to any judge of the circuit court of the circuit in which such proceeding is held and such person shall be cited to appear before the circuit judge to show cause why he should not be punished for contempt of court under chapter 729."

SECTION 14. Chapter 453, Hawaii Revised Statutes, is amended by adding three new sections to be appropriately designated and to read:

"**Sec. 453- Voluntary limitation of license.** A physician or surgeon may request, in writing, that the board limit his license to practice. The board may grant the request and may impose conditions on the limited license. The board shall determine whether and when such limitation shall be removed."

"**Sec. 453- Disciplinary action.** In disciplining a licensee in a proceeding

under section 453-9, the board may impose one or more of the following actions:

(1) Place the licensee on probation, including such conditions of probation as requiring observation of the licensee by an appropriate group or society of licensed physicians or surgeons.
(2) Suspend the license.
(3) Revoke the license.
(4) Limit the license by restricting the fields of practice in which the licensee may engage.
(5) Fine the licensee, including assessment against him of the costs of the disciplinary proceedings.
(6) Temporarily suspend the license for not more than thirty days without a hearing, when the board finds the practice of the licensee probably constitutes an immediate and grave danger to the public.
(7) Require further education or training or require proof of performance competency."

"**Sec. 453- Review of adverse decisions reported by peer review committees.** The board shall review all adverse decisions reported to it by the peer review committees of medical societies, hospitals, and other health care institutions required to report by section 663-1.7. The information in such decisions shall be held confidential by the board unless and to the extent any such information is admissible evidence at a hearing held under section 453-9."

SECTION 15. Chapter 622, Hawaii Revised Statutes, is amended by adding to Part V a new section to be appropriately designated and to read:

"**Sec. 622- Availability of medical records.** If a patient of a health care provider as defined in section -1, requests copies of his or her medical records, the copies shall, if available, be made available to the patient unless in the opinion of the health care provider it would be detrimental to the health of the patient to obtain the records. If the health care provider is of the opinion that release of the records to the patient would be detrimental to the health of the patient, the health care provider must advise the patient that copies of the records will be made available to the patient's attorney upon presentation of a proper authorization signed by the patient.

If an attorney for a patient asks a health care provider for copies of the patient's medical records and presents a proper authorization from the patient for the release of the information, complete and accurate copies of the records shall be given to the attorney within a reasonable time not to exceed ten working days.

Reasonable costs incurred by a health care provider in making copies of medical records shall be borne by the requesting person."

SECTION 16. Section 662-4, Hawaii Revised Statutes, is amended to read:

"**Sec. 662-4 Statute of limitations.** A tort claim against the State shall be forever barred unless action is begun within two years after the claim accrues, except in the case of a medical tort claim when the limitation of action provisions set forth in section 657-7.3 shall apply."

SECTION 17. Section 657-7.3, Hawaii Revised Statutes, is amended to read:

"**Sec. 657-7.3 Medical torts; limitation of actions; time.** No action for injury or death against a chiropractor, clinical laboratory technologist or technician, dentist, naturopath, nurse, nursing home administrator, dispensing optician, optometrist, osteopath, physician or surgeon, physical therapist, podiatrist, psychologist, or veterinarian duly licensed or registered under the laws of the State, or a licensed hospital as the employer of any such person, based upon such person's alleged, professional negligence, or for rendering professional services without consent, or for error or omission in such person's practice, shall be brought more than two years after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, but in any event not more than six years after the date of the alleged act or omission causing the injury or death. This time limitation shall be tolled for any period during which the person has failed to disclose any act, error, or omission upon which the action is based and which is known or through the use of reasonable diligence should have been known to him, or as provided in section -16."

SECTION 18. Section 663-1.7, Hawaii Revised Statutes, is amended to read:

"**Sec. 663-1.7 Professional society; peer review committee; no liability; exceptions.** (a) As used in this section, "professional society" or "society" means any association or other organization of persons engaged in the same profession or occupation, the membership of which comprises a majority of the people engaged in the profession or occupation in the area which it serves and a primary purpose of which is to maintain the professional standards of the persons engaged in its profession or occupation; and "peer review committee" or "committee" means a committee created by a professional society, or by the medical staff of a licensed hospital, whose function is to maintain the professional standards established by the bylaws of the society or the hospital of the persons engaged in its profession or occupation, or in its hospital.

(b) There shall be no civil liability for any member of a peer review committee for any acts done in furtherance of the purpose for which the committee was established; provided that:

(1) The member was authorized to perform in the manner in which he did; and

(2) The member acted without malice after having made a reasonable effort to ascertain the truth of the facts upon which he acted.

(c) This section shall not be construed to confer immunity from liability upon any professional society or hospital, nor shall it affect the immunity of any shareholder or officer of a professional corporation; provided, however, there shall be no civil liability for any professional society or hospital in communicating any conclusions reached by one of its peer review committees relating to the conformance with professional standards of any person engaged in the profession or occupation of which the membership of the communicating professional society consists, to a peer review committee of another professional society whose membership is comprised of persons engaged in the same profes-

sion or occupation, or to a duly constituted governmental board or commission or authority having as one of its duties the licensing of persons engaged in that same profession or to a government agency charged with the responsibility for administering a program of medical assistance in which services are provided by private practitioners.

(d) The highest level peer review committee of a medical society, hospital, or other health care institution shall report in writing every adverse decision made by it to the board of medical examiners within thirty days after the adverse decision is verified by the committee. Failure to comply with this subsection shall be a violation punishable by a fine of not more than $100 for each member of the committee."

SECTION 19. Section 663-21, Hawaii Revised Statutes, is amended to read:

"**Sec. 663-21 Advance payments not admission.** In any action, including a medical tort, as defined in section -1, brought to recover damages for personal injuries, wrongful death or property damage no payment made by the defendant or the defendant's insurance company, whether made before or after the complaint is filed, to or for the plaintiff or any other person, hereinafter called an "advance payment", shall be construed as an admission of liability by any person. Except as provided in section 663-22, evidence of such payment shall not be admissible during the trial for any purpose by either plaintiff or defendant."

SECTION 20. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of the Act are severable.

SECTION 21. There is appropriated out of the general revenues of the State the sum of $85,000(4), or so much thereof as may be necessary, for the purposes of this Act.

SECTION 22. Statutory material to be repealed is bracketed. New material is underscored. In printing this Act, the revisor of statutes need not include the brackets, the bracketed material, or the underscoring.*

SECTION 23. This Act shall take effect upon its approval.

(Approved June 9, 1976.)

*Edited accordingly.