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# 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 as  
3 inquiries rather than actual claims, and patients or their  
4 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 many filings, particularly by pro se  
15 parties, are inquisitive in nature and are based on a lack of  
16 information rather than claims based on substantive analysis of  
17 the applicable standard of care. Proceedings with medical claim  
18 conciliation panels should be conducted in a non-adversarial way



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

15 The legislature further finds that making medical claim  
16 conciliation panel proceedings advisory in nature would allow  
17 the panels' role to become more conciliatory rather than  
18 adjudicatory. To this end, this Act amends the current law to  
19 reflect this practice by deleting the decision-making function  
20 of the panels and instead emphasizing conciliation and mediation  
21 to resolve matters that are before them.



1           The legislature further finds that there is much that the  
2 medical claim conciliation panel process may do to narrow and  
3 define claims when complete resolution cannot be achieved during  
4 panel proceedings and litigation subsequently must be commenced.  
5 The legislature does not intend to eliminate panels' ability to  
6 consider and discuss liability, causation, or damages with the  
7 parties, but rather, it intends to focus discussion of those  
8 issues in the context of conciliation or mediation that better  
9 reflects the panels' advisory nature. This conciliatory  
10 approach will better assist parties in fully understanding the  
11 nature of claims, defenses, and damages and encourage parties to  
12 reach a voluntary settlement. Medical claim conciliation panels  
13 should continue to express their opinions on liability,  
14 causation, and damages to the parties to assist the parties in  
15 evaluating the parties' positions. However, panels should no  
16 longer render formal decisions in order to give the panels  
17 greater flexibility in handling true claims.

18           Panels should continue to have the authority to require  
19 adversarial proceedings when adversarial proceedings would be  
20 more helpful for the ultimate resolution of claims, but only  
21 after consultation with or agreement by the parties and only



1 upon a finding that further proceedings would be helpful to the  
2 resolution of important claim issues.

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

14 The legislature also finds that medical malpractice  
15 insurers should be prohibited from increasing premiums based on  
16 medical claim conciliation panel filings since these filings  
17 should be properly recognized as inquiries rather than true  
18 claims. In addition, panel records should be expunged if there  
19 is an insufficient basis to support a finding of a medical tort  
20 against a provider.

21 The purpose of this Act is to amend part II of chapter 671,  
22 Hawaii Revised Statutes, relating to medical claim conciliation,



1 to more closely reflect actual practice and the original intent  
2 for panels to serve in a conciliatory role.

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

5 "(b) The department shall employ, not subject to chapter  
6 76, an executive secretary to administer the board's activities  
7 and an employee to administer the medical ~~[claim]~~ inquiry and  
8 conciliation panels established under chapter 671. The employee  
9 responsible for administration of the medical ~~[claim]~~ inquiry  
10 and conciliation panels shall have no duties in administration  
11 of the board's activities."

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

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



1 present the results of its investigation to the Hawaii medical  
2 board for appropriate disciplinary proceedings."

3 SECTION 4. Chapter 671, part II, Hawaii Revised Statutes,  
4 is amended to read as follows:

5 "PART II. MEDICAL [~~CLAIM~~] INQUIRY AND CONCILIATION

6 §671-11 Medical [~~claim~~] inquiry and conciliation panels;  
7 composition, selection, compensation. (a) There are  
8 established medical [~~claim~~] inquiry and conciliation panels  
9 which shall [~~review and render findings and advisory opinions on~~  
10 ~~the issues of liability and damages in medical tort claims~~  
11 ~~against health care providers-~~] facilitate the resolution of  
12 inquiries regarding the rendering of professional services by  
13 health care providers that involve injury, death, or other  
14 damages to a patient.

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



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

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



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

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





1 used to defray the administrative costs of the medical [~~claims~~]  
2 inquiry and conciliation panel program.

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

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

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



1            ~~[§671-11.5]~~ **Waiver of filing fee.** (a) If any party  
2 to ~~[a claim]~~ an inquiry cannot pay the required filing fee, the  
3 party may file with the director a motion to waive the filing  
4 fee. The motion to waive the filing fee shall be accompanied by  
5 an affidavit in a format prescribed by the department, showing  
6 in 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~~] Any person  
21 or the person's representative [~~claiming that a medical tort has~~  
22 ~~been committed~~] having concerns regarding the existence of a



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

11 (b) Within five business days [~~thereafter~~] after receipt  
12 of an inquiry the panel shall give notice of the [~~claim~~] inquiry  
13 and the statement of the [~~claim~~] inquiry, by certified mail, to  
14 all health care providers and others who are or may be parties  
15 to the [~~claim~~] inquiry and shall furnish copies of written  
16 [~~claims~~] inquiries to [~~such~~] those persons. [~~Such~~] The notice  
17 shall set forth a date, not more than twenty days after the  
18 mailing of the notice, within which any health care provider  
19 against whom [~~a claim~~] an inquiry is made shall file a written  
20 response [~~to the claim~~] and a date and time, not less than five  
21 days following the last date for filing a response, for [~~a~~  
22 ~~hearing of~~] a proceeding upon the 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 [~~other~~] 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 [~~other~~] 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 the party's attorney has consulted with  
12 at 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 the party's attorney has  
18 concluded on the basis of ~~[such]~~ the consultation that  
19 there is a reasonable and meritorious cause for filing  
20 the ~~[claim.]~~ inquiry. If the ~~[claimant or the~~  
21 ~~claimant's]~~ party initiating the inquiry or the  
22 party's attorney is not able to consult with a



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

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



1 paragraph, the certificate required by paragraph (1)  
 2 shall be filed by the [~~claimant or the claimant's~~]  
 3 party initiating the inquiry or the party's attorney  
 4 within ninety days after filing the [~~claim,~~] inquiry;  
 5 or

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





1 does not respond within a reasonable time, the  
 2 ~~[claimant or claimant's]~~ party initiating the inquiry  
 3 or the party's attorney may submit ~~[its claim]~~ the  
 4 inquiry to the medical ~~[claim]~~ inquiry and  
 5 conciliation panel along with a certificate declaring  
 6 ~~[such]~~ the nonresponse to [claimant's] the party or  
 7 the party's attorney's good faith attempt. A "good  
 8 faith attempt" shall ultimately be evaluated in light  
 9 of the goal of having a qualified physician assist the  
 10 ~~[claimant or claimant's]~~ party initiating the inquiry  
 11 or the party's attorney in understanding the basis of  
 12 the ~~[claim]~~ inquiry and ~~[such]~~ the determination  
 13 shall depend upon the circumstances of each individual  
 14 case.

15 (b) Where a ~~[claimant or the claimant's]~~ party initiating  
 16 an inquiry or the party's attorney intends to rely solely on a  
 17 failure to inform of the consequences of a procedure (informed  
 18 consent), this section shall be inapplicable. The ~~[claimant or~~  
 19 ~~the claimant's]~~ party initiating an inquiry or the party's  
 20 attorney shall certify upon filing of the ~~[claim]~~ inquiry that  
 21 ~~[the claimant or the claimant's attorney is]~~ the party or the  
 22 party's attorney is relying solely on the failure to inform of



1 the consequences of a procedure and for that reason is not  
2 filing a certificate as required by this section.

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

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

20 **§671-13 Medical ~~[claim]~~ inquiry and conciliation panel**  
21 **~~[hearing, fact finding, evidence,]~~ proceedings; voluntary**  
22 **settlement.** Every ~~[claim of]~~ inquiry regarding a medical tort



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

9 The ~~hearing~~ proceedings shall be informal. Chapters 91  
 10 and 92 shall not apply. The panel may require a stenographic  
 11 record of all or part of its proceedings for the use of the  
 12 panel, but ~~such~~ the record shall not be made available to the  
 13 parties. The panel may receive any oral or documentary  
 14 evidence. ~~Questioning of parties, witnesses, and consultants~~  
 15 ~~may be conducted by the panel, and the panel may, in its~~  
 16 ~~discretion, permit any party, or any counsel for a party to~~  
 17 ~~question other parties, witnesses, or consultants. The panel~~  
 18 ~~may designate who, among the parties, shall have the burden of~~  
 19 ~~going forward with the evidence with respect to such issues as~~  
 20 ~~it may consider, and unless otherwise designated by the panel,~~  
 21 ~~when medical and hospital records have been provided to the~~  
 22 ~~claimant for the claimant's proper review, such burden shall~~

1 ~~initially rest with the claimant at the commencement of the~~  
2 ~~hearing.]~~ The panel shall conduct proceedings in a manner  
3 appropriate to the circumstances of the inquiry and to  
4 facilitate resolution of the matter. The panel shall conduct  
5 proceedings in a non-adversarial manner consistent with the  
6 primary purpose of conciliation.

7       The panel shall have the power to require by subpoena the  
8 appearance and testimony of witnesses and the production of  
9 documentary evidence. When [~~such~~] the subpoena power is  
10 utilized, notice shall be given to all parties. The testimony  
11 of witnesses may be taken either orally before the panel or by  
12 deposition. In cases of refusal to obey a subpoena issued by  
13 the panel, the panel may invoke the aid of any circuit court in  
14 the State, which may issue an order requiring compliance with  
15 the subpoena. Failure to obey [~~such~~] an order may be punished  
16 by the court as a contempt thereof. Any member of the panel,  
17 the director of [~~the department,~~] commerce and consumer affairs,  
18 or any person designated by the director [~~of the department~~] may  
19 sign subpoenas. Any member of the panel may administer oaths  
20 and affirmations, examine witnesses, and receive evidence.  
21 Notwithstanding [~~such~~] these powers, the panel shall attempt to



1 secure the voluntary appearance, testimony, and cooperation of  
2 parties, witnesses, and consultants without coercion.

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



1 records, nurses' notes, x-rays, and other records kept in the  
2 usual course of the practice of the health care provider,  
3 discovery by the parties shall not be allowed.

4 During the [~~hearing and at any time prior to the rendition~~  
5 ~~of an advisory decision pursuant to section 671-15,~~] proceedings  
6 or at any time before termination, the panel may encourage the  
7 parties to settle or otherwise dispose of the [ease] inquiry  
8 voluntarily.

9 **§671-14 Same; persons attending [~~hearings~~] proceedings of**  
10 **panel.** Unless excluded or excused by the panel, the following  
11 persons shall attend [~~hearings~~] proceedings before the panel:

- 12 (1) The party or parties [~~making the claim,~~] submitting  
13 the inquiry;
- 14 (2) The health care provider or providers against whom the  
15 [~~claim is made~~] inquiry is submitted or  
16 representatives thereof, other than counsel,  
17 authorized to act for [~~such~~] the health care provider  
18 or providers; and
- 19 (3) Counsel for the parties, if any.

20 **§671-15 [~~Same, decisions.~~] Panel termination. [(a)**  
21 ~~Within thirty days after the completion of a hearing, the~~  
22 ~~medical claim conciliation panel shall file a written advisory~~



1 ~~decision with the insurance commissioner who shall thereupon~~  
2 ~~mail copies to all parties concerned, their counsel, and the~~  
3 ~~representative of each health care provider's liability~~  
4 ~~insurance carrier authorized to act for such carrier, as~~  
5 ~~appropriate. The insurance commissioner also shall mail copies~~  
6 ~~of the advisory decision to the department of commerce and~~  
7 ~~consumer affairs, if the claim is against a physician,~~  
8 ~~osteopathic physician, or surgeon licensed under chapter 453 or~~  
9 ~~a podiatrist licensed under chapter 463E. The panel shall~~  
10 ~~decide the issue of liability and shall state its conclusions in~~  
11 ~~substantially the following language: "We find the health care~~  
12 ~~provider was actionably negligent in his or her care and~~  
13 ~~treatment of the patient and we, therefore, find for the~~  
14 ~~claimant"; or "We find the health care provider was not~~  
15 ~~actionably negligent in his or her care and treatment of the~~  
16 ~~patient and we, therefore, find for the health care provider".~~

17 ~~(b) After a finding of liability, the medical claim~~  
18 ~~conciliation panel shall decide the amount of damages, if any,~~  
19 ~~which should be awarded in the case. The decision as to damages~~  
20 ~~shall include in simple, concise terms a division as to which~~  
21 ~~portion of the damages recommended are attributable to economic~~



1 ~~losses and which to noneconomic losses; provided the panel may~~  
2 ~~not recommend punitive damages.~~

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

6 ~~(d) The advisory decision required by this section need~~  
7 ~~not be filed if the claim is settled or otherwise disposed of~~  
8 ~~before the decision is written or filed.] The director of~~  
9 ~~commerce and consumer affairs or the panel shall notify all~~  
10 ~~affected parties upon termination of panel proceedings. At the~~  
11 ~~discretion of the director or the panel, a notice of termination~~  
12 ~~may state whether any party or parties to the matter failed to~~  
13 ~~meet the requirements of this part or meaningfully participate~~  
14 ~~in panel proceedings.~~

15 **[+]§671-15.5[+] Expungement of records; malpractice**  
16 **insurance rates.** (a) [~~Upon a decision by the medical claim~~  
17 ~~conciliation panel finding for the health care provider pursuant~~  
18 ~~to section 671-15(a), the] A health care provider may apply to~~  
19 ~~the panel for expungement of all records of the related~~  
20 ~~proceedings. The panel shall expunge all records if [a majority~~  
21 ~~of] the panel [~~finds that the complaint is fraudulent or~~~~  
22 ~~frivolous.] agrees that the inquiry did not provide a sufficient~~





1 basis to support the finding of a medical tort against the  
2 health care provider applying for expungement.

3 (b) No insurer providing professional liability insurance  
4 for a health care provider shall increase any premium rate for  
5 the health care provider on the basis of the filing of [a  
6 ~~medical tort claim against~~] an inquiry involving the health care  
7 provider [that is determined by] with the medical [claim]  
8 inquiry and conciliation panel [to be fraudulent or frivolous.]  
9 unless an indemnity payment is made to the party initiating the  
10 inquiry or the party initiating the inquiry institutes  
11 litigation in a court of competent jurisdiction based on the  
12 circumstances of the inquiry.

13 **§671-16 Subsequent litigation; excluded evidence.** The  
14 ~~[claimant]~~ party initiating the inquiry may institute litigation  
15 based upon the ~~[claim]~~ circumstances of the inquiry in an  
16 appropriate court only after ~~[a party to a]~~ the medical [claim]  
17 inquiry and conciliation panel [hearing rejects the decision of  
18 the panel,] proceedings were terminated pursuant to section  
19 671-15; a party has participated in alternative dispute  
20 resolution pursuant to section 671-16.6; or ~~[after]~~ the twelve-  
21 month period under section 671-18 has expired.



1 No statement made in the course of the [~~hearing~~]  
2 proceedings of the medical [~~claim~~] inquiry and conciliation  
3 panel shall be admissible in evidence either as an admission, to  
4 impeach the credibility of a witness, or for any other purpose  
5 in any trial of the action; provided that [~~such~~] the statements  
6 may be admissible for the purpose of section 671-19[~~, hereof~~].  
7 No decision, conclusion, finding, statement, or recommendation  
8 of the medical [~~claim~~] inquiry and conciliation panel on the  
9 issue of liability or on the issue of damages shall be admitted  
10 into evidence in any subsequent trial, nor shall any party to  
11 the medical [~~claim~~] inquiry and conciliation panel [~~hearing,~~]  
12 proceeding, or the counsel or other representative of [~~such~~] a  
13 party, refer or comment thereon in an opening statement, an  
14 argument, or at any other time, to the court or jury; provided  
15 that [~~such~~] the decision, conclusion, finding, or recommendation  
16 may be admissible for the purpose of section 671-19[~~, hereof~~].

17 **[+]§671-16.5[+] Arbitration; subsequent litigation.** Any  
18 person or the person's representative claiming that a medical  
19 tort has been committed or any health care provider against whom  
20 [~~a claim~~] an inquiry has been made may elect to bypass the court  
21 annexed arbitration program under section 601-20 after the  
22 [~~claim~~] inquiry has been submitted to the medical [~~claim~~]



1 inquiry and conciliation panel and the panel has ~~[rendered a~~  
 2 ~~decision or]~~ been terminated pursuant to section 671-15 if the  
 3 party meaningfully participated in panel proceedings, an  
 4 alternative dispute resolution process has been terminated  
 5 pursuant to section 671-16.6, or the panel or alternative  
 6 dispute resolution process has not ~~[reached a decision]~~  
 7 completed proceedings within the tolling period of the statute  
 8 of limitations under section 671-18.

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



1 took any action prior to the submission of the inquiry to an  
2 alternative dispute resolution provider, the remaining balance  
3 of any filing fees shall be refunded to the appropriate parties,  
4 less a processing fee of \$50 and a pro-rata amount to be  
5 determined by the director.

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

14 (c) Notwithstanding section 671-12, any inquiry may be  
15 submitted directly to an alternative dispute resolution process  
16 upon the written agreement of all parties without first  
17 submitting the inquiry to a medical inquiry and conciliation  
18 panel. A written agreement shall be effective as of the date of  
19 its execution by the parties. Any inquiry submitted directly to  
20 alternative dispute resolution need not be subsequently  
21 submitted to a medical inquiry and conciliation panel and shall



1 not be subject to filing fees assessed by the director for the  
2 medical inquiry and conciliation panel.

3       ~~[(e)]~~ (d) Within thirty days after the completion of the  
4 alternative dispute resolution process, the alternative dispute  
5 resolution provider shall notify all parties concerned, their  
6 counsel, and the representative of each health care provider's  
7 liability insurance carrier authorized to act for the carrier,  
8 as appropriate, that the alternative dispute resolution process  
9 has been completed.

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

13       (1) The parties were not able to resolve the entire  
14 ~~[claim]~~ matter through the alternative dispute  
15 resolution process and the matter has not been  
16 resubmitted to the medical ~~[claim]~~ inquiry and  
17 conciliation panel pursuant to subsection (b) of this  
18 section; or

19       (2) The ~~[claim]~~ matter has not been resolved through the  
20 alternative dispute resolution process after twelve  
21 months from the date the ~~[claim]~~ matter was filed with



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the approved or agreed upon alternative dispute resolution provider.

[~~e~~] (f) No statement made in the course of the approved or agreed upon alternative dispute resolution process shall be admissible in evidence as an admission, to impeach the credibility of a witness, or for any other purpose in any trial of the action. No decision, conclusion, finding, or recommendation of the approved or agreed upon alternative dispute resolution provider 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 approved or agreed upon alternative dispute resolution hearing, their counsel, or other representative of [~~such~~] the party, refer or comment thereon in an opening statement, in an argument, or at any time, to the court or jury.

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

No member of a medical [~~claim~~] inquiry and conciliation panel shall be liable in damages for libel, slander, or other defamation of character of any party to a medical [~~claim~~] inquiry and conciliation panel proceeding for any action taken or any decision, conclusion, finding, or recommendation made by the member while acting within the member's capacity as a member



1 of a medical [~~claim~~] inquiry and conciliation panel under this  
2 [~~Act.~~] part.

3       **§671-18 Statute of limitations tolled.** The filing of the  
4 [~~claim~~] inquiry with the medical [~~claim~~] inquiry and  
5 conciliation panel or with an approved or agreed upon  
6 alternative dispute resolution provider shall toll any  
7 applicable statute of limitations, and [~~any such~~] the statute of  
8 limitations shall remain tolled until sixty days after the [~~date~~  
9 ~~the decision~~] termination of the panel or the notification of  
10 completion from the approved or agreed upon alternative dispute  
11 resolution provider is mailed or delivered to the parties. If  
12 [~~a decision by the medical claim conciliation panel is not~~  
13 ~~reached~~] panel proceedings are not completed within twelve  
14 months, or the alternative dispute resolution process is not  
15 completed within twelve months, the statute of limitations shall  
16 resume running and the party filing the [~~claim~~] inquiry may  
17 commence a suit based on the [~~claim~~] circumstances related to  
18 the inquiry in any appropriate court of this State. The panel  
19 or the approved or agreed upon alternative dispute resolution  
20 provider shall notify all parties in writing of this provision.

21       **§671-19 Duty to cooperate; assessment of costs and fees.**

22 It shall be the duty of every person who files [~~a claim~~] an



1 inquiry with the medical [~~claim~~] inquiry and conciliation panel,  
2 every health care provider against whom the [~~claim~~] inquiry is  
3 made, and every insurance carrier or other person providing  
4 medical tort liability insurance for the health care provider,  
5 to cooperate with the medical [~~claim~~] inquiry and conciliation  
6 panel and meaningfully participate in panel proceedings for the  
7 purpose of achieving a prompt, fair, and just resolution,  
8 disposition, or settlement of the [~~claim,~~] inquiry, provided  
9 that cooperation and participation shall not prejudice the  
10 substantive rights of those persons.

11 Any party may apply to the panel to have the costs of the  
12 action assessed against any party for failure to cooperate with  
13 the panel[~~]~~ or meaningfully participate in panel proceedings.  
14 The panel may award costs, or a portion thereof, including  
15 attorney's fees, witness fees[~~]~~ including those of expert  
16 witnesses, filing fees, and costs of the medical [~~claim~~] inquiry  
17 and conciliation panel [~~hearing~~] proceedings to the party  
18 applying therefor.

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





- 1 (1) The attendance of the persons at [~~the hearing~~  
2 proceedings of the medical [~~claim~~] inquiry and  
3 conciliation panel;
- 4 (2) The extent to which representatives of parties and  
5 counsel representing parties came to panel [~~hearings~~]  
6 proceedings with knowledge of the claims and defenses  
7 and authority to negotiate a settlement or other  
8 disposition of the [~~claim,~~] matter;
- 9 (3) The testimony of members of the panel as to the facts  
10 of the person's participation in the panel [~~hearing,~~]  
11 proceeding;
- 12 (4) The extent of the person's cooperation in providing  
13 the panel with documents and testimony called for by  
14 the panel;
- 15 (5) The reasons advanced by the person so charged for not  
16 fully cooperating, participating, or negotiating; and
- 17 (6) The failure of the person to submit any required fees  
18 to the department of commerce and consumer affairs, as  
19 required by this chapter.

20 The party against whom costs are awarded may appeal the  
21 award to the circuit court. The court may affirm or remand the  
22 case with instructions for further proceedings; or it may



1 reverse or modify the award if the substantial rights of the  
2 petitioners may have been prejudiced because the award is  
3 characterized as abuse of discretion.

4 ~~[§]§671-20[§]~~ **Annual report.** The director of commerce and  
5 consumer affairs shall prepare and submit to the legislature  
6 annually, twenty days prior to the convening of each regular  
7 session, a report containing the director's evaluation of the  
8 operation and effects of this chapter. The report shall include  
9 a summary of the ~~[claims]~~ inquiries brought before the medical  
10 ~~[claim]~~ inquiry and conciliation panel and the disposition of  
11 ~~[such claims,]~~ those inquiries, a description and summary of the  
12 work of the panel under this chapter, an appraisal of the  
13 effectiveness of this chapter in securing prompt and fair  
14 disposition of ~~[medical tort claims,]~~ inquiries regarding the  
15 rendering of professional services by health care providers that  
16 involved injury, death, or other damages to a patient, a review  
17 of the number and outcomes of ~~[claims]~~ inquiries brought under  
18 section 671-12, and recommendations for changes, modifications,  
19 or repeal of this chapter or parts thereof with accompanying  
20 reasons and data."



1 SECTION 5. This Act does not affect rights and duties that  
2 matured, penalties that were incurred, and proceedings that were  
3 begun before its effective date.

4 SECTION 6. Statutory material to be repealed is bracketed  
5 and stricken. New statutory material is underscored.

6 SECTION 7. This Act shall take effect on January 1, 2013.



**Report Title:**

Medical Claim Conciliation; Medical Inquiry and Conciliation  
Panels

**Description:**

Amends the medical tort chapter of the Hawaii Revised Statutes,  
to make the medical claim conciliation process less adversarial  
and to emphasize inquiry, conciliation, and settlement. Renames  
the panels as medical inquiry and conciliation panels.  
Effective January 1, 2013. (SD2)

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

