
A CLAIMANT'S GUIDE

TO THE

MEDICAL CLAIMS

CONCILIATION PANEL

THE MEDICAL CLAIMS CONCILIATION PANEL
OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE
AND CONSUMER AFFAIRS
STATE OF HAWAII

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1. *What is the MCCC?*

The Medical Claims Conciliation Panel ("MCCC") was established in 1976 by Hawai'i Revised Statutes ("HRS") §671-11, et seq., to hear and render non-binding advisory decisions of liability and damages for all potential medical tort claims in the State of Hawai'i.

2. *What is the purpose of the MCCC?*

The MCCC process is designed to help parties evaluate whether or not a case should be pursued further through the judicial system, and to help conciliate meritorious cases prior to the parties incurring the substantial expenses and time of extended litigation. The MCCC hearing provides an informal forum for both sides to test the strengths and weaknesses of their respective cases before an impartial Panel. Because of the composition and the collective experience of the Panel, the Panel's decision should reflect a likely outcome of the claim, if the same evidence were presented to a judge or a jury.

3. *Can the MCCC be bypassed and a lawsuit filed directly in court?*

No. Pursuant to HRS §671-11, before a lawsuit can be filed against a physician, osteopath (D.O.), podiatrist (DPM), or a hospital (or hospital staff), for medical negligence, the claim must first be filed with the MCCC.

4. *Can a claim be filed the MCCC, but not to set a hearing date?*

Generally, no. Pursuant to HRS §671-12, once a claim is filed, the MCCC will set the matter for hearing and send the notice of hearing to the parties involved.

5. *Who should file a claim?*

Anyone wishing to bring a lawsuit for medical malpractice against a physician, surgeon, osteopath (D. O.), podiatrist (D.P.M.), or hospital, licensed to practice or operate in the state of Hawaii, or an employee of these, must first file a claim with the MCCC before filing a lawsuit.

6. *What kinds of claims should not be filed with the MCCC?*

Generally, the jurisdiction of the MCCC does not cover claims against the following kinds of health care professionals: dentists (including oral surgeons), chiropractors, naturopaths, or psychologists. Claims against these kinds of health care professionals may therefore be filed directly with the appropriate courts. However, please remember that any employee of a health care provider may be subject to the MCCC's jurisdiction.

7. *How are claims filed with the MCCC, and is there a filing fee?*

Claims may be filed by using the MCCC Claim Form (a MCCC Claim Form is attached to this Guide) or by a claim letter that must include the following information: (1) the complete names and addresses of the health care providers against whom the claim is made; and (2) a

description of the alleged malpractice such as what, when, where, which health care provider(s) was (were) responsible for the alleged negligence, and the alleged negligent acts or omissions which the claimant believes fell below the standard of care. If the claim is not sufficiently clear, the respondents may ask for a more detailed statement of the claim.

Additionally, before a claim can be filed with the MCCP, HRS §671-12.5 requires that the claimants or claimants' attorneys have the claim evaluated by a qualified physician, or make a good faith effort to consult with a qualified physician. ***If a claim is submitted to the MCCP without the required certificate of consultation, the claim will not be accepted for filing.*** Please read HRS Chapter 671, Part II - MCCP, attached to this Guide. Also attached to this Guide is a Certificate of Consultation form that should be submitted as part of the claim.

Lastly, all claimants identified in a claim, must ***each*** submit a filing fee of \$450.00 to cover the Panel's costs, at the time the claim is filed. Each respondent identified in the claim will also be required to submit a \$450.00 filing fee when the respondents file their responses to the claim.

Claims may be submitted to the MCCP in the form of a letter to: **Medical Claims Conciliation Panel; P.O. Box 541; Honolulu, Hawai'i 96809**. For hand delivery, our street address is 335 Merchant Street, Suite 100; Honolulu, Hawai'i 96813. We are located in the King Kalakaua Building at the corner of Merchant and Richards Street, next door to the Downtown Branch of the Post Office.

8. What happens to the filing fee?

The filing fees submitted by the parties to a claim, are placed in an account to pay for the panel expenses. Additionally, \$50.00 from each filing fee is retained by the MCCP for administrative costs. After the Panel costs are paid for and the administrative fee retained, any remaining balances are returned to the parties on a proportionate basis.

9. What if a party cannot afford to pay the filing fee?

If any party cannot afford to pay the required filing fee, the party may submit a request to waive the filing fees. The MCCP utilizes the same financial guidelines used by the courts in determining whether a party is qualified to have judicial costs waived. If a claimant is not able to pay the required filing fee, the request to waive the filing fee must be filed along with the claim form or claim letter. The request to waive the filing fee is reviewed by the Director of the Department of Commerce and Consumer Affairs, and the Director will make the final decision as to whether the filing fee should be waived. The person requesting the waiver will be informed of the Director's decision.

10. What happens if a party doesn't submit a filing fee or a request for a waiver?

If a claim is submitted to the MCCP without the required filing fee or a request to waive the filing fee, the claim will not be accepted for filing. The rejection of a claim for filing with the MCCP also means that the applicable statute of limitations is not tolled. (See No. 11, below).

11. What happens to the Statute of Limitations when a claim is filed?

Pursuant to HRS §671-18, once a claim is filed with the MCCP, the applicable statute of limitations is tolled for 60 days following the mailing of the Panel decision, or for a maximum of 12 months from the filing of the claim, whichever occurs first. Consequently, it is very important for the claimant to keep track of how much time is remaining under the applicable statute of limitations as of the time the claim is filed with the MCCP, because that will be the amount of time remaining after the applicable statute of limitations resumes running.

12. What happens after a claim is filed?

After the claim is filed, we will process and log the claim, schedule a date for the hearing on the claim, and send notices to the parties informing the parties of the date of the hearing, and the deadlines for submitting required documents to the MCCP. Generally the hearing takes place within three to five months from the time we process the claim. In some circumstances, we may be able to expedite the processing of a claim, particularly in cases involving ongoing serious medical conditions or complications.

13. Who will be on the Panel?

Panels consist of three members: a chairperson, an attorney, and a doctor, selected pursuant to HRS §671-11. The chairperson is appointed the Director of DCCA from a list of individuals who are familiar with and experienced in the personal injury claims settlement process, and is generally an attorney. However, there are a number of eligible chairpersons who are not attorneys. The Chairperson selects the panel attorney member and the physician panel member. The physician member of the Panel is generally chosen from the same specialty as the health care provider named in the claim. If several health care providers are named in the claim, the Panel physician chosen will be from a specialty that can best evaluate the case.

14. How is the hearing conducted?

The MCCP hearings are less formal than judicial proceedings, and the judicial rules of evidence are not strictly applied, although the rules of evidence may be used as guidelines for purposes of relevancy. However, MCCP hearings are structured and are conducted with some degree of formality.

In MCCP cases, the claimant must prove by a preponderance of the evidence (more than 50%) that the respondent health care provider(s) breached of the applicable standard of care.

Typically, the Panel first asks for opening statements from all parties. After the opening statements, the claimant will have an opportunity to present claimant's case.

Following the presentation by the claimant, the Respondent puts on its case. Lastly, the Panel generally asks for brief closing arguments, and following that, the hearing is generally adjourned.

15. *What kind of decision does the Panel render?*

The Panel renders a written decision, signed by all Panel members, either of “actionable negligence” or “no actionable negligence.” A Panel member may also render a dissenting opinion. Sometimes the dissenting Panel member will attach the dissenting opinion to the decision, while at other times, the dissenting Panel member simply notes the dissent on the decision. The actual wording of the decision, is prescribed by HRS §671-15.

16. *What about damages?*

When Panels render a decision of actionable negligence, they will also make a suggested damage award if there has been sufficient evidence upon which a determination regarding the amount of the damages can be made. Because the Claimant has the burden of proof and the burden of persuasion, it is the Claimant's responsibility at the hearing to present evidence regarding damages.

Sometimes, the parties request that hearing be conducted in two parts: 1) the hearing to determine liability issue first, and then, if liability is found, 2) a further hearing to consider the evidence on damages. In cases such as these, generally the Panel will call a short recess (of approximately 30 minutes) to decide the liability issue. After the short recess, they reconvene the hearing, announce their decision as to liability and take evidence on damages.

17. *How does the Panel make its decision?*

The Panel bases its decision on evidence presented by parties before the hearing, such as medical records and prehearing statements, and on evidence presented at the hearing itself, including expert testimony, exhibits, and evidence regarding damages.

18. *When do the parties receive the Panel's decision?*

The decision will be mailed to the parties no later than thirty days following the completion of the hearing, pursuant to HRS §671-15.

19. *What if one or both parties disagree with the Panel's decision?*

Because the decisions of the Panel are only advisory and non-binding on the parties, after the M CCP hearing has been completed, the parties are may pursue their cases through the judicial system. **However, pursuant to HRS §671-16, before a lawsuit based upon the claim can be filed in court, a party rejecting the Panel's decision must file a written rejection with the M CCP.**

20. *Do all M CCP claims have to be heard by a Panel?*

Generally, yes. Pursuant to HRS §671-12, the M CCP must set a hearing date for all cases filed. There are a small number of cases in which all of the parties agree to have the hearing taken off the hearings calendar.

A typical reason for this request occurs when the claimant's attorney withdraws as counsel for a case leaving the claimant pro se. Generally in these cases the claimant pro se

then requests additional time to find other counsel. If the claimant is unsuccessful in finding new counsel, the case sometimes remains inactive at the claimant's request for the remainder of the 12 month period. If the defense wishes to proceed, however, the M CCP will reschedule the case for hearing.

Additionally, under HRS §671-16.6 the claim may be submitted to an alternative dispute resolution provider, upon the written agreement of all of the parties to the claim and with the written approval of the Director of DCCA. ***Please read HRS Chapter 671, Part II - M CCP, attached to this Guide***

21. Can a lawsuit be filed in court if the claim is not heard by a Panel?

In very unusual situations, there have been some cases that do not proceed to hearing, either at the request of both parties, or for some other procedural reason. However, because the provisions of HRS §671-18, the M CCP only has a maximum of 12 months from the filing date of the claim in which to conduct the hearing and issue an advisory decision. If the claim has not been heard by a Panel within this time period, the M CCP will remind the parties that the 12 month period has elapsed, that any applicable statute of limitations has resumed running, and that claimant may file a lawsuit in any appropriate State court.

22. Can a claim be withdrawn, or amended to dismiss or add parties?

The M CCP can only accept written withdrawals of claims and amendments to original claims. To withdraw a claim, simply write the M CCP advising us of your wish to withdraw the claim.

Similarly, if you wish to amend your claim to add additional respondents or dismiss any respondents from your claim prior to the hearing, you must submit your written request to the M CCP.

23. How can documents or witnesses be subpoenaed?

The Panel and the M CCP have the authority to subpoena witnesses, pursuant to HRS §671-13. In order to have subpoenas issued, the requesting party is required to follow the language of HRS §671-13, since that section also limits discovery by parties to medical records and notes kept in connection with the practice of medicine.

Usually, the claimant or the claimant's attorney does not need to subpoena the claimant's medical records. Generally, a written request to the health care provider is sufficient. Once the claim is filed with the M CCP and a defense attorney is assigned to the case, the defense counsel may be willing to assist the claimant in obtaining the records, as a professional courtesy. The M CCP staff can also assist.

On the other hand, if a party requests the M CCP to issue a subpoena, the requesting party is responsible for: 1) preparing (filling out) the subpoena; 2) having the subpoenaed served; and 3) any other appearance fees and costs related to the production of the documents. Generally, it is unnecessary to subpoena the health care provider(s) named in your claim to appear at the hearing, because HRS §671-14 requires their presence at the hearing, unless excused by the Panel. Please let us know if you would like to receive additional information regarding the preparation and service of subpoenas.

24. *Who must attend the MCCP hearing?*

HRS §671-14 requires that both claimant and health care provider appear at the hearing, along with their counsel, if any. Claimant's attorneys sometimes ask if their client may be excused if the client no longer lives in this state. Every Panel makes that decision on a case by case basis. Generally, the Panel requires all of the parties to be present at the hearing, even if they no longer reside in the state. Unlike judicial proceedings, the ultimate purpose of the MCCP is conciliation, which in turn, requires the presence of all parties to the claim.

However, HRS §671-14 does provide the Panel with the authority to excuse parties from having to attend the hearing if there is a valid reason, and you may make such a request of the Panel in advance of the hearing.

25. *Are there other requirement before the hearing?*

After the claim is processed, the MCCP will issue a Notice of Claim that will inform the parties of the: 1) deadline to submit the relevant medical records; 2) the deadline to submit the prehearing statements; and 3) date, time, and location of the MCCP hearing. A sample format for the prehearing statement is also sent to the parties.

Medical Records: We require that the claimant submit four paginated sets of the claimant's relevant medical records, within 20 days after the Notice of Claim is sent to the parties. If there are extensive medical records, it may be advisable for a claimant to start requesting and copying those records when the claimant files the claim, if not sooner. Generally, there should be very few, if any problems in a claimant obtaining the claimant's own medical records from the health care provider. If any problems are encountered, a phone call to opposing counsel or to the MCCP, generally takes care of the problem. If a party would like to have the medical records returned, the MCCP can return 3 of the 4 sets, if the request is made to the MCCP no later than the morning of the hearing.

Prehearing Statement: Approximately 5 to 6 weeks prior to the hearing, we require the parties to submit 4 sets of their prehearing statements (an original plus three additional copies for a total of four) to the MCCP. In addition, the parties are required to exchange prehearing statements. The MCCP supplies a sample format for the claimant's and respondent's prehearing statements.

26. *Does the MCCP have any authority to impose sanctions?*

Yes. Any party may apply to the MCCP to have the costs of the proceedings assessed on another party because that party failed to cooperate with the Panel. The Panel has the authority to assess costs of the hearing, including the costs of expert witnesses and Panel stipends, to a party who does not cooperate with the MCCP. For examples of non-cooperation, see HRS §671-19. If the party does not agree with the assessment of costs, the party may appeal the assessment to circuit court.

27. *Are there any other options to the M CCP?*

Yes. Act 211, 2003 Session Laws of Hawai'i, authorizes the parties involved in a M CCP claim to submit the claim to an alternative dispute resolution provider that is selected by all of the parties.

28. *Other considerations:*

A. Bring the claim against the correct health care provider(s). One of the most frequent errors made by attorneys for claimants is assuming that doctors are employees of a hospital, only to realize at the hearing that they have sued the wrong health care provider. The claimant or the claimant's attorney then has to go back to step one and file a new claim against the correct health care provider. This situation can be avoided by first doing a search of the DCCA corporate and professional licensing records of the health care provider(s)'s personal and professional corporate status.

If a claim is filed against the wrong health care provider, the statute of limitations could expire prior to the filing of a second claim against the correct health care provider(s).

B. Get help if you need it. Medical malpractice litigation is a very technical, time-consuming, and concomitantly costly experience. Health care providers and health care facilities that respondents in M CCP proceedings are usually represented by legal counsel, who are themselves very experienced very prepared when they come to M CCP hearings, including bringing expert testimony either in person, by letter, or by telephone. Because the M CCP and its staff cannot provide legal advice to parties, claimants should seriously consider retaining an attorney to represent them throughout the M CCP proceedings.

C. Present expert testimony Under Hawai'i law, the claimant is responsible for **proving through expert testimony**. 1) what is the applicable standard of care; 2) that respondent's care or conduct fell below the applicable standard of care (breach of the applicable standard of care); and 3) that the respondent's breach of the applicable standard of care caused harm to the claimant. See Craft v. Peebles, 78 Haw. 287, 298 (1995). **If a claimant does not, or cannot provide expert testimony regarding these three issues, the claimant will not be able to meet the claimant's burden of proof and the Panel cannot find actionable negligence on the part of the respondents.**

You should be aware that there are considerable expenses involved in retaining expert witnesses, and a claimant that is not represented by legal counsel, may have a difficult time trying to retain an expert witness for the M CCP proceedings.

At the M CCP hearings, claimants have presented expert testimony by letter, telephone, or in person. (Please note that if a claimant plans to present expert testimony by telephone, the Panel and the M CCP must be informed in advance since different arrangements must then be made with the cooperation of the attorneys and the Panel to provide a room with a conference telephone.)

29. *How to contact the M CCP:*

Medical Claims Conciliation Panel
Office of Administrative Hearings
Department of Commerce and Consumer Affairs
335 Merchant Street, Suite 100
Honolulu, Hawai'i 96813

Telephone: (808) 586-2823
Fax: (808) 586-3097
E-mail: mccp@dcca.hawaii.gov

INDIVIDUALS WITH SPECIAL NEEDS

Individuals who may require special accommodations for the hearing (e.g. sign language interpreter, large print, taped materials, etc.), are invited to call the Office of Administrative Hearings at 586-2828 at least five (5) days in advance of the hearing.

This publication can be made available for individuals with special needs in Braille, large print, or audio tape. Please submit your request to the Medical Claims Conciliation Panel at 586-2823.

Flowchart of the MCCP Process

