Date of Hearing: May 11, 2022

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
AB 35 (Reyes and Umberg) – As Amended April 27, 2022

FOR CONCURRENCE

SUBJECT: CIVIL DAMAGES: MEDICAL MALPRACTICE

KEY ISSUES:

1) SHOULD THE CAPS ON NONECONOMIC DAMAGES THAT CAN BE AWARDED TO PLAINTIFFS AND THE CONTINGENCY FEES THAT CAN BE EARNED BY ATTORNEYS IN MEDICAL MALPRACTICE ACTIONS, WHICH WERE CODIFIED NEARLY 50 YEARS AGO AND HAVE NOT BEEN UPDATED IN THE DECADES SINCE, BE INCREASED?

2) SHOULD SPECIFIED STATEMENTS, WRITINGS, OR "BENEVOLENT GESTURES" EXPRESSING SYMPATHY, BENEVOLENCE, OR REGRET, OR ACCEPTING FAULT AFTER AN ADVERSE PATIENT SAFETY EVENT OR UNEXPECTED HEALTH CARE OUTCOME, BE MADE CONFIDENTIAL AND INADMISSIBLE?

SYNOPSIS

The Medical Injury Compensation Reform Act (MICRA) was originally enacted in 1975 and has not been significantly updated in the 47 years since then. The malpractice insurance rate issue came to a head in early 1975, when malpractice insurers imposed dramatic rate hikes; some even announced that they planned to withdraw from the market. MICRA imposed a $250,000 cap on non-economic damages, including pain and suffering. It is unclear how or why the amount of the $250,000 cap was chosen. The bill did not provide for an increase in the cap to account for inflation. MICRA defenders say that the law has stabilized the malpractice liability insurance industry. They highlight the fact that California rates are among the lowest in the nation; more healthcare professionals now carry liability insurance; and premium rates are affordable. MICRA critics, on the other hand, allege that regulation of the insurance industry as a result of Prop 103's passage in 1988, rather than MICRA, stabilized malpractice insurance rates. They also argue that MICRA's cap on non-economic damages has been unfair to individuals who are severely injured, permanently disabled, or even killed as the result of medical negligence and then they (or their survivors) cannot be fully compensated for their losses. In any case, $250,000 (MICRA's cap on non-fatal injuries) is worth a small fraction today ($46,327.91) of its value in 1975.

After failed attempts to challenge MICRA in the courts or modify it in the legislative or initiative process, this bill, co-sponsored by Consumer Attorneys of California and Californians Allied for Patient Protection, reflects a historic modification to several key provisions of MICRA. The bill makes two significant changes to MICRA by (1) restructuring MICRA's limit on attorney fees and (2) raising MICRA's cap on noneconomic damages. It also makes specified statements, writings, or "benevolent gestures" expressing sympathy, regret, or accepting fault after an adverse patient safety event, or unexpected health care outcome, confidential and inadmissible.

The bill is supported by a large number of consumer groups, health care insurers, and health care providers. It has no opposition on file.

SUMMARY: Increases the caps on noneconomic damages that can be awarded to plaintiffs and the contingency fees that can be earned by attorneys in medical malpractice actions which were codified nearly 50 years ago and have not been updated in the decades since; and makes specified statements after an adverse patient safety event or unexpected health care outcome, confidential and inadmissible. Specifically, **this bill**:

1) Adjusts the contingency fees an attorney can contract for or collect for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence to the following limits:

    a) Twenty-five percent of the dollar amount recovered if the recovery is pursuant to a settlement agreement and release of all claims executed by all parties thereto prior to a civil complaint or demand for arbitration being filed.

    b) Thirty-three percent of the dollar amount recovered if the recovery is pursuant to settlement, arbitration, or judgment after a civil complaint or demand for arbitration is filed.

2) Provides that if an action is tried in a civil court or arbitrated, the attorney representing the plaintiff or claimant may file a motion with the court or arbitrator for a contingency fee in excess of the above percentage, which motion shall be filed and served on all parties to the action and decided in the court's discretion based on evidence establishing good cause for the higher contingency fee.

3) Provides that in any action for injury against a health care provider or health care institution based on professional negligence that does not involve wrongful death, the injured plaintiff shall be entitled to recover up to $350,000 in noneconomic losses, regardless of the number of health care providers or institutions, in each of the following three categories:

    a) Against one or more health care providers, collectively;

    b) Against one or more health care institutions, collectively; and

    c) Against one or more health care providers or health care institutions that are unaffiliated with the above defendants based on separate and independent acts of professional negligence that occurred at, or in relation to medical transport to, a health care institution unaffiliated with a health care institution described above, collectively.

4) Increases the $350,000 limit in 3), above, by $40,000 each January 1st for 10 years up to $750,000.

5) Provides that the limit for noneconomic damages is raised to $500,000 in each of the above categories if the action is for wrongful death against a health care provider or health care institution based on professional negligence.

6) Provides that the amounts in 5), above, are to increase each January 1st by $50,000 for 10 years up to $1,000,000.

7) Prohibits a health care provider or health care institution defendant from being found liable for damages for noneconomic losses in more than one of the above categories.

8) Applies the above applicable dollar amounts, regardless of the number of defendant health care providers or health care institutions against whom the claim is asserted or the number of separate causes of actions on which the claim is based.

9) Applies to all cases filed or arbitrations demanded on or after, January 1, 2023; provides that the dollar amount in effect at the time of judgment, arbitration award, or settlement shall apply to an action. Allows the amounts in 4) and 6), above, to be adjusted for inflation each January by two percent beginning on January 1, 2034.

10) Updates the definition of "health care provider" and defines the following terms:

    a) "Health care institution" means one or more health care facilities licensed pursuant to Chapter 2 (commencing with Section 1250) of Division 2 of the Health and Safety Code owned or operated by the same entity or its affiliates and includes all persons and entities for which vicarious liability theories, including, but not limited to, the doctrines of respondeat superior, actual agency, and ostensible agency, may apply; and

    b) "Unaffiliated" means a specified health care provider, health care institution, or other entity not covered by the definition of affiliated, or affiliated with, as defined in Section 150 of the Corporations Code, or that is not employed by, performing under a contract with, an owner of, or in a joint venture with another specified entity, health care institution, health care provider, organized medical group, professional corporation, or partnership, or that is otherwise not in the same health system with that health care provider, health care institution, or other entity. Whether a health care provider, health care institution, or other entity is unaffiliated is determined at the time of the professional negligence.

11) Allows for the payment of a judgment by periodic payments rather than by a lump-sum payment if the award equals or exceeds $250,000 in future damages.

12) Requires that statements, writings, or benevolent gestures expressing sympathy, regret, a general sense of benevolence, or suggesting, reflecting, or accepting fault relating to the pain, suffering, or death of a person, or to an adverse patient safety event or unexpected health care outcome, in relation to an act or omission to act in the provision of or failure to provide health care, and made to that person or the family or representative of that person prior to the filing of a lawsuit or demand for arbitration, be confidential, privileged, protected, not subject to subpoena, discovery, or disclosure.

13) Specifies that such statements, writings, or benevolent gestures cannot be used or admitted into evidence in any civil, administrative, regulatory, licensing, or disciplinary board, agency, or body action or proceeding, and shall not be used or admitted in relation to any sanction, penalty, or other liability, as evidence of an admission of liability or for any other purpose, and all such communications, whether verbal, electronic, in writing, or in any other form, shall also be entitled to specified privileges and protections.

14) Defines the following terms for purposes of the bill:

    a) "Adverse patient safety event or unexpected health care outcome" means any event or condition identified in Section 2216.3 of the Business and Professions Code, Section 1279.1, and any act or omission to act by a health care provider in the rendering of professional services resulting in, alleged to have resulted in, or with the potential to result in injury or death to one or more persons and that is not the result of knowingly or purposefully harmful action.

    b) "Benevolent gestures" means any action that conveys a sense of compassion or commiseration emanating from humane impulses.

    c) "Family" means the spouse, domestic partner, parent, grandparent, stepparent, child, guardian, stepchild, grandchild, sibling, half-sibling, adopted children of a parent, a spouse's parent, and in-laws of an injured party.

EXISTING LAW:

1) Provides generally that personal injury victims are entitled to actual, or compensatory damages, as well as punitive, or exemplary damages when appropriate. (See Civil Code Sections 3333 and 3294.)

2) Includes, as damages available for personal injuries, full compensation for all the detriment proximately caused by the injuries, including damages for pain and suffering and emotional distress. (See *Merrill v. Los Angeles Gas & Elec. Co*. (1910) 158 Cal. 499, 509.)

3) Defines "economic damages" as damages that compensate a victim for quantifiable out-of-pocket costs, such as medical expenses, as well as lost earning capacity and lost time at work. (See *J'Aire Corp. v. Gregory* (1977) 24 Cal. 3d 799, 805-13.)

4) Defines "noneconomic damages" as subjective, non-monetary losses, including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, and humiliation. (Civil Code Section 1431.2 (b)(2).)

5) Provides that an attorney shall not contract for, or collect, a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits:

    a) Forty percent of the first $50,000 recovered;

    b) Thirty-three and one-third percent of the next $50,000 recovered;

    c) Twenty-five percent of the next $500,000 recovered; and

    d) Fifteen percent of any amount on which the recovery exceeds $600,000. (Business & Professions Code Section 6146 (a).)

6) Provides that the injured plaintiff in any action for injury against a health care provider based on professional negligence shall be entitled to recover noneconomic losses to compensate for

pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damage, but such damages are capped at $250,000. (Civil Code Section 3333.2.)

7) Requires a superior court, in any action for injury or damages against a provider of health care services to, at the request of either party, enter a judgment ordering that money damages or its equivalent for future damages of the judgment creditor be paid in whole or in part by periodic payments rather than by a lump-sum payment if the award equals or exceeds $50,000 in future damages. In entering a judgment ordering the payment of future damages by periodic payments, the court shall make a specific finding as to the dollar amount of periodic payments that will compensate the judgment creditor for such future damages. As a condition to authorizing periodic payments of future damages, the court shall require the judgment debtor who is not adequately insured to post security adequate to assure full payment of such damages awarded by the judgment. Upon termination of periodic payments of future damages, the court shall order the return of this security, or so much as remains, to the judgment debtor. (Code of Civil Procedure Section 667.7.)

8) Provides that if periodic payments are awarded to the plaintiff pursuant to 7), the court shall place a total value on these payments based upon the projected life expectancy of the plaintiff and include this amount in computing the total award from which attorney's fees are calculated under this section. (Business & Professions Code Section 6146 (b).)

9) Defines the following terms for the purposes of the provisions above:

   a) "Recovered" means the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and the attorney's office-overhead costs or charges are not deductible disbursements or costs for such purpose.

   b) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500), or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider.

   c) "Professional negligence" is a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that the services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital. (Business & Professions Code Section 6146 (c); Civil Code Section 3333.2; Code of Civil Procedure Section 667.7.)

FISCAL EFFECT: As currently in print the bill is keyed non-fiscal.

COMMENTS: This bill, co-sponsored by Consumer Attorneys of California and Californians Allied for Patient Protection, reflects a historic modification to several key provisions of the Medical Injury Compensation Reform Act (MICRA), originally enacted in 1975 and not significantly updated in the 47 years since. According to the author:

Times have changed, but MICRA hasn't. California's medical malpractice statute has been unchanged for nearly five decades and in that time has magnified and exacerbated political differences.

Finally, stakeholders representing patients and the medical community were determined to provide a balanced and equitable solution and put aside the political divides of the past. They have succeeded. AB 35 represents the tireless work of stakeholders to protect patients and provide stability for medical providers.

Background – the History and Origins of MICRA. The rising cost of medical malpractice insurance for physicians was an issue in the months and years leading up to MICRA's enactment in 1975. (Malpractice insurance rates were not regulated in California at that time.) The U.S. Department of Health, Education and Welfare issued a report on malpractice insurance in January, 1973 about the issue, and the California Assembly's Select Committee on Medical Malpractice released its own report in June of 1974. Both reports recommended a sliding scale for plaintiffs' lawyers' contingent fees (which ultimately became part of MICRA), but neither suggested a cap on compensation awarded by juries.

The malpractice insurance rate issue came to a head in early 1975, when malpractice insurers imposed dramatic rate hikes; some even announced that they planned to withdraw from the market. Argonaut Insurance of Menlo Park announced in January 1975 that it would cancel its group coverage of 4,000 doctors in Northern California and Nevada on May 1, 1975, and would raise premiums by up to 384% for individual doctors it chose to cover. Travelers Indemnity Company warned Los Angeles area doctors that their malpractice insurance rates would increase five-fold.

Meanwhile, a number of doctors warned hospitals and patients that they would go on strike unless the doctors obtained what they considered to be affordable malpractice insurance coverage. When their strike began, on May 1 in San Francisco, patients were diverted to public or federal hospitals where the physicians were employees and therefore covered by hospital malpractice plans. At the hospitals where doctors were absent, hours were reduced for the rest of the medical work force, administrators took pay cuts, vacations were offered, and leaves of absence were encouraged, as the hospitals' incomes were reduced. As a result, other hospital employees were motivated to support the doctors' cause. (Fosburgh, Lacey, *Operations Curtailed in Strike Of Northern California Doctors,* New York Times (May 3, 1975).) The strike spread to other parts of the state. Hundreds of hospital employees descended on the Capitol on May 13, 1975 and waited outside the governor's office. Governor Brown called a special session on malpractice. By the beginning of June, the doctors agreed to go back to work while negotiations on legislation continued. The malpractice insurance crisis spread across the country, with Argonaut pulling out of New York State (See Cerra, Frances, *Malpractice Coverage Goes On As Argonaut Pulls out of State,* New York Times (July 1, 1975), and numerous states enacting tort reform legislation and establishing commissions to study the problem. (See Altman, Lawrence, *Malpractice Rates Drive Up Doctor Fees,* New York Times (July 27, 1975).)

On June 13, 1975, the Assembly Judiciary Committee approved, on an 8-1 vote, a malpractice reform bill, AB 1xxx (B. Keene). The bill, as approved by the Committee, did not include any cap on damages, after the committee deleted a provision that capped certain non-economic damages, including pain and suffering, at $800 a month and prohibited any noneconomic damages for plaintiffs who earned more than $1,500 a month. AB 1xxx included a cap on

attorney fees and a shorter statute of limitations while giving the state insurance commissioner new powers to review malpractice rate increases. In the Senate Insurance and Financial Institutions Committee, however, the bill was amended to include a $250,000 cap on non-economic damages, including pain and suffering. It is unclear how or why the amount of the $250,000 cap was chosen. The bill did not provide for an increase in the cap to account for inflation.

Controversy and Impact of MICRA. MICRA defenders say that the law has stabilized the malpractice liability insurance industry. They highlight the fact that California rates are among the lowest in the nation; more healthcare professionals now carry liability insurance; and premium rates are affordable. MICRA critics, on the other hand, allege that regulation of the insurance industry as a result of Prop 103's passage in 1988, rather than MICRA, stabilized malpractice insurance rates. (See *How Insurance Reform Lowered Doctors' Medical Malpractice Rates in California; And How Malpractice Caps Failed,* Foundation for Taxpayer and Consumer Rights (March 7, 2003), available at 1008.pdf (consumerwatchdog.org).) They also argue that MICRA's cap on non-economic damages has been unfair to individuals who are severely injured, permanently disabled, or even killed as the result of medical negligence and then they (or their survivors) cannot be fully compensated for their losses.

An analysis by the RAND Corporation confirms, at least to some extent, this latter perspective. According to a 2004 RAND analysis, the cap on non-economic damages has impacted "jury awards for certain kinds of plaintiffs—those with the most severe non-fatal injuries, those with modest levels of economic loss, and those who died as a result of malpractice—are affected more often or to a greater degree by MICRA's cap on non-economic damages than are awards for other kinds of plaintiffs." (Pace, Nicholas M., Daniela Golinelli, and Laura Zakaras, *Changing the Medical Malpractice Dispute Process: What Have We Learned from California's MICRA?*. Santa Monica, CA: RAND Corporation, 2004. https://www.rand.org/pubs/research_briefs/RB9071.html.) RAND found that, "When their awards are capped, plaintiffs typically lose many hundreds of thousands of dollars." (*Ibid.*) According to RAND, the following types of claims and plaintiffs are most affected by the MICRA cap:

- Death cases are capped more frequently than injury cases (58 percent versus 41 percent) and have much higher percentage reductions in total award size than injury cases, with a median loss of 49 percent when the award is capped versus a 28 percent drop for injury cases.

- Plaintiffs with the severest non-fatal injuries (brain damage, paralysis, or a variety of catastrophic losses) had their non-economic damage awards capped far more often than injury claims generally and had median reductions exceeding $1 million (compared with $286,000 for all injury cases).

- Plaintiffs who lost the highest percentage of their total awards due to the cap were often those with injuries that led to relatively modest economic damage awards (about $100,000 or less) but that caused a great loss to their quality of life (as suggested by the jury's million-dollar-plus award for pain, suffering, anguish, distress, and the like). These plaintiffs sometimes received final judgments that were cut by two-thirds or more from the jury's original decision.

- Plaintiffs less than one year of age had awards capped 71 percent of the time, compared with 41 percent for all plaintiffs with identifiable non-fatal injuries. Injury cases with reductions of $2.5 million or more usually involved newborns and young children with very critical injuries. (*Ibid.*)

Given continued inflation since the date of the RAND report in 2004 (more than 50% in just the past eight years), these gaps between jury awards and the MICRA cap likely have increased substantially since the date of the RAND report. In any case, $250,000 (MICRA's cap on non-fatal injuries) is worth a small fraction today ($46,327.91) of its value in 1975. (See CPI Inflation Calculator. U.S. Bureau of Labor Statistics, available at https://www.bls.gov/data/inflation_calculator.htm.) If the cap were adjusted for inflation, it now would be at almost $1.35 million. (*Ibid.*)

Past Efforts to Modify MICRA Through the Courts and the Initiative, and Legislative Process. While caps that affect compensation for those harmed by medical negligence similar to MICRA's in other states have been struck down by courts in those states (See *Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund* (Wis. 2005) 701 N.W.2d 440, 468 [striking down Wisconsin's noneconomic damage cap]), legal challenges to MICRA in California courts have been largely unsuccessful. The California Supreme Court has reviewed various provisions of MICRA and found them to be rationally related to the legitimate state interest of reducing medical malpractice insurance costs. (See *American Bank* (1984) 36 Cal.3d 359, 372; *Barme v. Wood* (1984) 37 Cal.3d 174, 180; *Roa v. Lodi Medical Group, Inc.* 37 Cal.3d 920, 931; *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 159.) In fact, in 2011 the Fifth District Court of Appeal said than any modification of MICRA should come from the Legislature, where the law originated, not from the courts. (*Stinnett v. Tam* (2011) 198 Cal.App.4th 1412, 1433.)

Efforts to Modify MICRA via the Initiative Process – In November 2014, voters in California considered a ballot initiative — Proposition 46 — that would have modified MICRA by raising it to approximately $1.1 million (the 2014 equivalent value of $250,000 in 1975) and indexing it to inflation thereafter. Prop 46 was widely viewed as a potential indicator for future efforts to modify damage caps in other states and was highly contested. After the two sides spent tens of millions of dollars (about $13.3 million in support of the measure and $59.6 million against it), Prop 46 earned about 33% of the votes cast and therefore did not become law. (See Ballotpedia, *California Proposition 46, Medical Malpractice Lawsuit Cap and Drug Testing of Doctors Initiative (2014),* available at https://ballotpedia.org/California_Proposition_46,_Medical_Malpractice_Lawsuit_Cap_and_Drug_Testing_of_Doctors_Initiative_(2014).)

Most recently, an initiative to modify MICRA -- the "Fairness for Injured Patients Act to Adjust California's Maximum Compensation Cap of $250,000 Set by Politicians in 1975 on Wrongful Death and Quality of Life Damages That Has Never Been Updated" (Act) -- qualified for the upcoming November 2022 ballot. The Act would (1) adjust the cap for inflation retroactively to 1975, increasing it to well over $1 million, and (2) eliminate the cap for "catastrophic injuries." According to the title and summary of the proposed measure issued by the Attorney General of California:

> **ADJUSTS LIMITATIONS IN MEDICAL NEGLIGENCE CASES. INITIATIVE STATUTE.** In medical negligence cases, adjusts for inflation: (1) $250,000 limit established in 1975 on quality-of-life and survivor damages

> (which include pain and suffering); and (2) contingent attorney's fees limits established in 1987. In cases involving death or permanent injury, allows judge or jury to exceed these limits and requires judge to award attorney's fees.
>
> Requires attorneys filing medical negligence cases to certify reasonable basis for claims or good faith attempt to obtain medical opinion; attorneys who file meritless lawsuits must pay defendant's expenses. Extends deadlines for filing medical negligence lawsuits. Summary of estimate by Legislative Analyst and Director of Finance of fiscal impact on state and local governments: Increased state and local government health care costs predominantly from raising or removing the cap on noneconomic damages in medical malpractice cases, likely ranging from the low tens of millions of dollars to the high hundreds of millions of dollars annually.

The website for the proponents of the measure lays out their motivation:

> It's time to put an end to the most regressive medical negligence law in U.S. history (MICRA), the 45 year-old California law that favors Insurance Company profits over Civil Rights of Patients & countless Families whose loved ones are negligently killed each year. Medical Negligence is the 3rd leading cause of death, killing 400,000 Americans each year, while injuring & maiming over a million more.

According to the co-sponsors of this bill, the proposed initiative will be withdrawn from the ballot if this bill is signed into law.

Efforts to Modify MICRA via the Legislative Process - Given the strong opinions and powerful interests on both sides of the debate about MICRA, it is not surprising that past legislative efforts to significantly alter it have been undertaken but generally have been unsuccessful. One exception occurred in 1987, when legislative leaders Willie Brown and Bill Lockyer led intense negotiations that produced the comprehensive tort package known as the "Napkin Deal." The "Napkin Deal" raised the MICRA contingency fee limits and made changes to punitive damages and public entity liability; stakeholders agreed to a five-year truce on initiatives.

In 1997, two MICRA bills were introduced: AB 250 (Kuehl), increasing the cap to $950,000 and eliminating it in the worst cases; and AB 1220 (Migden), eliminating the cap in certain cases. AB 250 passed the Assembly Judiciary Committee but was not brought up for a vote on the Assembly floor. In 1999, Assembly Speaker Antonio Villaraigosa carried AB 1380, which initially included intent language calling for MICRA reform. The bill was approved by this Committee, and later amended to provide a cost-of-living adjustment to the cap from the time of enactment forward. AB 1380 died in the Senate Appropriations Committee. AB 1429 (Steinberg, 2014) was similar to the introduced version of AB 1380 in that it stated, "It is the intent of the Legislature to bring interested parties together to develop a legislative solution to issues surrounding medical malpractice injury compensation." Apparently, interested parties were not sufficiently interested in developing a legislative solution because that bill died without ever being referred to a policy committee.

This bill. The bill makes two significant changes to MICRA by (1) restructuring MICRA's limit on attorney fees and (2) raising MICRA's cap on noneconomic damages. It also makes specified statements, writings, or "benevolent gestures" expressing sympathy, regret, or accepting fault

after an adverse patient safety event, or unexpected health care outcome, confidential and inadmissible.

Attorney fee cap. Existing law places limitations on the contingency fee an attorney can contract for or collect in connection with their representation of a person against a health care provider based on the latter's professional negligence. The current system ties the limits to the amount recovered. An attorney can collect 40 percent of the first $50,000 recovered, 33 1/3 percent of the next $50,000, 25 percent of the next $500,000, and 15 percent of anything exceeding that amount. (Business & Professions Code Section 6146.)

This bill restructures the metrics and instead ties the tiered fee limits to the stage of the representation at which the amount is recovered. An attorney can collect a fee of 25 percent for an amount recovered pursuant to a settlement agreement and release of claims executed by the parties prior to a civil complaint or demand for arbitration being filed. If there is a recovery pursuant to a settlement, arbitration, or judgment after a complaint or demand for arbitration is filed, then the fee can be 33 percent of the dollar amount recovered. Where the action is tried in a civil court or resolved in arbitration, an attorney can petition the court for a fee in excess of these limits and the court must decide whether good cause has been established for approving a higher contingency fee. These changes simplify the structure of the statute and make the ultimate fee award more logically tied to the stage of representation in which the amount was recovered, loosely approximating the amount of work that it takes to secure the judgment or settlement, rather than basing it solely on the amount recovered.

Cap on noneconomic damages. Existing law entitles an injured plaintiff in any action for injury against a health care provider based on professional negligence to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damage. However, such damages are capped at $250,000. (Civil Code Section 3333.2.) This figure has not been modified since the statute was enacted almost 50 years ago. As mentioned above, based on the United States Bureau of Labor Statistics' Consumer Price Index calculator, that amount has the same buying power as approximately $1.35 million today. This bill not only increases the amount of the cap and provides for future increases to the cap to account for inflation, but also restructures how these caps function.

The bill establishes two separate caps, depending on whether a wrongful death claim is involved. In a wrongful death case against a health care provider or health care institution based on professional negligence, the cap increases to $500,000. Each January 1st thereafter, this cap increases by $50,000 until it reaches $1,000,000. If the medical malpractice case does not involve wrongful death, the cap starts at $350,000, and increases each year by $40,000 until it reaches $750,000.

While existing law applies the cap, regardless of the number and type of defendants, this bill creates three separate categories for which a plaintiff is able to seek the limit. In the respective cases, a plaintiff can seek the cap against one or more health care providers, collectively; against one or more health care institutions, collectively; and against one or more health care providers or institutions that are "unaffiliated" with the other defendants based on professional acts of negligence that are separate and independent from the other acts and that occurred at, or in relation to medical transport to, a health care institution unaffiliated with the other institutions.

The bill also raises the ceiling for when a court must, at the request of either party, enter a judgment ordering that an award for future damages be paid in whole or in part by periodic

payments rather than by a lump-sum payment. Currently the award must equal or exceed $50,000. This bill moves this threshold to $250,000.

Confidentiality of Communications Expressing Sympathy or Fault. Finally, the bill adds a new section to the Health and Safety Code to make specified statements, writings, or "benevolent gestures" (defined to mean "any action that conveys a sense of compassion or commiseration emanating from humane impulses") expressing sympathy, benevolence, or fault in the provision of health care that are made to either the person who received the health care, or to the family or representative of that person, confidential and inadmissible. The covered expressions include statements regarding sympathy or even fault relating to the pain, suffering, or even death of a person, as well as an "adverse patient safety event or unexpected health outcome."

The scope of the communications covered by this provision is very broad and would appear to apply to virtually every oral or written statement about the cause of a patient's injury or death. One of the only apparent exceptions is when the "injury or death to one or more persons and that is the result of *knowingly or purposefully harmful action*." Also, the confidentiality provision applies only to statements that are made "prior to the filing of a lawsuit or demand for arbitration." So any statement made after such filing would not be covered by the confidentiality provision.

The scope of the confidentiality protection provided for these statements is also extremely broad. Under the bill, the communications would not be "subject to subpoena, discovery, or *disclosure*[.]" Furthermore, the communications "shall not be used or admitted into evidence in any civil, administrative, regulatory, licensing, or disciplinary board, agency, or body action or proceeding, and shall not be used or admitted in relation to any sanction, penalty, or other liability, as evidence of an admission of liability or for any other purpose." While this provision would likely prevent all disclosures of confidential communications in court or administrative proceedings, it likely could not be used to prohibit a patient or their family member who were not subject to a court order from publicly disclosing such statements. Otherwise, it would violate that person's First Amendment right to speak. (See *Seattle Times Co. v. Rhinehart* (1984) 467 U.S. 20 [holding that a party does not have a First Amendment right to disseminate information obtained during discovery *that is covered by a protective order* but has a right to disclose information gathered outside of the discovery process].) Finally, while these confidential statements could not be used in any civil, administrative, regulatory, licensing, or disciplinary board, agency, or body action or proceeding, a health care provider could still be sued or subject to disciplinary proceedings on the basis of other information. The particular confidential statements themselves could not be used as evidence against the health care provider in those proceedings.

As the Senate Judiciary Committee points out in its analysis of the bill, this confidentiality provisions could be interpreted to shield the admissibility of covered statements in criminal proceeding:

> Given the broad language in the provision, specifically the phrase "shall not be used or admitted in relation to any sanction, penalty, or other liability," it may be read in isolation to restrict the statements or writings from being used in criminal proceedings seeking to impose a criminal sanction or penalty. However, the surrounding references that limit the scope to statements, writings, and gestures made "prior to the filing of a lawsuit or demand for arbitration" and the fact that the specific proceedings listed include an extensive list, "civil,

> administrative, regulatory, licensing, or disciplinary board, agency, or body action or proceeding," but do not include any criminal proceedings, arguably make clear that the scope of the provision is not intended to extend into the criminal realm. The sponsors of the bill have also made clear that their intent is not to extend this section to any criminal proceedings.

The author and co-sponsors may wish to clarify in future legislation that statements that are made otherwise confidential pursuant to this provision of the bill would be admissible in criminal proceedings.

***ARGUMENTS IN SUPPORT**:* The Consumer Attorneys of California and Californians Allied for Patient Protection write in a joint letter that they, "are pleased to sponsor AB 35, which would amend California's Medical Injury Compensation Reform Act of 1975 (MICRA). If this legislation is passed by the Legislature and signed by the Governor in an expedited fashion, this agreement will preclude a costly ballot fight in November. . . . The consensus demonstrates a willingness to put aside outworn political differences and to enact a compromise that will settle this issue moving forward and protect the rights of patients."

The Consumer Federation of California observes:

> After its enactment in 1975, MICRA has remained largely untouched. The legislation put into place rigid limitations on how much can be awarded in medical malpractice cases. This amount has not kept up with the changing medical costs and inflation over the past 50 years. While MICRA was originally designed to stabilize costs in the medical malpractice insurance market, the passage of time and changing circumstances require that the law be modernized. . . .CFC believes that this legislation represents a fair compromise and, most importantly, provides significant additional assistance for harmed or deceased consumers.

Fund Her states that the current cap on non-economic damages under MICRA "[S]everely limits the ability of women, children, the elderly to seek justice for their injuries." Fund Her continues, "After decades of treating patients unfairly, with women and especially women of color suffering the most, California is finally opening the door of justice for those suffering from medical negligence. For these reasons Fund Her is in strong support of this landmark legislation." Consumer Watchdog expresses that it supports the bill because it will, "[A]llow Californians who are currently locked out of the courtroom because of the low value of the cap – especially women, children, people of color, the elderly and low-income Californians – to find an attorney and seek justice when they are harmed." Consumer Watchdog also sites fiscal savings as a reason for its support: "By adjusting the cap, AB 35 will also reduce medical errors. A forthcoming study from the UCLA Fielding School of Public Health, available Monday, examines new research that finds imposing caps is associated with a 16% increase in hospital adverse events. . . . A 16% reduction in adverse events could mean savings to the state as much as $245 million annually."

Finally, a number of health care providers made up of the California Medical Association; Osteopathic Physicians and Surgeons of California; American College of Physicians, California Services Chapter; California Academy of Family Physicians; Southern California Chapter of the American College of Surgeons; California Urological Association; American Academy of Pediatrics; and California Association of Northern California Oncologists write in a joint letter:

AB 35 will extend the long-term predictability and sustainability of the state's medical malpractice laws and settle a decades-long divide on the issue. The compromise reflected in this legislation will ensure that health care is accessible and affordable while providing fair and reasonable compensation for Californians who have experienced health care related injury or death. The passage of AB 35 will begin a new and sustained era of stability around malpractice liability and fair compensation for injured patients.

REGISTERED SUPPORT / OPPOSITION:

Support

American Academy of Pediatrics, California
American College of Physicians - California Services Chapter
American College of Surgeons, Southern California Chapter
American Nurses Association - California
Association of Northern California Oncologists
Beta Healthcare Group
California Academy of Family Physicians
California Academy of Physician Assistants
California Association for Nurse Practitioners
California Association of Health Facilities
California Dental Association
California Healthcare Insurance Company, INC.
California Hospital Association
California Medical Association
California Orthopedic Association
California Solar & Storage Association
California Urological Association
Californians Allied for Patient Protection (co-sponsor)
Central Valley Health Network
Children's Specialty Care Coalition
Consumer Attorneys of California (co-sponsor)
Consumer Federation of California
Consumer Watchdog
Fund Her
Medical Insurance Exchange of California
Medical Oncology Association of Southern California
Norcal Group
Osteopathic Physicians and Surgeons of California
Patient Safety Action Network
Planned Parenthood Affiliates of California
The Dentists Insurance Company
The Doctors Company
4kira4moms
One individual

Opposition

None on file

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