LAO

November 15, 2019

Hon. Xavier Becerra
Attorney General
1300 I Street, 17th Floor
Sacramento, California 95814

Attention: Ms. Anabel Renteria
Initiative Coordinator

Dear Attorney General Becerra:

Pursuant to Elections Code Section 9005, we have reviewed the proposed statutory initiative (A.G. File No. 19-0018, Amendment #1) relating to the process of medical malpractice cases.

BACKGROUND

Medical Malpractice

Persons Injured While Receiving Health Care May Sue for Medical Malpractice. Under current state law, patients injured while receiving health care may sue health care providers for medical malpractice. A successful malpractice claim typically requires that the injured party prove that he or she was injured as a result of the health care provider's negligence. Damages awarded in medical malpractice cases include:

- ***Economic Damages***—payments to a person for the financial costs of an injury, such as medical bills or loss of income.
- ***Noneconomic Damages***—payments to a person for items other than financial losses, such as pain and suffering.

Attorneys working malpractice cases are typically paid a fee that is based on the damages received by the injured person—also known as a contingency fee. Most medical malpractice claims—as with lawsuits in general—are settled outside of court.

How Health Care Providers Cover Malpractice Costs. Health care providers usually pay the costs of medical malpractice claims—including damages and legal costs—in one of two ways:

- ***Purchasing Medical Malpractice Insurance.*** The provider pays a monthly premium to an insurance company and, in turn, the company pays the costs of malpractice claims.

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- ***Self-Insurance.*** Sometimes the organization a provider works for or with—such as a hospital or physician group—directly pays the costs of malpractice claims. This is often referred to as self-insurance.

These malpractice costs are roughly 1 percent of total annual health care spending in California.

Medical Injury Compensation Reform Act (MICRA)

In 1975, the Legislature enacted MICRA in response to a concern that high medical malpractice costs would limit the number of doctors practicing medicine in California. The act made the following changes intended to limit malpractice liability:

MICRA Established a Cap on Noneconomic Damages Awarded in Malpractice Cases. MICRA established a $250,000 cap on noneconomic damages that may be awarded to an injured person. (There is no cap on economic damages.)

MICRA Established Caps on Fees Going to Attorneys Representing Injured Persons in Malpractice Cases. MICRA established a capped percentage of a damages award that can go to these attorneys depending on the amount of damages awarded, with the percentage declining as the amount of the award grows. MICRA established the following caps for the fees attorneys representing injured persons in malpractice cases may collect:

- 40 percent of the first $50,000 recovered.
- 33.3 percent of the next $50,000 recovered.
- 15 percent of any amount on which the recovery exceeds $600,000.

MICRA Allowed Evidence of Outside Sources of Support Going to Injured Parties in Malpractice Cases. It is possible for an injured party in a malpractice case to receive payment from an outside source (such as health insurance) to help cover their medical costs. In general, payments from outside sources are not considered when determining awards in other liability cases. However, MICRA allowed evidence of these payments to be considered in malpractice cases to potentially reduce the damages awarded. MICRA also prohibited outside sources, other than certain government programs including Medi-Cal, from recovering their costs incurred for the medical treatment of the injured party from a malpractice award.

Allowed Periodic Payments of Damages Awarded. MICRA established an option for defendants found liable for malpractice to pay damages over time instead of in a lump sum, if either party to the malpractice case requests it. This practice is referred to as "periodic payments."

Established a Statute of Limitations for Filing a Malpractice Case. MICRA established that an injured adult party has one year after discovery of their injury to file a malpractice case, and that malpractice cases on behalf of a minor must be filed within three years from the date of injury.

State and Local Governments Pay for a Substantial Amount of Health Care

The state and local governments in California spend tens of billions of dollars annually on health care services. These costs include purchasing services directly from health care providers (such as physicians and pharmacies), operating health care facilities (such as hospitals and clinics), and paying premiums to health insurance companies. The major types of public health care spending are:

- ***Health Coverage for Government Employees and Retirees.*** The state, public universities, cities, counties, school districts, and other local governments in California pay for a significant portion of health costs for their employees and their families and for some retirees. Together, state and local governments pay about $25 billion annually for employee and retiree health benefits.
- ***Medi-Cal.*** In California, the federal-state Medicaid program is known as Medi-Cal. Medi-Cal pays about $23 billion annually from the state General Fund to provide health care to almost 13 million low-income persons.
- ***State-Operated Mental Hospitals and Prisons.*** The state operates facilities, such as mental hospitals and prisons, that provide direct health care services.
- ***Local Government Health Programs.*** Local governments—primarily counties—pay for many health care services, mainly for low-income individuals. Some counties operate hospitals and clinics that provide health care services.

PROPOSAL

This measure makes changes to several key provisions of MICRA, including the following major ones:

Replaces Terminology on Noneconomic Damages. This measure replaces the terminology of "damages for noneconomic losses" with the somewhat more descriptive terminology of "quality of life or survivor damages." Although it appears that this change is generally intended to be consistent with the current legal interpretation of noneconomic damages, there is some uncertainty whether or not this represents an expansion of such damages. For the remainder of this letter, we use "noneconomic damages" to refer to quality of life or survivor damages under the measure.

Raises Cap on Noneconomic Damages Awarded in Malpractice Cases. Beginning January 1, 2021, this measure adjusts the current $250,000 cap on noneconomic damages in medical malpractice cases to reflect the increase in inflation since the cap was established—effectively raising the cap to $1.2 million. The cap on the amount of damages would be adjusted annually thereafter to reflect any increase in inflation.

Removes Cap on Noneconomic Damages in Cases of Catastrophic Injury. This measure removes the cap on noneconomic damages in medical malpractice cases involving catastrophic injury. It defines catastrophic injury as death, permanent physical impairment, permanent disfigurement, permanent disability, or permanent loss of consortium.

Raises Caps on Fees Going to Attorneys Representing Injured Persons in Malpractice Cases. This measure adjusts the caps MICRA established for the fees attorneys can collect to reflect the increase in inflation since the caps were established.

Removes Caps on Fees Going to Attorneys Representing Injured Persons in Cases of Catastrophic Injury. This measure removes the caps MICRA established for the fees attorneys can collect in medical malpractice cases involving catastrophic injury.

No Longer Allows Evidence of Outside Sources of Support Going to Injured Parties in Malpractice Cases. This measure no longer allows consideration of evidence of outside sources of payment to cover injury costs (such as health insurance) to an injured party in medical malpractice cases. As a result, damage awards would not be reduced to reflect outside sources of support. The measure also lifts the prohibition on outside sources recovering their costs from the award.

Eliminates Periodic Payments of Damages Awarded. This measure would eliminate the ability of either party to unilaterally require periodic payments.

Requires Plaintiffs' Attorneys to Take Steps to Certify Merits of Case Before Proceeding. This measure would require an attorney representing an injured party in a medical malpractice case to file a document known as a "certificate of merit" attesting to the merits of the case within 60 days of filing the malpractice complaint. In order to file a certificate of merit, the attorney would be required to at least attempt to obtain the opinion of a qualified health care provider on the merits of the case. Without a certificate of merit, the case could be dismissed. However, under the measure, a judge would be barred from finding a case to be without merit if a certificate of merit is filed.

Extends the Statute of Limitations for Filing a Malpractice Case. This measure would extend the statute of limitations to two years after discovery of the injury for adults, and four years after the date of injury in cases filed on behalf of a minor.

FISCAL EFFECTS

This measure would likely have a wide variety of fiscal effects on state and local governments—many of which are subject to substantial uncertainty. The most significant fiscal impacts result from the measure's provisions that adjust or remove the cap on noneconomic damages. We describe the major potential fiscal effects below.

Effects of Raising or Removing Cap on Noneconomic Damages in Medical Malpractice Cases

Raising or removing the cap on noneconomic damages would likely *increase* overall health care spending in California (both governmental and nongovernmental) by: (1) increasing direct medical malpractice costs and (2) changing the amount and types of health care provided. We discuss these two impacts below. We note that we also considered whether the measure's provisions could result in offsetting health care savings in the long run to the extent that the measure incentivizes health care providers to provide higher quality care due to a deterrence

effect. However, on balance, the existing research does not provide conclusive evidence of a link between the provisions this measure would enact and better quality care.

Higher Direct Medical Malpractice Costs. Raising the cap on noneconomic damages would likely affect direct medical malpractice costs in the following ways:

- ***Higher Damages.*** Raising or removing the cap on noneconomic damages would increase the amount of damages in many malpractice claims.
- ***Change in the Number of Malpractice Claims.*** Raising or removing the cap on noneconomic damages would also change the total number of malpractice claims, although it is unclear whether the total number of claims would increase or decrease. For example, raising or removing the cap would likely encourage health care providers to practice medicine in a way that decreases the number of medical malpractice claims. (We discuss this change in behavior further below.) On the other hand, raising or removing the cap on noneconomic damages would increase the amount of damages—thereby increasing the amount that could potentially go to an attorney representing an injured party on a contingency-fee basis. This, in turn, would make it more likely that an attorney would be willing to represent an injured party, thereby increasing the number of claims.

On net, these changes would likely result in higher medical malpractice costs, and thus higher total health care spending, in California. Based on our review of studies looking at other states' experience, we estimate that the increase in medical malpractice costs could range from 20 percent to 30 percent. Since medical malpractice costs are currently about 1 percent of total health care spending, raising or removing the cap on noneconomic damages would likely increase total health care spending—based on our very rough estimates—by .02 percent to 0.3 percent. Further below, we discuss how this change in total health care spending translates to a change in health care spending by state and local governments.

Costs Due to Changes in Health Care Services Provided. Raising or removing the cap on noneconomic damages would also affect the amount and types of health care services provided in California. Raising or removing the cap on noneconomic damages would likely encourage health care providers to change how they practice medicine in response to higher medical malpractice liability risk. This could affect health care costs in different ways. For example:

- Health care providers may order additional tests and procedures to avoid facing a medical malpractice lawsuit. This could simply increase the total cost of health care services, to the extent that the additional tests and procedures do not result in future offsetting savings.
- Health care providers may order fewer high-risk tests and procedures, to avoid complications that may result in a medical malpractice lawsuit. This could result in health care savings, more likely in the short term.

Based on our review of studies looking at other states' experience and their applicability to California, we estimate that the cost side of the impacts noted above would outweigh the potential savings. Accordingly, we estimate that these changes in health care services provided

would result in a *net* increase in total health care spending. We estimate that this spending would increase—based on our very rough estimates—by 0.1 percent to 1 percent. We discuss below how this translates to changes in health care spending by state and local governments.

Bottom Line: Annual Government Costs Likely Ranging From the Low Tens of Millions of Dollars to the High Hundreds of Millions of Dollars. As noted earlier, state and local governments pay for tens of billions of dollars of health care services annually. Our analysis assumes additional costs for health care providers—such as higher direct medical malpractice costs—are generally passed on to purchasers of health care services, such as governments. In addition, we assume state and local governments will have net costs associated with changes in the amount and types of health care services.

There would likely be a very small percentage increase in health care costs in the economy overall as a result of raising or removing the cap on noneconomic damages. However, even a small percentage change in health care costs could have a significant impact on government health care spending. For example, a 0.5 percent increase in state and local government health care costs in California as a result of raising or removing the cap on noneconomic damages (which is in the range of potential cost increases discussed above) would increase government costs by roughly a couple hundred million dollars annually. Given the range of potential effects on health care spending, we estimate that state and local government health care costs associated with raising or removing the cap on noneconomic damages would likely range from the low tens of millions of dollars to the high hundreds of millions of dollars annually.

Research on the Fiscal Impact of Other Provisions Is Inconclusive

In contrast to the existing literature on the effect of caps on noneconomic damages, available research on the other provisions this measure would enact does not provide conclusive evidence on the direction or magnitude of effect on state and local government spending. The impact of raising or eliminating caps on fees going to attorneys representing injured parties in malpractice cases, disallowing evidence of outside sources of support, eliminating periodic payments, requiring certificates of merit, and extending the statute of limitations for filing medical malpractice cases have been examined in several studies—often as part of a package of reforms that includes a cap on noneconomic damages. However, on balance, most researchers have been unable to draw conclusions about the effect these other reforms have on health care spending.

Other Fiscal Effects

This measure could have some other additional, although likely relatively minor, fiscal effects.

- ***Recovery of Malpractice Awards.*** As noted previously, when Medi-Cal has paid for health benefits provided to a beneficiary injured by medical malpractice, it may recover a portion of medical malpractice damages awarded to the beneficiary to reimburse the state costs of these benefits. Increasing the number of medical malpractice awards would potentially increase the amount that could be recovered by the state through Medi-Cal. Additionally, this measure would no longer allow evidence of outside sources of payment to be considered in medical malpractice cases

and would allow these sources to recover their costs. This would broaden the recovery of malpractice awards to include entities outside of Medi-Cal, including insurers that provide health care coverage for state and local government employees. Increased recoveries by such insurers could potentially partially offset increased costs due to higher damage awards, which, as discussed previously, we assume would be passed on to the governments purchasing the coverage. The amount of such an offset is uncertain, but likely relatively minor.

- ***State Trial Court Costs.*** This measure could potentially increase the number of medical malpractice cases and thereby increase costs for state trial courts. It could also potentially increase the length of cases, which would increase costs for state trial courts as well. However, we expect that these increased costs are not likely to be significant relative to other fiscal impacts of this measure.

Summary of Fiscal Effects

This measure would have the following significant fiscal effect:

- 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.

Sincerely,

for Gabriel Petek
Legislative Analyst

for Keely Martin Bosler
Director of Finance