Eric Andrist August 26, 2012

Dear Eric,

This is a summary response to the important and disturbing issues you raised in previous communications concerning the growing impacts of the Medical Injury Compensation Reform Act, and especially the discriminatory effect in cases like yours. It will not contain all that you want, but feasibility is always a consideration in the shaping of public policy.

MICRA was introduced in the mid-70's to address a serious, and potentially worse, breakdown in California's health delivery system. I could elaborate on the components of the patient catastrophe, but only if you wish me to do so. A crisis atmosphere prevailed. The animosity among (in short-hand terms) the doctors, the lawyers and the insurance companies posed great obstacles to the passage of any bill dealing with the problem, let alone a perfect one.

As the measure passed the Assembly, it conformed far more to the wishes of the trial bar than of the other two groups. Opponents among the assembly members reluctantly agreed to let the bill go out of the house to keep it alive as a vehicle for further review after Senate action. There, in the Senate Insurance Committee, with all relevant parties present, the bill was substantially re-written.

Towards the hearing's end, the Legislative Counsel, for obvious reasons, recommended that the $250,000 CAP be indexed to inflation. I offered to take that recommendation as an "author's amendment." Amendments by an author are usually granted without further consideration. However, the Chair, or a committee member, asked how the three directly-affected factions mentioned above would react to the amendment. The doctors opposed it, perhaps to retain bargaining leverage when the bill returned to the Assembly. I cannot recall precisely the position of the malpractice insurers, but I presume it was in accord with that of the doctors.

Those two positions were no surprise. What came next was a block-buster. I was absolutely astounded when the trial lawyers' organization joined the opposition to inserting an inflation escalator. Later I found out why. I have always assumed that their on the spot calculation was that anything done to "improve" the bill (i.e., make it less objectionable) was a bad idea and might make it less likely to fail. And they were understandably confident it would fail.

After all, the Assembly Speaker had committed that when the bill returned to the Assembly, it would be re-referred to the trial lawyer-dominated Judiciary Committee where, everyone knew, the bill would be killed. Moreover, no one could recall a time when a Speaker's orders were overridden by the membership of the house. However, against all odds, MICRA's assured demise did not occur. In an historic turn of events, the Speaker's plea was ignored and he was overridden.

Second, they thought that even if by some unimaginable chance the arrangement with the Speaker did not hold – again, remember, the times were chaotic – the Governor would never sign the bill. But remarkably he did.

Third, they reasoned that if by any chance MICRA were to become law, it would soon thereafter be declared unconstitutional by the Supreme Court. Instead, by a 4-3 vote of the Justices, it was upheld.

Everyone had been focused on whether the measure would be politically viable; no one, it seems (except the Legislative Counsel) from a public policy standpoint focused on the absence of an *inflation escalator* for the CAP that limited subjective damages.

A few years later, as the un-indexed CAP began to close like a vise, the trial lawyers, though war-weary, threatened to act through the ballot box to repeal or amend the CAP through introduction of an initiative measure. All agreed that would have imposed on all sides battle costs likely to have been unprecedented. For that reason, it did not fail to get the attention of the also war-weary medical community. Negotiations, though imperative, would nonetheless prove difficult until the hostility of both was overcome by reason.

In those negotiations, the doctors' groups flatly refused to loosen the CAP. Then, the trial lawyer representatives offered a compromise: Leave the CAP as is, but eliminate the progressive limitation on attorney fees. Sensing the direction of the negotiations – taking discussion of the CAP off the table -- I walked out. All of this occurred one night at a local "watering hole." Thus, the resulting "compromise" soon became known as the Napkin Agreement.

The consequences of the CAP's growing "efficacy" became harsher each year. For a time, there were intermittent reports of severe consequences for certain alleged victims of medical malpractice – those whose injuries were limited, or virtually limited, to "pain and suffering." Those were the awards limited by the CAP. Moreover, some lawyers began refusing to take those cases on grounds it would not be economically sensible.

Without knowing the details and therefore not commenting on its merits, *the lawsuit on behalf of your sister seems to fall precisely into that category.* Although I have no statistics, I feel certain this not an isolated incident. Whatever the number of those cases, it is bound to increase. As inflation continued, the CAP would be seen to shut out a growing number of potentially meritorious claims. I find that disturbing and ominous for future fairness in the civil system.

My take on dealing pragmatically with these circumstances is that the CAP should be amended to include a provision for it to be raised periodically to reflect increases in inflation. MICRA, which I still believe was a necessary response to the potential destruction of the health care delivery system some three-and-a-half decades ago, has become far harsher than I, or perhaps anyone, intended. As a matter of public policy, this aberration demands to be addressed.

I would hope that the health care supporters of MICRA, who are committed to relieving human suffering, agree. Further, I would hope that policy makers, including those who abhor the CAP itself, and those who consider it essential to prevent frivolous lawsuits, also agree that it surely needs adjustment through the inclusion of an inflation-sensitive formula.

Yours Truly,
Barry Keene