



## **BALLOT INITIATIVE NUMBER 1606: "A WOLF IN SHEEP'S CLOTHING"**

by Darryl A. Ross Ryan J. Anderson

On October 10, 1911, California became the tenth state to adopt the voter initiative process. This process allows for Californians to petition to have new laws enacted or changes made to the California Constitution. This form of direct democracy gives the people the ability to create new laws or amend pre-existing laws without using the legislative process. Some have criticized the process as it allows legislatures the ability to skirt making decisions on difficult issues. The initiative process has also been criticized as it allows special interest groups to advance legislation while stuffing self-serving provisions deep into the bowels of a proposal where few read. As a result, voters can be left with the proverbial "wolf in sheep's clothing" and head into the polls with an incorrect understanding of certain initiatives.

That brings us to November 4, 2014, where Californians will vote on initiative number 1606, titled "Drug and Alcohol Testing of Doctors. Medical Negligence Lawsuits. Initiative Statute." While proponents of this initiative proclaim its intent is to protect Californians from medical malpractice, don't be fooled. This initiative is a perfect example of the special interest groups ("consumer rights" attorneys) using the "democratic" process to manipulate and mislead the people of California.

### **INITIATIVE PROVISIONS**

Initiative number 1606 will add a new article under California's Business and Professions Code, make changes and additions to California's Civil Code, and make additions to California's Health and Safety Code. First, the Business and Professions Code will be amended to add a new article titled "Physician and Surgeon Alcohol or Drug Impairment Prevention." This new article sets forth statutory requirements for hospitals and the Medical Board of California to administer and regulate random drug testing of physicians. A new section will be added to California's Civil Code creating a presumption of negligence in any action against a healthcare provider who tests positive for drugs or who refuses to participate in the random drug testing. In support of these proposed additions, the proponents of the initiative point to a 2013 study from the Journal of Patient Safety which estimates that medical negligence is the cause of 440,000 deaths each year in the United States.<sup>1</sup> With the Medical Board of California estimating that 18% of all licensed physicians may abuse alcohol or drugs,<sup>2</sup> proponents of the initiative believe physician drug testing may be a reasonable approach to reduce the number of deaths each year caused by medical malpractice.

<sup>1</sup> James, John T. M.D. (2013) "A Mew, Evidence-based Estimate of Patient Harms Associated with Hospital Care." [https://www.packat.org/assets/440K\\_Malpractice\\_Deaths\\_Each\\_Year.pdf](https://www.packat.org/assets/440K_Malpractice_Deaths_Each_Year.pdf)

<sup>2</sup> Medical Board of California (March 2013) "Physician Diversion Program" [https://www.packat.org/assets/California\\_Physician\\_Substance\\_Abuse.pdf](https://www.packat.org/assets/California_Physician_Substance_Abuse.pdf)

Second, this initiative creates a requirement that all healthcare practitioners and pharmacists access and consult an electronic database of prescribed controlled substances before they prescribe any individual a Schedule II or III controlled substance for the first time. If the database shows that the patient has an existing prescription for a Schedule II or III controlled substance, the healthcare practitioner shall not prescribe any additional controlled substance until a legitimate need is determined. This portion of the initiative is meant to curb access to narcotics by "drug shopping" patients who have addiction problems, going from doctor to doctor in order to obtain more drugs.

Lastly, and the most significant as it relates to the long-term care industry, this initiative will amend California Civil Code Section 3333.2. Currently, Section 3333.2 does not allow a plaintiff to be awarded more than \$250,000 for noneconomic losses (pain and suffering) in a medical malpractice suit. If the initiative is approved by the voters, this \$250,000 cap will be adjusted for inflation starting January 1, 2015. California Civil Code Section 3333.2 was enacted in 1975. According to the Bureau of Labor Statistics inflation calculator, **this initiative would raise the current cap of \$250,000 to \$1,105,483**. This number would continue to increase, as the initiative requires the cap to be adjusted over time to reflect any increase in inflation.

The unfortunate reality is that this initiative essentially puts a "wolf in sheep's clothing" on California's November 4 ballot. While the premise behind the initiative, e.g. protecting patients from medical malpractice, may be sound, implementation appears to be costly and the provision increasing the cap on damages is merely an attempt by "consumer rights" attorneys to increase the amount of malpractice lawsuits which in turn increases the fees these attorneys receive.

### **IMPLEMENTATION AND ITS FISCAL EFFECTS**

As it stands, implementation of the new provisions created by the present initiative will increase the cost for medical services for Californians. The California Legislature's Legislative Analyst's Office reviewed the proposed initiative and provided the state Attorney General with its findings. In general, implementing random drug testing and increasing the cap on noneconomic damages in medical malpractice cases would ultimately increase government costs, which would be passed on to the healthcare professionals and then to the consumers/patients.<sup>3</sup> A recent report analyzing data on healthcare expenditures and medical liability claim payments estimates that this increase in medical malpractice insurance "would raise the annual cost of California's healthcare system by &9.9 billion, or \$1000 per four-person household."<sup>4</sup>

Additionally, an increase in the general damages cap may also result in the reduction of the number of healthcare providers, and the possibility that healthcare providers will be discouraged from performing high risk, life-saving measures because of the risk of lawsuit.<sup>5</sup>

Further complicating implementation is the fact that the initiative fails to set parameters for physician drug testing. The proposed addition to California Business and Professions Code could make the Medical Board of California responsible for establishing standards for confirming a positive result and require the Medical Board of California to be responsible for managing physician suspensions. Creating the standards by which physicians must be tested, as well as adding this additional aspect to physician

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<sup>3</sup> Taylor, Mac, and Michael Cohen. "A.G. File No. 13-0016." Letter to California Attorney General Hon. Kamala D. Harris. 7 Oct. 2013. [https://oag.ca.gov/system/files/initiatives/pdfs/fiscal-impact-estimate-report\(13-0016\).pdf](https://oag.ca.gov/system/files/initiatives/pdfs/fiscal-impact-estimate-report(13-0016).pdf)

<sup>4</sup> Hamm, William G., Frech, H.E., and Wazzan, C. Paulo. (2008, revised 2014) "MICRA and Access to Health Care by Lowering Health Care Costs. Micra has improved Californians' Access to Care." <https://www.cmanet.org/files/pdf/micra/final-2014-micra-report-012114-web.pdf>

<sup>5</sup> Hamm, William G., Frech, H.E., and Wazzan, C. Paulo. (2008, revised 2014) "MICRA and Access to Health Care by Lowering Health Care Costs. Micra has improved Californians' Access to Care." <https://www.cmanet.org/files/pdf/micra/final-2014-micra-report-012114-web.pdf>

licensure will logically equate to additional costs. Per the proposed initiative, the Medical Board of California must assess an annual fee from physicians to pay for administering these new drug testing requirements. Additional physicians' expenses will ultimately lead to higher healthcare costs for Californians.

As it relates to long-term care providers, this initiative would have a direct impact on the cost of providing care to residents. In a field where compensation from the state and federal government is already minimal, additional costs for facility management could have a devastating affect on available funds.

Moreover, the medication database requirement raises multiple questions with regards to implementation at the long-term care facility level. As it stands, long-term care facility level. As it stands, long-term care providers are already subject to a multitude of California and Federal statutes and regulations relating to the administration of medications. If the present initiative is passed, the question then becomes: What happens when an individual is admitted to a long-term care facility and requires a Schedule II or III drug? Will the proposed requirements trump the timing requirements a long-term care facility must follow with regards to medication administration? Will the facility be liable when a delay in medication administration is caused by a physician failing to consult the database? What precautions will need to be put in place to make sure a resident's physician or the pharmacy consulted the database prior to a long-term care facility administering Schedule II or II drugs? We can continue down the rabbit hole with this line of questioning. Will long-term care facilities are required to confirm with a resident's physician or pharmacy that the database was consulted? If long-term care facilities are required to confirm that that database was consulted, will this mean that long-term care facilities are required to access the database as well?

Additional questions are raised at the facility management level. What amendments will need to be made to the contracts between long-term care facilities and pharmacies? What protections are being put into place to make sure individuals' private healthcare information is protected within the database?

For what has been lauded as an initiative that will help protect Californians from medical malpractice, implementation of its provisions may actually hurt Californians by increasing the cost of healthcare, creating barriers to access healthcare services, and decreasing the available funds associates with long-term care due to increased administrative costs.

### **TRIAL ATTORNEY'S FEES ARE THE TRUE DRIVING FACTOR BEHIND THIS INITIATIVE**

Per the language of the initiative, one of its purposes is to "retain the cap on attorney's fees in medical negligence cases." Thus, the drafters of the initiative and its supporters would have voters believe that the cap on damages will be increased to the benefit of the injured individual without actually increasing the amount of money going into Plaintiff's attorney's pockets. Unfortunately this is ot only misleading, but completely false. The current call allows "consumer rights" titled to roughly \$240,000.00, equating to an increase of over 200% from the current cap.

The unfortunate reality is that Plaintiffs' attorneys have created an initiative that on its face appears to protect patients from medical malpractice through random drug testing and controlled substance monitoring. While there may be a meritorious reason to increase the amount of general damages that are recoverable since the present amount of \$250,000 was enacted in 1975, the increased

amount should be determined by people who do not have a direct pecuniary interest in that amount. In reality, the initiative increases the fees "consumer rights" attorneys receive, will limit Californian's access to healthcare, and will increase the costs of healthcare services that Californians must pay.

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About the authors:

Darryl Ross is a Shareholder with the firm of Wroten & Associates and maintains a diverse litigation practice with experience handling all aspects of civil litigation including arbitrations, complex settlements, trials (jury and court), and appeals. Mr. Ross' practice focuses on the defense of nursing homes and residential care facilities. He has successfully handled a wide variety of health care matters for public and private entities including insurance coverage issues, product liability claims, interpretation, advice and enforcement of medical staff bylaws, as well as class action litigation.

Mr. Ross is a frequent speaker at industry conferences and forums and has given numerous Webinars for clients on a variety of issues impacting their operations. Recent presentations include How to Deal with a Challenging Resident?, What Rights Do Facilities Have When They Discover A Sex Offender is Living in the Building?, and How to Protect the QA Process.

Mr. Ross is a member of the California Association of Healthcare Facilities Legal Committee, as well as a member of the American Youth Soccer Organization's (AYSO) National Legal Commission. Mr. Ross is also a Planning Commissioner for the City of Aliso Viejo California, as well as Regional Commissioner of AYSO Region 889 located in Aliso Viejo, California.

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