LFC Requester:	Ruby Ann Esquibel

AGENCY BILL ANALYSIS - 2025 REGULAR SESSION

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Date Prepared: 2/21/2025

Bill Number: SB176

Check all that apply:

Original X Correction ____

Amendment ____ Substitute ____

Sponsor: Sen. Martin Hickey
Sen. Pat Woods

Short Title: Medical Malpractice Changes

Agency Name and Code Number: 305 – New Mexico Department of Justice

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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	**FY26**		

(Parenthesis ( ) indicate expenditure decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	**FY26**	**FY27**		

(Parenthesis ( ) indicate revenue decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

This analysis is neither a formal Opinion nor an Advisory Letter issued by the New Mexico Department of Justice. This is a staff analysis in response to a committee or legislator's request. The analysis does not represent any official policy or legal position of the NM Department of Justice.

BILL SUMMARY

Synopsis:

SB176 proposes amendments to the Medical Malpractice Act ("the MMA") that would limit Patient Compensation Fund ("PCF") payments for future medical care and related benefits, limit contingent attorney fees in MMA cases, and divert a portion of punitive damages awards that customarily go to the patient or the patient's personal representative in MMA cases to a new state fund.

Sections 1 and 2 would require the PCF to pay expenses for future medical care and related benefits only "as [such] expenses are incurred." Specifically, Section 1 seeks to amend Section 41-5-6 by adding the phrase "[e]xcept as provided in Section 41-5-7 NMSA 1978" to Subsection (H) that states that no limits shall be placed on the value of accrued medical care and related benefits; and Section 2 seeks to amend Section 41-5-7 by adding a Subsection (C) that states that "[p]ayments made from the [PCF] for medical care and related benefits shall be made as expenses are incurred."

Section 2 would also add a new Subsection (F) that requires MMA punitive damage awards to be split between the prevailing party and the state treasurer, with 25 percent going to the prevailing party and 75 percent going to the patient safety improvement fund ("PSIF").

Section 3 seeks to add a new section to the MMA that would limit contingent attorney fees based on when the MMA case is resolved. For cases settled before an arbitration proceeding or trial has started, the fee would be "twenty-five percent of the dollar amount recovered." For cases settled after an arbitration proceeding or trial has started, the fee would be "thirty-three percent of the dollar amount recovered," whether the case is resolved by settlement, arbitration, or judgment.

Section 4 seeks to add a new section to the MMA that establishes the PSIF, a non-reverting fund in the state treasury. The fund is to be invested by the state treasurer, expended as set forth in the section, and subject to appropriation by the Legislature to the department of health ("DOH") "for the purposes of improving patient safety and health care outcomes."

FISCAL IMPLICATIONS

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

SIGNIFICANT ISSUES

Chilling and Constitutional Concerns regarding Taking the Bulk of a Punitive Damages Award

Section 2 would require New Mexico state courts to distribute seventy-five percent of an MMA plaintiff's punitive damages award to a government held patient safety improvement fund. "Punitive damages are awarded for *the limited purpose* of punishment and to deter others from the commission of like offenses." UJI 13-1827 NMRA (emphasis added). In tort cases, including medical malpractice cases, the factfinder may currently award *the plaintiff, as the injured party,* punitive damages, if the trier of fact finds that: (1) the plaintiff should recover compensatory damages; and (2) the defendant's conduct was malicious, willful, reckless, wanton, fraudulent, in bad faith. *Id.* A bill that diverts the vast majority of a punitive damage award away from a plaintiff who has expended significant time, stress, and energy helping the general public by pursuing medical malpractice claims to "punish[] and . . . deter" those actions will, at the very least, have a significant impact on whether such plaintiffs will be willing to pursue such actions.

For example, in some cases, punitive damages are most of what a plaintiff can recover—the compensatory damage award may be minimal. But the fact that a claim would result in low compensatory damages does not mean there is a decreased necessity in pursuing those who have committed medical malpractice to such a degree that punitive damages would be appropriate. If this bill is passed and the vast majority of a punitive damages award is diverted to the state, which has not done any work to protect against medical malpractice, it is exceedingly unlikely that a plaintiff will have incentive to litigate such a case, leaving certain types of medical malpractice unpunished and undeterred. Section 2 would therefore create a significant chilling effect on these types of actions. This bill provides the plaintiff with no recourse to object to the taking, no flexibility in determining whether and when such taking is in fact appropriate, and significantly decreased incentive for plaintiffs to pursue such claims.

In addition, such outcomes may raise novel challenges in New Mexico regarding violations of the due process clause, takings clause, right to a jury trial, and excessive fines under the federal and/or state constitutions.

Such taking may also reduce accountability of bad actors if MMA plaintiffs choose to strategically limit their cases by only naming those healthcare providers who are not deemed qualified providers under the MMA as parties to fall outside its scope of this bill. In this way, the bill would discourage accountability for true bad actors.

Section 3 – Constitutional Question in Limiting Contingent Attorney Fees

Section 3 raises serious constitutional separation of powers concerns as it appears to infringe upon Supreme Court authority to regulate attorney conduct. Article III, Section 1 of the New Mexico Constitution provides: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and *no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others*, except as in this constitution otherwise expressly directed or permitted." As relevant here, in *Ammerman v. Hubbard*

Broadcasting, Inc., 1976-NMSC-031, ¶ 15, 89 N.M. 307, our Supreme Court stated that "[u]nder the Constitution, the legislature lacks the power to prescribe by statute rules of practice and procedure, although it has in the past attempted to do so. Statutes purporting to regulate practice and procedure in the courts cannot be made binding, for the constitutional power is vested exclusively in this court." *See also Sw. Community Health Servs. v. Smith*, 1988-NMSC-035, ¶ 6, 107 N.M. 196 ("While, historically, the judiciary has shared procedural rule-making with the legislature, any conflict between court rules and statutes that relate to procedure are today resolved by this Court in favor of the rules.").

Similarly, Section 3 conflicts with the New Mexico Supreme Court's Rules of Professional Conduct, which govern the practice of law by licensed attorneys. This legislative overreach poses the same constitutional concerns as noted above. Section 3 proposes to impose limitations on contingent attorney fees when Rule 16-105(E) NMRA already regulates this practice by permitting New Mexico attorneys to work for and charge contingent fees in all cases, except criminal cases and certain domestic relations cases. The standard under Rule 16-105(A), a fee, whether contingent or fixed, must be "reasonable and the following factors must be considered:

- the time and labor required;
- the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- the fee customarily charged in the locality for similar legal services;
- the amount involved and the results obtained;
- the time limitations imposed by the client or by the circumstances;
- the nature and length of the professional relationship with the client;
- the experience, reputation and ability of the lawyer . . . performing the services; and
- whether the fee is fixed or contingent.

Id.

Even if the Section 3's provisions survived a constitutional challenge, basing the contingent attorney fee solely on whether case is resolved before or after an arbitration proceeding or trial has started, without considering other factors, may, by itself, is an arbitrary and unreliable indicator of whether that fee is reasonable.

PERFORMANCE IMPLICATIONS

N/A

ADMINISTRATIVE IMPLICATIONS

N/A

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

N/A

TECHNICAL ISSUES

Section 1 proposes amending Section 41-5-6(H) so that it reads: Except as provided in Section 41-5-7 NMSA 1978, the value of *accrued* medical care and related benefits shall not be subject to any limitation." It may be advisable to substitute the word "received" for the word "accrued" in Section 1 as the meaning of "accrued" could be disputed.

OTHER SUBSTANTIVE ISSUES

The bill conflicts with and therefore would supersede existing case law if passed. The statute currently provides: "The value of accrued medical care and related benefits shall not be subject to any limitation." NMSA 1978, § 41-5-6(H) (2023). In *Hoag v. Aswad*, A-1-CA-40189, mem. op. ¶¶ 14-17 (N.M. Ct. App. June 17, 2024) (nonprecedential), *cert. denied*, 2024-NMSC-010, the Court of Appeals relied on the above language, applied the collateral source rule, and held that jurors could consider the amount billed for past medical care and related benefits and that damages are not to be limited even when portions of the expenses have been paid for by an insurer. Sections 1 and 2 appear to treat compensatory damages for future medical care differently than *Hoag* treats compensatory damages for past medical care. It prohibits lump sum payments to plaintiffs for future medical care and requires the PCF to pay damages for such care only as expenses for such care are incurred.

ALTERNATIVES

N/A

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo.

AMENDMENTS

N/A