March 21, 2016

The Honorable Bob Goodlatte  The Honorable John Conyers, Jr.
Chairman                             Ranking Member
Committee on the Judiciary          Committee on the Judiciary
U.S. House of Representatives       U.S. House of Representatives
Washington, DC 20515                Washington, DC 20515

Re: Concerns Regarding H.R. 4771, the “Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2016”

Dear Chairman Goodlatte and Ranking Member Conyers:

On behalf of the American Bar Association, which has over 400,000 members, I am writing to express our opposition to H.R. 4771, the “Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2016.” I understand that your committee is scheduled to mark up this bill tomorrow.

For over 200 years, the authority to determine medical liability law has rested in the states. This system, which grants each state the autonomy to regulate the resolution of medical liability actions within its own borders, is a hallmark of our American justice system. The states also regulate the insurance industry. Because of the roles they have played, the states are the repositories of experience and expertise in these matters. Therefore, the ABA believes that Congress should not substitute its judgment, as is proposed in H.R. 4771, for the systems that have evolved in each state over time.

Specifically, I would like to share with you the ABA’s concerns and other views regarding key provisions in the proposed legislation relating to damages, proportionate liability, and contingent fees.

**Damages.** The ABA believes that compensatory damages should not be capped at either the state or federal level, and, as a result, we have serious concerns regarding Section 4(b) of H.R. 4771 that would cap noneconomic damages for a plaintiff’s injuries at $250,000. For more than thirty years, the ABA has studied the research on federal and state legislative efforts to impose limits on noneconomic damages, including pain and suffering. Empirical research has shown that caps diminish access to the courts for low-wage earners, like the elderly, children, and women; if economic damages are minor and noneconomic damages are capped, attorneys are less likely to represent these potential plaintiffs.
Those affected by caps on damages are the patients who have been most severely injured by the negligence of others. These patients who reside in communities around the country should not be told that, due to an arbitrary limit set by members of Congress in Washington, DC, they will be deprived of the compensation determined by a fair and impartial jury. The courts already possess and exercise their powers of remittitur to set aside excessive jury verdicts, and that is the appropriate solution rather than an arbitrary cap. For these reasons, the ABA opposes those provisions in H.R. 4771, such as Section 4(b), which would place a dollar limit on recoverable damages and operate to deny full compensation to a patient in a medical liability action.

**Proportionate Liability.** Section 4(d) of H.R. 4771 would create a “fair share rule” under which each party would be liable only for its share of any damages, and as a result, the provision would preempt existing state laws that provide for joint and several liability in medical liability cases. The ABA believes that, at the state level, the laws providing for joint and several liability should be modified to recognize that defendants whose responsibility is substantially disproportionate to liability for the entire loss suffered by the plaintiff should be held liable for only their equitable share of the plaintiff’s non-economic loss. Although the ABA supports this principle and encourages other improvements to the tort laws at the state level, it opposes federal preemption of the medical liability laws of the states and territories. Therefore, the ABA opposes Section 4(d) to the extent that it would preempt existing state laws and to the extent that it would apply a proportionate liability rule to all damages, not just the plaintiff’s non-economic damages.

**Contingent Fees.** Section 5(a) of H.R. 4771 would empower a court to reduce the contingent fees paid from a plaintiff’s damage award to an attorney, redirect damages to the plaintiff, and further reduce contingent fees in cases involving minors and incompetent persons. The ABA has opposes sliding scales for contingent fees and other special restrictions on such fees. In 1985, the ABA created a Special Committee on Medical Professional Liability (“Special Committee”) to study the initiatives proposed at that time in an Action Plain of the American Medical Association Special Task Force on Professional Liability and Insurance. Among the initiatives was a recommendation of sliding scales on contingent fees, having effects comparable to the caps proposed here. After review, the Special Committee concluded the following:

A sliding scale for contingency fees in medical malpractice litigation may very well reduce total awards for patient-victims by depriving them of representation by a trial lawyer sufficiently skilled at obtaining the highest appropriate award. Mandatory sliding scale systems could also inhibit claimants’ access to the court system by limiting the availability of counsel. And imposing sliding scales only in medical malpractice cases would, in effect, create different level of skills among available counsel for plaintiffs in medical malpractice cases from those available to claimants in other tort cases.

As a result of this finding, the ABA adopted a policy in 1986 that “no justification exists for imposing special restrictions on contingent fees in medical malpractice actions.”
Therefore, the ABA opposes the limits on contingent fees contained in Section 5(a) of H.R. 4771.

The American Bar Association remains committed to maintaining a fair and efficient justice system where victims of medical malpractice can obtain redress based on state laws, without arbitrary or harmful restrictions. We offer these perspectives for your consideration as you mark up H.R. 4771.

Sincerely,

Thomas M. Susman

cc: Members of the House Judiciary Committee