

**To: Joe Bieniek, NAIC**

**From: Kathy Zeiler, Georgetown University Law Center**

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**Re: Comments on NAIC Medical Malpractice Closed Claim Reporting Guidelines, Collection of Information on Damages**

I respectfully submit the comments below on the NAIC malpractice closed claims reporting guidelines (December 3, 2008 version).

Section 7K requires estimation of economic and noneconomic damages. The reporting entity is required to estimate past and future economic damages (e.g., medical expenses, loss of earnings, burial costs, etc.). The guidelines require the estimates to be based on “documented evidence obtained during the claim resolution process.”

**The wording and structure of Section 7K is potentially problematic for several reasons. First,** the current wording is ambiguous. The reporting entity might read the language to mean it should report a breakdown of the amount it paid to close the claim by economic damages categories. On the other hand, it might plausibly interpret the guideline to imply that it should report economic damages that would have been awarded by a court had the patient won at trial.

To optimally resolve this ambiguity, the language should be altered to require reporting entities to report economic damages by *estimating the damages that would have been awarded if the plaintiff had won at trial*.<sup>1</sup> This estimation method will result in the most objective measures of economic damages.<sup>2</sup> It will eliminate subjective components of the estimation (e.g., probability the patient will win at trial, discount patient is willing to accept to get settlement money without waiting for a trial, etc.). Additional questions can be added to collect information on the reporting entity’s guess at the likelihood of winning at trial and the overall percentage discount the patient was willing to accept to forego delay.

**Second,** Section 7K(3)(c) requires the reporting entity to account for “related factors, such as issues of negligence and liability, the relative strength of the defense, and the component of the indemnity payment driven by economic damages” when computing damages for future economic losses. This requirement is problematic for three reasons. First, the meaning of “the component of the indemnity payment driven by economic damages” is unclear. Second, the language suggests that the reporting entity should report future economic damages by category after adjusting for several subjective factors. As noted above, the data will be more useful if reporting entities estimate damages that

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<sup>1</sup> Estimated trial awards will include adjustments for the time value of money.

<sup>2</sup> It’s important to note that this measure includes a subjective component as well. Evidence of economic damages might lead to uncertainty about the amount a court would award at trial. For example, a dispute might arise over whether the patient would have received a bonus as part of her wage package in the year the injury occurred. In addition, awards for medical costs are sometimes reduced by an amount related to unreasonable medical expenses (e.g., fees paid to a high-priced but unnecessary specialist).

would have been awarded if the plaintiff had won at trial. Third, if the committee decides to ask reporting entities to report economic damages adjusted by subjective factors, the section should make clear that the subjective factors apply not only to future economic damages but also to past economic damages.

**Third**, Section 7K(4) requires that “[t]he total indemnity payment must be equal to the sum of the reporting entity’s best estimate of economic damages and the reporting entity’s best estimate of noneconomic damages....” This requirement is problematic regardless of which method is used to estimate economic damages. First, if economic damages are computed by estimating court awards, reporting the difference between economic damages and the total settlement amount as non-economic damages will result in a noisy, and ultimately unhelpful, measure of non-economic damages. Second, even if economic damages are computed by estimating court awards adjusted for the probability the patient wins at trial, etc., inevitable errors in estimating economic damages will skew non-economic damages. To maintain consistency between the guidelines and the model law, the guidelines might include a cautionary note warning of measurement error. The note might suggest that all analyses of the damages data include appropriate caveats related to potential measurement error.

Regardless of which estimation method is required, clarification of the language of Section 7K will be helpful for both reporting entities and data analysts, who will consult the guidelines when analyzing the data.