



ADR Services, Inc. Presents:

# MICRA UPDATE

January 11, 2023 MCLE Day

Presented by  
Randy Even, Esq.  
Hon. Joe Hilberman  
Hon. James Lambden



# Speakers



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# Agenda

## Examining Recent Changes to the Medical Injury Compensation Reform Act of 1975 (MICRA)

### 01

#### History of Limitations

- Original Statutory Positions
- Nationwide Reform
- Limits Attacked
- 2022 Ballot Reforms
- Risk Benefit Analysis & Negotiations

### 02

#### Assembly Bill 35: MICRA Reform

- Changes Effective Jan. '23
- What Doesn't Change
- Other Reforms by AB 35

### 03

#### Application

- 3 Defendant Cap Types
- Skilled Nursing Facility
- Privilege for Providers' "Benevolent Statements"
- Contingency Fee Awards



Part 1:

# History of Limitations



# Seven Original Statutory Provisions

## 1. Limited Non-Economic Damages to \$250,000

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With no limit on economic damages and no provision for increasing damages cap for future inflation

## 2. Limited Statute of Limitations

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For professional liability actions against health care providers **shorter** of 1 year after plaintiff discovers or should have discovered injury or **for minors** 3 years after injury.

## 3. Periodic Payments

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Over time when future damages are  $\geq$ \$50,000

## 4. Evidence of Collateral Source Payments

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Allowed

## 5. Binding Arbitration

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For professional liability actions against health care providers **shorter** of 1 year after plaintiff discovers or should have discovered injury or **for minors** 3 years after injury.

## 6. Advance Notice

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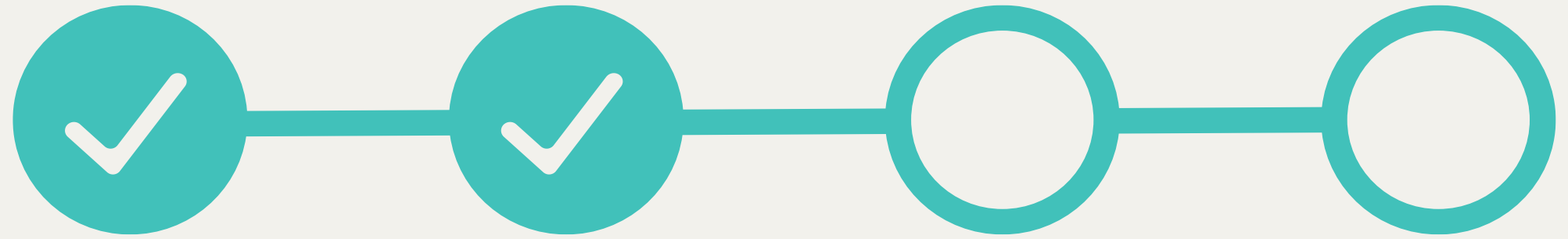
Of a claim

## 7. Tiered Contingent Attorney's Fees

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Added in 1987 and capped

# MICRA Leads to Nationwide Reform



26 states impose a cap on non-economic damages in med mal actions;  
6 have "total caps" limiting both economic and non-economic damages

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Some states have never had caps, have had them overturned as  
unconstitutional, or affirmatively prohibit them

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CA currently has lowest cap in the nation



# MICRA Limits Attacked

Never accepted as fair by consumer attorneys and failure to acknowledge changed circumstances invigorate challenges.

In 2014 Proposition 46 would have abruptly raised the damages cap to \$1.1 million then adjusted annually for inflation. Opposition was based on shock to system.

Numerous cases over the years since 1975 have unsuccessfully challenged the constitutionality of MICRA.

In 2020 alone 5 cases were filed around the state challenging constitutionality of the damages cap, attorney's fee limit, etc.

Alleged violation of right to petition government for redress of grievances, taking without just compensation, equal protection (fundamental interest, suspect class), etc.

3 cases were being appealed when the current reform was negotiated.

# Most Extensive Reform Qualified for Ballot in 2022

The threatened 2022 Ballot Measure: "Fairness for Injured Patient Act" would have severely shocked the industry and judiciary and it brought negotiators to the table.



- ➡ If approved by the voters, the Proposition would have adjusted "quality of life for survivor" (noneconomic) damages limit to approx. \$1.35M.
- ➡ The increase would have been abrupt on 1/1/2023 to reflect the entire total of CPI (increases since 1975), followed by mandatory annual CPI increases.
- ➡ The proposal contained No damages cap for "catastrophic injury" Defined as "death, permanent physical impairment, permanent disfigurement, permanent disability, or permanent loss of consortium."
- ➡ Mandatory attorney fee awards. Since Court "shall" award reasonable attorney's fees to the prevailing plaintiff in cases involving catastrophic injury; and attorney's fees would be paid by defendant in addition to damages.
- ➡ No limits on attorney's fees in cases involving catastrophic injury.



# Risk Benefit Analysis Leads to Successful Negotiations

## Impetus for Reform Discussions



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Insurance industry faced uncertain prospects for defeat of FIPA.



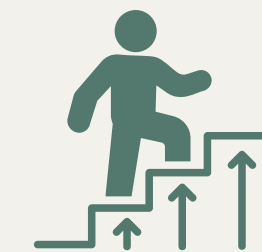
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Tremendous Cost of initiative battle with consumer attorneys girded for battle.



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Opportunity to achieve meaningful and obviously needed consensus between competing interests: classic mediation challenge.



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Parties to the negotiations on all sides have need to continue “doing business” without shocking system into collapse.





Part 2:

# Assembly Bill 35: MICRA Reform



# Overview of Changes

## Effective January 1, 2023

### Non-Economic Damages

- Change in amount of cap on non-economic damages.
- Different caps for injury cases vs. death cases.
- Separate caps for providers and hospitals/institutions, with possible third cap for “unaffiliated” defendants under rare circumstances.

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Change in amount of eligible for periodic payments.

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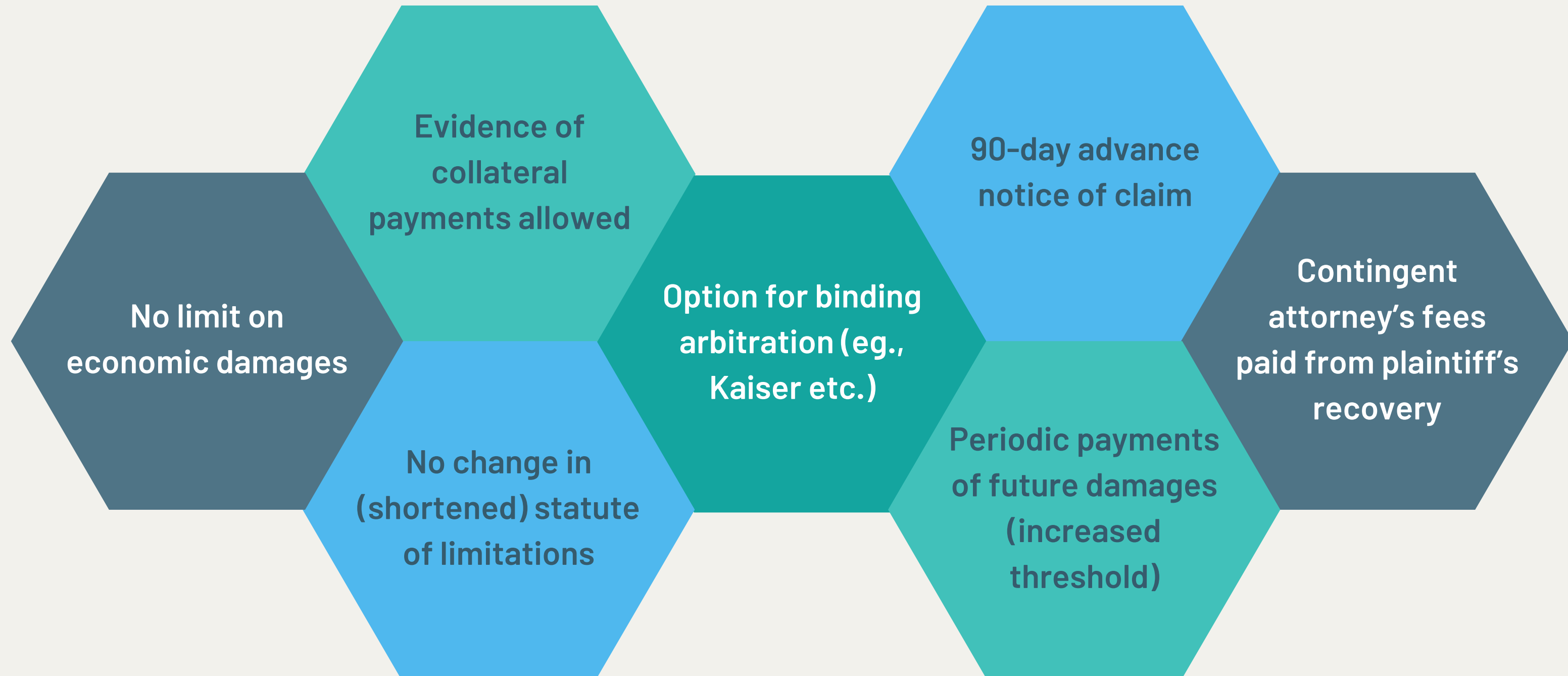
Discovery and evidentiary protections for pre-litigation benevolent gestures, expressions, and statements of fault.

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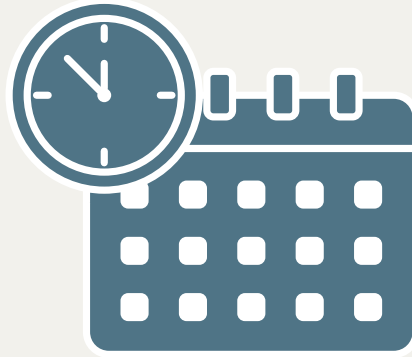
Change in formula for recovery of attorney’s fees.



# What AB 35 Doesn't Change



# Other Reforms by AB 35



## Periodic Payments

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- Continues to allow either party to request periodic (rather than lump sum) payments for future damages
- Increases the threshold for period payments from \$50,000 to \$250,000



## Non-Economic Damages

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- Increases cap for non-economic damages
- Non-death cases
  - Cap increases to \$350,000 on 1/1/2023
  - Starting 1/1/2024, cap will increase by \$40,000/year for 10 years until it reaches \$750,000
  - Starting 1/1/2034, 2% annual increase for inflation
- Death Cases
  - Cap increases to \$500,000 on 1/1/2023
  - Starting 1/1/2024, cap will increase by \$50,000/year for 10 years until it reaches \$1M
  - Starting 1/1/2034, 2% annual increase for inflation



Part 3:

# Application





# Here is Where AB 35 Complicates Our Analysis

**AB 35 Creates Three Separate Caps for Defendant Types**





**FIRST  
Defendant  
Type CAP**

**“Health care provider”  
(Civ. Code §3333.2(j)(1))**

- Person licensed or certified under Div. 2 of B&P Code, Osteopathic Initiative Act, Chiropractic Initiative Act, or licensed pursuant to H&S Code §1440 et seq.
- Clinic, health dispensary, or health facility licensed pursuant to Chapters 1 (clinics) or 1.3 (outpatient settings) of the H&S Code.
- Includes legal representatives of a health provider and the provider’s employer, professional corporation, partnership, or other form of legally recognized professional practice organization.
- Does not include “health care institutions” as defined.

**SECOND  
Defendant  
Type CAP**

**“Health care provider”  
(Civ. Code §3333.2(j)(1))**

- One or more health care facilities licensed pursuant to Chapter 2 (§1250 et. Seq.) of Div. 2 of H&S Code owned or operated by the same entity or its affiliates.
- Including “all persons and entities for which vicarious liability theories, including, but not limited to, the doctrines of respondeat superior, actual agency, and ostensible agency, may apply.”



# “Unaffiliated” health care institution or provider

For this third cap to be available to a plaintiff, a health care institution or provider must meet the WHO, WHAT, and WHERE requirements of Civ. Code §3333.2(b)(3), (j)(3))

## THIRD Defendant Type CAP

### Who/What/Where is Included?

#### Who

Defendant must be “unaffiliated”

- Not covered by definition of “affiliated” per Corp. Code §150
  - Corporation is an affiliate of or affiliated with another specified corporation if it “directly, or thorough one or more intermediaries, controls, is controlled by or is under common control with the other specified corporation”
- Is not employed by, performing under a contract with, and owner of, or in a joint venture with another specified entity, health care institution, health care provider, organized medical group, professional corporation, or partnership; or
- Is otherwise not in the same health system with that health care provider, health care institution, or other entity
- Must be “unaffiliated” with all (1) and (2) defendants and all health care institution defendants
- “Unaffiliated” determined at the time of the professional negligence

#### What

Defendant’s liability must be based on acts of professional negligence [separate and independent](#) from the acts of a (1) or (2) defendant.

#### Where

This defendant’s act must have occurred at or in relation to medical transportation to a health care institution unaffiliated with a health care institution described in (2).

# AB 35: Application of Separate Caps for Defendant Types

Each cap applies regardless of the number of defendants in that category or the number of causes of action.

- Combined liability for non-economic damages of all defendants in a category cannot exceed the amount of the cap.

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No defendant (provider or institution) can be liable for non-economic damages in more than one category.

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New caps apply to all cases filed or arbitrations demanded on or after 1/1/2023.

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Cap(s) in effect at the time of judgment/arbitration award/settlement apply.



# Hypothetical: How Many Caps Apply?

- Surgeon and Assistant Surgeon negligently perform a hip replacement on Patient at Hospital.
- During patient's subsequent stay at Hospital, Nurse 1 fails to properly monitor wound site and timely report signs of infection. Because of the resulting treatment delay, an infection spread.
- Patient is transferred to Skilled Nursing Facility (SNF) for further recovery and rehab, where Patient falls out of bed and fractures her hip because of Nurse 2's failure to raise the guardrails on Patient's bed.
- Patient files a malpractice lawsuit against Surgeon, Assistant Surgeon, Nurse 1, Hospital, SNF, and Nurse 2.

**For how many non-economic damages caps is the patient eligible?**



# Analysis of Hypothetical: How Many Caps Apply?



- One “provider” cap will be shared by Surgeon and Assistant Surgeon
  - A single “provider” cap applies regardless of the number of health care providers found liable (excluding “unaffiliated” providers) (Civ. Code §3333.2(b)(1))
- One “institution” cap for Hospital (which includes Nurse 1)
  - Hospital is subject to the “institution” cap (Civ. Code §3333.2(b)(2))
  - Nurse 1 is included in Hospital’s cap because “health care institution” includes all persons and entities for which the Hospital has vicarious liability, including employees. (Civ. Code §3333.2(j)(2))
    - If only Nurse 1 and not Hospital, is sued, Nurse 1 would be included in the “provider” cap, as it covers any person licensed or certified pursuant to Division 2 of the Business & Professions Code. (Civ. Code §3333.2(j)(1))



Is the SNF liability included within the Hospital's "institution" cap or is Patient able to seek a third cap from the SNF?

Remember the Third cap only available if requirements of WHO, WHAT, and WHERE are met:

**Who**

Is the defendant unaffiliated with every defendant in the "provider" or "institution" categories?

**What**

Is its liability based on a separate and independent act of negligence?

**Where**

Did its negligent act occur at, or in relation to medical transport to, a health care institution unaffiliated with any health care institution subject to the "institution" cap?

**What about  
the Skilled  
Nursing  
Facility  
(SNF)?**

Is the SNF "unaffiliated" with any of the "provider" defendants (the surgeons) or the "institutional" defendant (the Hospital)?

- If yes, Patient would be entitled to seek a third damages cap from the SNF, as the guardrail failure is a separate and independent act of negligence from what occurred at the Hospital.
- If the SNF is affiliated with any one of the other defendants (such as being owned by the Hospital), it is not "unaffiliated." Patient would be unable to seek a third cap, because the SNF's liability would fall within the institution cap.

# AB 35 Creates Privilege for Providers' "Benevolent Statements"

Protection	Broadly Covers	Privilege
<p>The law includes evidentiary protection for pre-litigation expressions of sympathy, regret, or benevolence by a health care provider, including statements of fault.</p>	<ul style="list-style-type: none"><li>• "Benevolent gestures" such as statements and gestures that convey a sense of compassion including sympathy, regret, and even acceptance of fault</li><li>• The gestures relate to the pain, suffering, or death of a person, or to an adverse patient safety event or unexpected health outcome</li><li>• And made to the patient or the family or representative of that person</li><li>• Prior to the filing of a lawsuit or demand for arbitration</li></ul>	<p>The law makes such statements privileged, and not subject to discovery or disclosure and thus cannot be used or admitted in a civil, administrative, licensing, or other proceeding; used as an admission of liability; or in connection with any sanction, penalty, or other liability.</p>



# AB 35 Changes Contingency Fee Awards

## Replaces Four-Tier System with Two-Tier System

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25% of amount recovered by settlement PRIOR filing complaint or arbitration demand.

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33% of amount recovered in settlement, arbitration of court judgment AFTER filing of civil complaint or lodging demand for arbitration.

Includes ability to petition court or arbitrator for an increased percentage of contingency fee above the specified percentages.

# Thank You for Attending



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