

MEDICAL SOCIETY of the STATE OF NEW YORK

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Division of Governmental Affairs
MEMORANDUM IN SUPPORT

**IN ASSEMBLY JUDICIARY
COMMITTEE**

A.5018 (ABBATE)

**AN ACT to amend the civil practice law and rules, in relation to
requiring an affidavit of merit and expert discovery in medical,
dental and podiatric malpractice actions**

This bill would amend the civil practice law and rules to enact a number of important reforms to New York's dysfunctional medical liability adjudication system to require additional expertise in the consideration of a medical liability action. **The Medical Society supports this bill.**

Specifically, this bill would help to provide some balance to the current procedural rules governing medical liability actions by: a) requiring the plaintiff's attorney in such lawsuits to submit an affidavit of merit from an appropriate medical provider outlining the applicable standard of care with a description of the breach of this standard as to each defendant rather than simply providing a conclusory attorney affirmation; and b) establish the same rules for disclosure of expert witnesses in these lawsuits as apply in every other jurisdiction besides New York, namely the ability to depose an adversary's expert and thereby limit surprise at trial while also providing judicial economy. There is no good reason for New York to maintain this "one of a kind" rule shielding the identity of expert witnesses in medical liability actions.

New York physicians find it increasingly difficult to maintain a viable practice, as they find themselves caught in an ever-tightening squeeze between exorbitant and rapidly rising medical liability premiums on the one hand, and decreasing reimbursement from commercial payors and Medicare on the other. This growing squeeze is already beginning to have a significant impact upon patient access to care in many regions of the State. For example, a recent HANYS study indicated that, across upstate New York, 86% of hospital emergency departments indicated there were times when a patient needed to be transferred because a needed specialist was not available.

It is a problem which will only become worse unless action is taken by the Legislature.

While the slashing of payments by health insurers and the huge increase in insurer deductibles and administrative hassles are shrinking practice revenue, New York physicians continue to pay liability premiums that far exceed those in any other state. These combined effects if unaddressed will result in a continued erosion of our patients' access to needed care.

Physicians in many other states have seen their premiums reduced in the last several years, while the liability premiums for New York physicians continue to rise. Physicians in New York face far greater liability insurance costs and exposure than their colleagues in other states. By way of example, a neurosurgeon practicing on Long Island pays an astounding \$338,252 premium for just one year of insurance coverage and an OB/GYN practicing in the Bronx or Staten Island has a premium of \$186,630. By comparison, an OB-GYN practicing in Los Angeles, CA pays less than \$50,000, about 25% of New York's staggering premiums.

Malpractice payouts in New York State continue to be far out of proportion to the rest of country. This is not surprising, given that a just release report from Leverage Rx (<https://www.leveragerx.com/malpractice-insurance/2019-medical-malpractice-report/>) showed that once again New York State had far and away the highest number of cumulative medical liability payouts of any state in New York, and that this cumulative number had increased by 11% from 2017 to 2018. Claimants in New York were awarded nearly two times more than the state with the next highest amounts, Pennsylvania, and payments in New York far exceeded states such as California and Florida.

Moreover, demonstrating once again why New York is considered to be the lawsuit capitol of the country, New York had the highest per capita medical liability payment as well, averaging over \$35 per New York resident, more than 20% higher than the second highest state, New Jersey.

New York is already a huge outlier when it comes to medical malpractice awards! Yet despite being outlier, New York actually enacted legislation in 2017 that expanded the ability of patients to sue their doctors without including any countervailing measure to help contain these costs. It is no wonder that WalletHub again listed New York this year as the worst state in the country in which to practice medicine, in large part due to its overwhelming liability exposure as compared to other states in the country.

The problems of the medical liability adjudication system do not just impact physicians – they impact the cost of all health care. Several studies have shown that billions of dollars are unnecessarily spent each year due to the practice of defensive medicine, such as unnecessary MRIs, CT scans and specialty referrals. These defensive medicine costs are likely to go up further with the enactment of this new law, as many physicians will believe they have no choice but to recommend patients for additional diagnostic tests or refer to specialists, beyond what they believe is clinically indicated, to better assure the record is “complete” in case they are to be sued many years later. While estimates vary about the cost impact to the health care system, an MIT study reported in a July 2018 *New York Times* article found the possibility of a lawsuit increased the intensity of health care that patients received in the hospital by about 5%.

New York must follow the lead of the many, many other states that have passed legislation to bring down the gargantuan cost of medical liability insurance. This legislation would enact a number of measures that have been enacted by other states to contain these exorbitant costs. Given the huge financial constraints facing our community hospitals and physicians that is already creating access to care issues for our patients, we cannot wait to take efforts to help bring New York’s exorbitant and disproportionately large liability costs under control

Based upon the foregoing, the Medical Society of the State of New York supports this legislation and urges its enactment.

Respectfully submitted,

**8/1/19
MMA – support**

MSSNY DIVISION OF GOVERNMENTAL AFFAIRS