Report of the Reference Committee on Governmental Affairs and Legal Matters (A)  
Presented by: Ellen Braunstein, MD, Chair

Mister Speaker and Members of the House of Delegates:

Your Reference Committee recommends the following consent calendar for acceptance:

**FILED FOR INFORMATION**
1. Legislation and Physician Advocacy Committee (GA Report 1)

**SUNSET REPORT - RECOMMENDED FOR ADOPTION**
2. 2022 Government Affairs & Legal Matters Sunset Report

**RECOMMENDED FOR REAFFIRMATION**
3. Resolution 55 - Physician Freedom to Manage Their Patients
4. Resolution 61 - Insurance Reform

**RECOMMENDED FOR ADOPTION AS AMENDED**
5. Resolution 50 - Non-Compete Agreements and Certain Restrictive Covenants in Professional Contracts
6. Resolution 51 - Membership Option of Medical Licensure
7. Resolution 52 - Covid Hazard Pay
8. Resolution 54 - Protecting State Medical Licensing Boards from External Political Influence
9. Resolution 56 - Mitigation of The Unintended Consequences for Quality of Care Triggered by Value–Based Payment Models
10. Resolution 58 - Abolish “Preferred” Status of Laboratories
11. Resolution 59 - Fair Health Database
12. Resolution 60 - Electronic Submission of Medical Records
14. Resolution 63 - Protection of Peer Review

**RECOMMENDED FOR REFERRAL TO COUNCIL**
15. Resolution 57 - Unintended Consequences of Value–Based Payment Models —Conflicts of Interest

**RECOMMENDED NOT FOR ADOPTION**
16. Resolution 53 - Expediting Action by OPMC in Cases of Prescribing Abuse
1. **LEGISLATIVE AND PHYSICIAN ADVOCACY COMMITTEE (GA REPORT 1)**

   THE REFERENCE COMMITTEE RECOMMENDS THAT THE ANNUAL REPORT OF THE LEGISLATION AND PHYSICIAN ADVOCACY COMMITTEE BE APPROVED AND FILED FOR INFORMATION.

   Your Reference Committee noted that the Report of the Legislative and Physician Advocacy Committee was a presentation of the Medical Society’s 2021 Legislative Program, which was approved by the MSSNY Council at its meeting on November 4, 2021.

2. **POLICY SUNSET REPORT**

   THE REFERENCE COMMITTEE RECOMMENDS THAT THE SUNSET REPORT FOR GOVERNMENTAL AFFAIRS AND LEGAL MATTERS (A) FOR 2022 BE ADOPTED.

3. **RESOLUTION 55 – PHYSICIAN FREEDOM TO MANAGE THEIR PATIENTS**

   Original Resolution 55 reads as follows:
   
   RESOLVED, That the Medical Society of the State of New York should seek legislation to prohibit elected officials from interfering with the right of licensed physicians to treat their patients to the best of their ability; and be it further

   RESOLVED, that any physician treating a patient off label with an FDA-approved medication, who has obtained informed consent and has a reasonable scientific basis for that treatment decision, shall be presumed to be practicing within the standard of care.

   **RECOMMENDATION A:**
   
   THE REFERENCE COMMITTEE RECOMMENDS THE FOLLOWING REAFFIRMATION OF MSSNY POLICY INSTEAD OF RESOLUTION 55

   75.988 **Medicare and ‘Off Label’ Uses of Drugs:**

   MSSNY confirms its strong support for the autonomous clinical decision-making authority of physicians to prescribe medications for ‘off-label’ use. (HOD 2004-67; Modified and reaffirmed HOD 2014; Reaffirmed HOD 2015-53)

   Your Reference Committee heard from multiple physicians opposed to this resolution. They were concerned that it would be perceived as an endorsement of physicians treating patients with therapies that have not been scientifically proven to be successful. The Reference Committee recommended that MSSNY instead re-affirm long-standing policy protecting the right of physicians’ clinical decision-making authority.

   **RECOMMENDATION B:**
   
   THE REFERENCE COMMITTEE RECOMMENDS REAFFIRMATION OF MSSNY POLICY 75.988.
4. RESOLUTION 61 – INSURANCE REFORM

Original Resolution 61 reads as follows:
RESOLVED that MSSNY advocates for widespread comprehensive and immediate insurance reform that:

A. holds insurers accountable for actions that compromise the care of their patients and the well being of their partnering physician practices

B. Allows physicians to compare fees so as to decide whether they can afford to continue accepting specific insurance plans.

C. Insists that insurers provide updated specialty specific payment schedules annually so that proper payment can be determined

D. Forces insurers to provide notice and good reason for dropping physicians from their panels and when doing so that this change be approved by the state department of financial services so that a provider group may have the opportunity to address any such legitimate grievance on behalf of the insurer.

E. That insurers be required to prove the necessity of any recoupment of overpayment before withholding further payments.

F. That the prompt payment act be enforced so that insurers pay within the 45-day period and that interest be recouped when they fail to do so.

RECOMMENDATION A:
THE REFERENCE COMMITTEE RECOMMENDS THE FOLLOWING REAFFIRMATION OF MSSNY POLICY INSTEAD OF RESOLUTION 61

165.917 Carriers’ Failure to Obey PHL 4406-c (5A) Release of Fee Schedule:
MSSNY will work with the NYS DOH to amend appropriate provisions of law to assign monetary penalties for failure to comply with requests for fee schedules. Failing legislative relief, MSSNY will study the feasibility of bringing appropriate legal action against carriers in New York who are identified as refusing to provide requested fee schedule data. (HOD 2003-52; Reaffirmed HOD 2013; Reaffirmed HOD 2016-56)

165.918 Time Limit for Retrospective Denials:
MSSNY continues in its efforts to seek legislation, regulation or other appropriate means to prohibit retrospective refund requests by health plans in all circumstances except fraud. Short of achieving a complete ban on retrospective refund requests, MSSNY seek legislation, regulation or other appropriate means to limit to 90 days the time within which a health plan can seek such a refund, or other significant restrictions on the ability of health plans to seek such refunds, such as limiting the time that a health plan can seek a refund to the same time that a physician has to file a claim with such health plan. (HOD 2003-69; Reaffirmed HOD 2013; Reaffirmed HOD in lieu of 2017-108)

165.968 Liability of Managed Care Entities As Well As Their Employees, Agents, Ostensible Agents And Representatives:
MSSNY will develop or support legislation or regulation requiring that whenever an employee, agent, ostensible agent and/or representative of a managed care entity makes a determination that affects a patient’s health, both the individual and the entity should be held liable for any adverse outcome to the patient arising directly from the determination or as a consequence of the determination. (HOD 1997-114; Reaffirmed
HOD 1998-84; Reaffirmed HOD 2014; Reaffirmed HOD 2015-57; Reaffirmed HOD 2020-56)

120.890  **We’re Mad as Hell and We aren’t Going to Take it Anymore**
MSSNY will aggressively work with county and specialty medical societies across the State to collect examples of health insurers inappropriately denying payment for care, appropriately delaying patient access to needed treatment and abusive audit practices for redress by the New York State Department of Financial Services and the NYS Department of Health. MSSNY will educate physicians regarding strategies to assist in collecting examples for review by state oversight agencies, such as the use of relevant ICD-10 codes that identify in the electronic medical record when patients have difficulty accessing care due to inappropriate denials. (HOD 2021-56)

120.952  **Insurance Companies Dis-enrollment of Participating Physicians**
The Medical Society of the State of New York will seek legislation that would expand physician protections similar to those enunciated in Public Health Law § 4406-d for non-renewal of a network contract for both managed care plans and HMOs in order to enable physicians to have the right to appeal a plan’s non-renewal decision and have a hearing, if needed.

The Medical Society will urge the Department of Financial Services to require that all health insurance companies doing business in the State of New York, provide clear and concise justification with appropriate documentation, which substantiates a decision to terminate or non-renew a physician’s participation status. When a physician receives a notification that his/her participation agreement is being terminated or not renewed, an appropriate appeals mechanism be provided which allows adequate time for the physician to seek appropriate counsel (if necessary) and to assemble any necessary and supporting documentation which may be needed to assist in the appeal. (HOD 2012-259)

RECOMMENDATION B:
THE REFERENCE COMMITTEE RECOMMENDS REAFFIRMATION OF MSSNY POLICIES 120.890, 120.952, 165.917, 165.918 AND 165.968

The resolution highlights the pervasive problem experienced by many physicians of delayed payments by insurers, abusive audits and inappropriate dropping from networks without adequate appeal rights. However, MSSNY has ample policy in each of these areas, and has been advocating for various pieces of legislation to address these abuses. Moreover, through its new Director of Payment & Practice, MSSNY has been aggressively working with county medical societies and physicians to share examples of abusive payor tactics with various regulatory agencies. Therefore, instead of adopting new policy that is largely redundant of existing MSSNY policy, the recommendation was to re-affirm several existing MSSNY policies that are substantially similar to the resolution. At the Reference Committee hearing, there was testimony that the sponsor of the resolution agreed with the recommendation to re-affirm these MSSNY policies.
5. RESOLUTION 50 – NON-COMPETE AGREEMENTS AND CERTAIN RESTRICTIVE COVENANTS IN PROFESSIONAL CONTRACTS

Original Resolution 50 reads as follows:
RESOLVED, that MSSNY advocate for unanimous support of Senate Bill S6425 which addresses this issue.

RECOMMENDATION A:
THE REFERENCE COMMITTEE RECOMMENDS THAT THE FOLLOWING SUBSTITUTE AMENDMENT BE ACCEPTED INSTEAD OF ORIGINAL RESOLUTION 50:

RESOLVED, That the Medical Society of the State of New York support legislation that would prohibit non-compete clauses in health care employment contracts.

RECOMMENDATION B:
THE REFERENCE COMMITTEE RECOMMENDS THAT SUBSTITUTE RESOLUTION 50 BE ADOPTED.

Your Reference Committee heard extensive testimony on this resolution. The legislation referred to in the resolved, S.6425/A.9591 Bill Search and Legislative Information | New York State Assembly (nyassembly.gov), would prohibit most restrictive covenants, also known as “non-compete” clauses, in all employment contracts in New York State. There was much testimony in support of the goal resolution of the resolution to prohibit all restrictive covenants, but there was testimony in opposition or in favor of re-affirming existing MSSNY policy. Physicians in support discussed the very difficult position they find themselves when they are subject to contractual non-compete provisions that limit where that physician can deliver care if they leave employment. Physicians in opposition discussed the burden on private practice physicians, particularly the risk of bringing on a younger physician to expand care availability to patients, but then have that physician leave their employ and start their own medical practice in the same region. The Reference Committee carefully considered the well-thought-out perspectives of both sides of the argument but recommended that MSSNY support prohibiting restrictive covenants altogether in all health care employment contracts because of concerns that MSSNY will not have sufficient credibility to advocate for the restriction or prohibition of restrictive covenants if they seeking to exempt themselves from its application.

6. RESOLUTION 51 – MEMBERSHIP OPTION TIED TO MEDICAL LICENSURE

Original Resolution 51 reads as follows:
RESOLVED, that the Medical Society of the State of New York seek legislation/regulation to include an opt out membership fee to be determined tied to initial medical licensure and every renewal.

RECOMMENDATION A:
THE REFERENCE COMMITTEE RECOMMENDS THAT THE FOLLOWING SUBSTITUTE AMENDMENT BE ACCEPTED INSTEAD OF ORIGINAL RESOLUTION 51:

RESOLVED, that MSSNY continue to investigate how best to enable physicians through an uncomplicated process to make MSSNY and county medical society membership payments through their biennial licensure re-registration process.

RECOMMENDATION B:
THE REFERENCE COMMITTEE RECOMMENDS THAT SUBSTITUTE RESOLUTION 51 BE ADOPTED.
At the Reference Committee hearing, several physicians spoke in favor of the resolution noting that it could potentially significantly increase MSSNY membership by reminding the over 100,000 licensed and registered New York physicians of the importance to their profession of supporting MSSNY. However, some physicians also raised concerns regarding MSSNY being the only physician association that would be benefitted by this proposal, when there are other associations (for example, the New York State Osteopathic Society) that also provides professional development for physicians. Other physicians raised concerns about possible delays in payment to MSSNY that could occur if the physician makes payment to the Education Department rather than directly to MSSNY.

Therefore, the Reference Committee recommended MSSNY a substitute resolution calling for MSSNY to continue in its efforts, similar to its existing policy, calling for MSSNY to investigate the logistics of including MSSNY and county society opt-out dues as part of the biennial re-registration process.

7. RESOLUTION 52 – COVID HAZARD PAY

Original Resolution 52 reads as follows:

RESOLVED, that the Medical Society of the State of New York seek legislation/regulation that these physicians and other members of the healthcare team working during a state disaster emergency be entitled to hazard pay; and be it further RESOLVED, that this issue be brought forward to the AMA for similar legislation/regulation at the national level.

RECOMMENDATION A:
THE REFERENCE COMMITTEE RECOMMENDS THAT THE FOLLOWING SUBSTITUTE AMENDMENT BE ACCEPTED INSTEAD OF ORIGINAL RESOLUTION 52:

RESOLVED, that the Medical Society of the State of New York work with the American Medical Association and the federation of medicine to seek a state and/or federal program to provide hazard pay bonuses to physicians and other health care staff delivering care during a state and/or federal disaster emergency.

RECOMMENDATION B:
THE REFERENCE COMMITTEE RECOMMENDS THAT SUBSTITUTE RESOLUTION 52 BE ADOPTED.

Your Reference Committee heard testimony from several physicians in support of the resolution. While the federal government has provided several subsidy programs to enable health care providers to navigate the worst of the pandemic, (including the Provider Relief Fund and the Paycheck Protection Program), these programs do not directly reward health care professionals for the emergency care that was provided in both hospitals and in physicians’ offices. The Reference Committee recommended a substitute resolution to more specifically articulate the goals of the resolution.
8. **RESOLUTION 54 – PROTECTING STATE MEDICAL LICENSING BOARDS FROM EXTERNAL POLITICAL INFLUENCE**

Original Resolution 54 reads as follows:

RESOLVED, That the Medical Society of the State of New York work with the AMA and the Federation of State Medical boards and other interested parties to work to create policy that prohibits outsider political influence from interfering with the function of state medical licensing boards.

**RECOMMENDATION A:**

THE REFERENCE COMMITTEE RECOMMENDS THAT THE FOLLOWING SUBSTITUTE AMENDMENT BE ACCEPTED INSTEAD OF ORIGINAL RESOLUTION 54:

RESOLVED, That the Medical Society of the State of New York work with the AMA and the Federation of State Medical boards and other interested parties to work to help minimize external interference with the independent functioning of state medical disciplinary and licensing boards.

**RECOMMENDATION B:**

THE REFERENCE COMMITTEE RECOMMENDS THAT SUBSTITUTE RESOLUTION 54 BE ADOPTED.

The Reference Committee heard testimony from several physicians in support of the resolution, but also concerns from some physicians regarding the ambiguous term “outsider political influence”. Whether someone may be considered to be an “outsider” attempting to exert “political influence” might depend upon the particular perspective of a person expressing an opinion. While the goal of the resolution appears to be to protect medical boards from threats from those who disagreed with disciplining physicians for treating patients with unproven therapies during the pandemic, the words of the resolution could be interpreted in other ways. For example, there could be instances where it would be appropriate for a medical association to raise concerns with the functioning of a disciplinary board for being not aggressive enough or being too aggressive in its efforts to protect the public. Would that be considered “outsider interference”? Therefore, the Reference Committee recommended a substitute resolution to clarify that the goal of the policy is to help protect the independence of medical boards.

9. **RESOLUTION 56 - MITIGATION OF THE UNINTENDED CONSEQUENCES FOR QUALITY OF CARE TRIGGERED BY VALUE–BASED PAYMENT MODELS**

Original Resolution 56 reads as follows:

RESOLVED, That the Medical Society of the State of New York seek legislation prohibiting health insurance plans or organizations that employ physicians, from retaliating or discriminating against a physician because he or she has in good faith disclosed information critical of the organization relating to patient care, services, or conditions affecting patients or staff, to management personnel or an appropriate public agency or accrediting body; and be it further

RESOLVED, That the Medical Society of the State of New York seek legislation prohibiting a healthcare insurance plan or organization from dismissing physicians based on those physicians’ patient expenditures; and be it further

RESOLVED, That the Medical Society of the State of New York seek legislation prohibiting the use of Merit Incentive Payment System (MIPS) scores in the hiring of physicians.
RECOMMENDATION A:

THE REFERENCE COMMITTEE RECOMMENDS THAT THE FOLLOWING SUBSTITUTE AMENDMENTS BE ACCEPTED INSTEAD OF ORIGINAL RESOLUTION 56:

RESOLVED, that the Medical Society of the State of New York re-affirm MSSNY Policy 80.989; and be it further

RESOLVED, that MSSNY continue to advocate to protect physicians against wrongful termination from employment or network participation for reasons related to the cost of the care provided or directed by a physician for their patients.

RECOMMENDATION B:

THE REFERENCE COMMITTEE RECOMMENDS THAT SUBSTITUTE RESOLUTION 56 BE ADOPTED.

Your Reference Committee heard mixed testimony on this resolution. There was strong support for the first resolved to protect against retaliation for advocating on behalf of patients, but concerns were expressed regarding the second and third resolveds. The Reference Committee was advised that MSSNY has already adopted policy that calls for laws that protect physicians from retaliatory acts by employers and insurance companies for disclosing to government bodies actions that could adversely impact patient care. And there is New York law, Labor Law Section 741, that provides some protection for health care employees against employer retaliation for reporting to state agencies activities that could impact patient care (NYS Nursing:Practice Information:Whistleblower Law (nysed.gov)). This MSSNY policy substantially overlaps with the first resolved and therefore should be re-affirmed. The Reference Committee also recommended revising and combining the second and third resolveds to arrive at a more general consensus statement protecting physicians from the adverse consequences of ensuring that patients receive the care they need, even if it is expensive.

**Ethical Protection of Physicians**

MSSNY will continue to support legislation that protects physicians from any retaliatory acts by employers, insurance companies, and other payers when they act in the best interest of their patients and in a manner consistent with their ethical obligations and consistent with state and federal laws. MSSNY will educate physicians regarding existing legal protections that limit retaliatory acts by employers, insurance companies and other payers when they act in the best interest of their patients in a manner consistent with their ethical obligations and consistent with state and federal laws. (HOD 2019-73)

10. **RESOLUTION 58 - ABOLISH “PREFERRED” STATUS OF LABORATORIES**

Original Resolution 58 reads as follows:

RESOLVED, that The Medical Society of The State of New York (MSSNY) seek legislation and regulation to abolish any designation of a lab as “preferred” by any insurance company that would place an undue burden (including inadequate networks) upon an insured, that would otherwise result in limited access to care and potential harm to patients.

RECOMMENDATION A:

THE REFERENCE COMMITTEE RECOMMENDS THAT THE FOLLOWING SUBSTITUTE AMENDMENT BE ACCEPTED INSTEAD OF ORIGINAL RESOLUTION 58:
RESOLVED, that the Medical Society advocate for health insurers to have comprehensive networks for delivery of lab services that ensure meaningful choice for physicians and affordability and accessibility for patients.

RECOMMENDATION B:
THE REFERENCE COMMITTEE RECOMMENDS THAT SUBSTITUTE RESOLUTION 58 BE ADOPTED.

The Reference Committee heard mixed testimony on this resolution. Some physicians expressed strong support for the resolution because of the need for physicians to refer their patients to laboratories they trust. Other physicians expressed concerns because they believed that labs should not be treated differently than other health care providers, for whom a health plan has a right to pick which should be in-network, provided that the network for services is adequate. Because the goal is to ensure comprehensive choice of lab services that are both affordable and accessibility for patients, as well as providing the quality sought by their treating physicians, the Reference Committee recommends adoption of the above substitute resolution.

11. RESOLUTION 59 – FAIR HEALTH DATABASE

Original Resolution 59 read as follows:
RESOLVED, that MSSNY will lobby to have FAIRHEALTH restore its information in regard to the “frequency” of the data on which its statistics are based; and be it further
RESOLVED, that MSSNY will ask the American Medical Association to similarly lobby to have FAIRHEALTH restore its information in regard to the “frequency” of the data on which its statistics are based.

RECOMMENDATION A:
THE REFERENCE COMMITTEE RECOMMENDS THAT THE FOLLOWING SUBSTITUTE AMENDMENTS BE ACCEPTED INSTEAD OF ORIGINAL RESOLUTION 59:
RESOLVED, that the Medical Society of the State of New York work together with the American Medical Association to advocate to Fair Health to ensure the continued identification of the frequency by which a particular CPT code is used; and be it further
RESOLVED, that MSSNY re-affirm MSSNY Policy 256.833.

RECOMMENDATION B:
THE REFERENCE COMMITTEE RECOMMENDS THAT SUBSTITUTE RESOLUTION 59 BE ADOPTED.

The Reference Committee heard testimony from the sponsor of the resolution regarding concerns that Fair Health has stopped identifying the frequency by which a particular medical CPT code has been billed in a particular region, defined by the “geozip”. The concern is that this has implications for surprise billing Independent Dispute resolution proceedings, for which a prominent data point is the usual and customary charge for that region or geozip. If there are insufficient claims for that code in a particular geozip, Fair Health will broaden the region for defining usual and customary charge. MSSNY has for several years had policy (265.833) calling for working with Fair Health to ensure transparency in data collection and presentation. This policy should be re-affirmed, as well as clarifying that MSSNY should work with AMA to ensure the data on frequency of use of a code remains available for identification.
The Medical Society of the State of New York will continue to work with Fair Health to ensure appropriate transparency and fairness in the collection and presentation of its usual and customary charge data, as well as appropriate representation by practicing primary and specialty care physicians on the Fair Health Board of Directors. (HOD 2018-54; Reaffirmed HOD 2019-66)

12. RESOLUTION 60 – ELECTRONIC SUBMISSION OF MEDICAL RECORDS

Original Resolution 60 reads as follows:
RESOLVED, that MSSNY favor legislation and or regulations that require insurers to provide the means for electronic submission of requested records for medical necessity reviews.

RECOMMENDATION A:
THE REFERENCE COMMITTEE RECOMMENDS THAT THE FOLLOWING SUBSTITUTE AMENDMENT BE ACCEPTED INSTEAD OF ORIGINAL RESOLUTION 60:

RESOLVED, that MSSNY advocate for favor legislation, and/or regulations or other regulatory intervention that require insurers to provide the means for electronic submission of requested records for medical necessity reviews.

RECOMMENDATION B:
THE REFERENCE COMMITTEE RECOMMENDS THAT SUBSTITUTE RESOLUTION 60 BE ADOPTED.

Your Reference Committee heard testimony regarding the hassles that physicians have experienced based on excessive medical record requests from some insurers as part of the claims review process. The Reference Committee was made aware that insurance companies have exacerbated this hassle by requiring physicians to mail paper records to a regional office of the insurer, and that often health insurers deny they ever received these records. As noted in the whereas, MSSNY has brought this issue to the attention of the NY Department of Financial Services. As a result, included in the DFS Administrative Simplification Report (NYSDFS: Report of New York’s Health Care Administrative Simplification Workgroup - October 3, 2021) was an obligation on insurers to ensure they can accept medical records submitted via an electronic portal. The Reference Committee was advised that MSSNY is already taking steps to bring these concerns to the DFS in response to concerns brought by physicians that some insurers’ electronic portals are not able to accept medical records. The Reference Committee recommended a technical amendment to clarify the action steps requested of MSSNY, which could involve state agencies working with regulated health insurance plans to ensure they have functioning web portals for medical record submission.
RESOLUTION 62 - OPT-OUT OF ONLINE PHYSICIAN RATING WEBSITES

Original Resolution 62 reads as follows:

RESOLVED, that MSSNY advocate for NYS regulation requiring online rating websites that accept comments concerning physicians practicing in NYS to have a defined resolution/arbitration process to determine if patient complaints have been resolved and to create a process to remove comments if they have been resolved; be it further

RESOLVED, that MSSNY advocates for NYS regulation that grants the right to NYS Physicians to opt-out of having their professional information, and comments about their clinical interactions, from being included on a specific online physician rating site; and be it further

RESOLVED, that MSSNY brings a similar measure to the AMA for consideration.

RECOMMENDATION A:
THE REFERENCE COMMITTEE RECOMMENDS THAT THE FOLLOWING SUBSTITUTE AMENDMENTS BE ACCEPTED INSTEAD OF ORIGINAL RESOLUTION 62:

RESOLVED, that the Medical Society of the State of New York re-affirm MSSNY Policy 117.987: and be it further

RESOLVED, that MSSNY continue to investigate and advocate for opportunities to protect physician reputations against inaccurate online commentary.

RECOMMENDATION B:
THE REFERENCE COMMITTEE RECOMMENDS THAT SUBSTITUTE RESOLUTION 62 BE ADOPTED.

The Reference Committee heard extensive testimony on this resolution. Some physicians expressed strong support, highlighting the professional harm that can occur as a result of unproven online adverse comments from patients. Other physicians expressed sympathy for the concerns, but also noted the significant legal difficulty in regulating internet content. Therefore, your Reference Committee recommends re-affirmation of MSSNY’s existing comprehensive policy, 117.987, which is very similar to AMA Policy 487.960 referred by one of the speakers during the Reference Committee hearing. The policy incorporates several steps to push back against Internet misinformation. The Reference Committee also recommends adding an additional resolved calling for MSSNY to continue to undertake efforts to educate physicians and identify opportunities for physicians to challenge inaccurate comments made about them online.

117.987 Internet Ranking/Rating of Physicians
The Medical Society of the State of New York will:
(1) work with appropriate entities to encourage the adoption of guidelines and standards consistent with AMA policy governing the public release and accurate use of physician data;
(2) continue pursuing initiatives to identify and offer tools to physicians that allow them to manage their online profile and presence.
(3) seek legislation that supports the creation of laws to better protect physicians from cyber-libel, cyber-slander, cyber-bullying and the dissemination of Internet misinformation and provides for civil remedies and criminal sanctions for the violation of such laws;
(4) work to secure legislation that would require that the Web sites purporting to offer evaluations of physicians state prominently on their Web sites whether or not they are...
officially endorsed, approved or sanctioned by any medical regulatory agency or authority or organized medical association including a state medical licensing agency, state Department of Health or Medical Board, and whether or not they are a for-profit independent business and have or have not substantiated the authenticity of individuals completing their surveys. (HOD 2012-257)

14. RESOLUTION 63 – PROTECTION OF PEER REVIEW

Original Resolution 63 reads as follows:

RESOLVED, that the Medical Society of the State of New York pursue all actions including via legislative or regulatory actions that would reverse the expansion of discovery to cover comments attributed to unidentified speakers as decided in Siegel v. Snyder, et al. (201 NY Slip Op 07264 (2nd Dept., 12/22/21).

RECOMMENDATION A:
THE REFERENCE COMMITTEE RECOMMENDS THAT THE FOLLOWING SUBSTITUTE AMENDMENTS BE ACCEPTED INSTEAD OF ORIGINAL RESOLUTION 63:

RESOLVED, that MSSNY advocate through legislation or other legal means to overturn the court ruling in Siegel v. Snyder that inappropriately expanded the discovery of comments during peer review proceedings; and be it further

RESOLVED, that the Medical Society of the State of New York re-affirm MSSNY Policies 225.988 and 225.992.

RECOMMENDATION B:
THE REFERENCE COMMITTEE RECOMMENDS THAT SUBSTITUTE RESOLUTION 63 ADOPTED.

Your Reference Committee heard much testimony in support of this resolution. Long standing law provides that discussion at a hospital quality peer review committee is exempt from disclosure in litigation, except for statements made by a person who becomes a party to the litigation. In December, a 2d Department Appellate Division court concluded that a hospital peer review committee must be able to establish that statements made at a peer review meeting were not made by the party involved in the litigation, and that if it is unclear who made the statements, the material is discoverable. Physicians raised strong concerns regarding the chilling impact that this court decision could have on physician participation in hospital peer review discussions. This is turn could have substantial adverse impact on efforts to improve patient care delivery in hospitals based upon honest and thorough discussions in a peer review forum. It was noted at the Reference Committee hearing that MSSNY has existing policy that is broader than the proposed resolution because it seeks to ensure that all discussions at a hospital peer review proceeding, including those made by a physician who becomes a party to a lawsuit, remain confidential. To that end, MSSNY and several other physician and hospital advocacy organizations have sought legislation to achieve that policy’s goals (A.1165/S.1800 of the 2019-2020 legislation session -Bill Search and Legislative Information | New York State Assembly (nyassembly.gov). Therefore, in addition to advocating for efforts to overturn the Court’s ruling in this case, these existing MSSNY policies should be re-affirmed.

225.988 Peer Review Protection:
MSSNY will advocate for a change in New York Education and Public Health Laws to allow the peer review process to accomplish its goals of enhancing patient safety and quality of care by protecting from discoverability the statements made by a reviewed
physician during the peer review process. Such legislation is to be pursued distinctly
and separately from its effort to effect global reform of the medical tort system.
Also, MSSNY will notify its members of the current discoverability of peer review
activity. (HOD 2008-70; Reaffirmed HOD in lieu of 2017-101)

225.992 Confidentiality of Documents Submitted to Peer Review Committee:
MSSNY has adopted as policy that any materials or comments generated by a physician
in response to a review by a Peer Review/Quality Committee of a hospital and/or a
health care entity or organization should be confidential as regards discovery in a
malpractice action.

MSSNY has pledged to work with other interested parties, the Department of Health,
and the appropriate legislators to develop legislation and/or regulations that would
ensure such confidentiality. (HOD 1994-59; Reaffirmed HOD 2014)

15. RESOLUTION 57 - UNINTENDED CONSEQUENCES OF VALUE–BASED PAYMENT
MODELS—CONFLICTS OF INTEREST

Original Resolution 57 reads as follows:
RESOLVED, That the Medical Society of the State of New York seek to amend the New York
State Patient’s Hospital Bill of Rights to include the following patient rights:

1. The right, at all points in the patient’s care, to demand medical decisions that are
informed by physicians;

2. The right to an unbiased medical opinion and all relevant medical information, including
information about treatments or services that are not reimbursed by the patient’s
insurance company or may be better managed at another institution; and

3. The right to complete disclosure of physicians’ financial conflicts of interest, that arise
from insurance or employment contracts that could influence the care these physicians
provide; and be it further

RESOLVED, That the Medical Society of the State of New York ask the American Medical
Association to work for legislation creating a National Patient Bill of Rights including the above
points.

RECOMMENDATION:
THE REFERENCE COMMITTEE RECOMMENDS THAT RESOLUTION 57 BE REFERRED
TO COUNCIL

The Reference Committee heard mixed testimony on this resolution. The sponsor of the
resolution noted the importance of patients have a clear understanding of the financial
relationships health care providers may have that may impact care delivery. However, others
testified regarding the difficulty for physicians in ensuring compliance should this policy
ultimately become law and suggested that even if the concept was generally supportable, it
should not be a legal requirement. Some also suggested their support for the requirement that
patient medical decisions be informed by physicians, but not the other two components. Given
that there are many aspects to this proposal, each which could produce a lengthy debate
among physicians as to proper wording, the Reference Committee recommended that it be
referred to Council to develop a consensus policy.
RESOLUTION 53 - EXPEDITING ACTION BY OPMC IN CASES OF PRESCRIBING ABUSE

Original Resolution 53 reads as follows:
RESOLVED, that the MSSNY recommends that the criminal code be amended to add the penalty of a minimal of one (1) year of termination of the provider’s medical license (and applicable rules for all other providers with prescribing authority) when the abuse of prescribing privileges has been established by a court or other jurisdiction overseeing physicians who provide services in the state of New York.

RECOMMENDATION:
The Reference Committee recommends that Resolution 53 not be adopted.

Your Reference Committee heard some testimony in support of this resolution, but also significant testimony in opposition to MSSNY affirmatively advocating to establish specific licensure penalties in addition to the criminal consequences of inappropriate diversion of prescriptions. Your Reference Committee was advised that there already substantial criminal penalties under Article 178 of New York's Penal Law for Criminal Diversion of Prescription Medications, which begin at a Class A misdemeanor for a 4th degree offense and can reach as high as a Class C Felony for a 1st degree offense (Criminal diversion of prescriptions and medications | Article 178 (newyorklegaldefense.com)). Moreover, Education Law Section 6530(9) makes a physician subject to professional license sanction, including loss of license, for being convicted of a crime. Instead of advocating for specific penalties, the Reference Committee believed a more productive path would be to continue to make physicians aware of the many adverse legal consequences that can occur because of the abuse of prescribing privileges. Therefore, the Reference Committee recommends that this resolution not be adopted.

Your Chairperson is grateful to the Committee Members, namely, Timothy Holahan, MD, Chris Kjolhede, MD, Carlo Milani, MD, Bruce Molinelli, MD, and Beverly Ortiz, MD

Your Reference Committee Chairman also wishes to express her appreciation to Moe Auster and Jennifer LaRose for their help in preparation of this report.

Respectfully submitted,

Ellen Braunstein
Ellen Braunstein, MD, Nassau County

Timothy Holahan
Timothy Holahan, MD, Monroe County

Chris Kjolhede
Chris Kjolhede, MD, Otsego County

Carlo Milani
Carlo Milani, MD, Young Physicians’ Section

Bruce Molinelli
Bruce Molinelli, MD, Westchester County

Beverly Ortiz
Beverly Ortiz, MD, Suffolk County