

MEDICAL SOCIETY of the STATE OF NEW YORK

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MEMORANDUM IN OPPOSITION

IN SENATE JUDICIARY COMMITTEE

S. 4002 (DEFRANCISCO)

AN ACT to repeal Section 474-a of the Judiciary Law, relating to contingent fees for attorneys in claims or actions for medical, dental or podiatric malpractice

This bill would eliminate the statutory limitation on contingency fees for attorneys in claims or actions for medical, dental or podiatric malpractice. At a time when physicians and hospitals across the State desperately need relief from exorbitant liability costs, this bill would actually increase them substantially. Therefore, **the Medical Society of the State of New York is strongly opposed to this measure.**

Enacted in 1976 and substantially revised in the mid-1980s, Section 474-a of the Judiciary Law, requires a sliding scale attorney fee schedule for contingency fees in medical, dental and podiatric cases. This law was enacted in response to a severe medical liability crisis in New York State and was one of several tort reform measures designed to curb the increasing frequency and severity of malpractice claims. The purpose of the controlled sliding scale was to diminish the incentive for malpractice plaintiff attorneys to needlessly drag out litigation in the hope of achieving a larger contingency fee as well to discourage the bringing of frivolous claims. Even more importantly, the goal was also to assure that an injured plaintiff received a fair proportion of the award which a jury had determined to represent his or her damages. Finally, it was the Legislature's intent to assure that the out of control costs of New York's liability system were at least somewhat restrained.

At a time when physicians already face unrelenting financial pressure from extraordinary medical liability costs and insurance company payment tactics, any proposal such as this to expand liability would be disastrous to the health care system in New York State. The medical community of New York State cannot tolerate any further steps that would add to their financial burden. PHYSICIANS NEED LIABILITY PREMIUM DECREASES, NOT INCREASES!

It must be understood that New York physicians pay premium rates that are already among the very highest in the country, if not the highest. **Yet while many other states have passed legislation to reduce these costs, New York State has failed to enact legislation to address this problem.**

Liability premiums for New York physicians shot up 55-80% between 2003 to 2008 before the Legislature intervened to impose rate freezes in 2008 and 2009, but rates have continued to rise steadily since then. Many New York physicians pay liability premiums that far exceed \$100,000 and some even exceed \$300,000! For example, for just a single year of coverage, the cost of medical liability coverage for the 2014-15 policy year was:

- \$338,252 for a neurosurgeon in Nassau and Suffolk counties;
- \$186,639 for an Ob-GYN in Bronx and Richmond counties;
- \$132,704 for a general surgeon in Kings and Queens counties; and
- \$134,902 for an vascular surgeon or cardiac surgeon in Bronx and Richmond counties

Moreover, malpractice payouts in New York State continue to be far out of proportion to the rest of country. For example, according to a report by Diederich Healthcare and reported in the March 15, 2014 *Washington Post*, New York State had by far and away the highest number cumulative medical liability payouts (\$689,800,300), nearly two times greater than the state with the next highest amounts, Pennsylvania (\$356,855,500), and far exceeding states such as California (\$274,590,800) and Florida (\$199,442,450).

Additionally, the report indicated that the New York had by far and away the highest per-capita medical liability payments in the country, far exceeding the second highest state Pennsylvania by 57%, the third highest state New Jersey by 67%, and the fourth highest state Massachusetts by 74%.

Moreover, a recent analysis from the website WalletHub listed New York as the fourth 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.

These enormous costs are driven by an unpredictable medical liability adjudication system that numerous studies have concluded results in cases where awards are made despite the absence of any negligence whatsoever. Moreover, under the current system studies have shown that often those truly injured by negligence do not sue.

While approximately 2/3 of all medical liability cases brought result in no payment, even the costs of defending these cases are extensive and significantly add to the astronomical cost of medical liability insurance. For example, MLMIC spent over \$800,000,000 in the previous decade to defend physicians and hospitals on whose behalf no payment was ever made to the plaintiff.

Should this measure be enacted, it will inevitably create an even greater imbalance in New York's tort system. According to a recent actuarial study, it will increase liability costs to physicians by over 10%. It will clearly result in higher health care costs for businesses and consumers. Additionally, the repeal of the contingency fee controls could have a devastating impact on injured parties themselves – those who are supposed to be the ultimate beneficiaries of these awards because it would significantly reduce the amount of the jury's intended compensation which plaintiffs actually receive.

The contingency fee sliding scale law was one of the most important recommendations made by the New York State Special Advisory Panel on Medical Malpractice (McGill Commission) that had been created by Governor Carey. In arriving at its recommendation to set limits on attorneys fee in malpractice cases, the McGill Commission weighed the concerns of ensuring that those without resources were able to pursue their claims in the courts through competent, qualified legal counsel against the need to assure that plaintiffs actually received a substantial part of the damages which the juries intended them to have as compensation for their injuries. There were also equally important objectives relating to assuring the containment of health care costs, which were already rising to the point where access to health care was becoming seriously problematic for large sectors of our population. And finally there was the need to address the urgent threat to the delivery system itself which the high cost of malpractice insurance was seriously jeopardizing.

The panel was also cognizant of the fact that juries were sometimes inflating awards impermissibly because they knew that lawyers' fees could be exorbitant and could deprive plaintiffs of necessary compensation for actual damages. The Report noted that "*Without attempting to support a general policy of income regulation for attorneys, the Panel has found that sound limits on contingent fee arrangements are necessary to diminish the distortion of such high awards on the system. In seeking to establish a fair measure for contingent fee, the Panel has consulted fee schedules of other jurisdictions and has come to the conclusion that a contingent fee must be*

high enough to provide adequate incentives for the plaintiffs' attorneys without adversely affecting the severity factor in setting insurance premiums."

It is worthwhile to note that, when this legislation was placed before the Governor in 2000, several major newspapers across New York State condemned it and urged a gubernatorial veto, including the:

- Albany Times Union
- Crain's
- Kingston Daily Freeman
- New York Daily News
- New York Post
- Schenectady Daily Gazette
- Westchester-Rockland Journal News

The Medical Society has maintained for many years that New York State, rather than eliminating the moderate sliding scale limitations on contingency fees, should actually enact a measure making a further reduction in the sliding scale percentage. At the very least, the Medical Society agrees and supports the efforts to extend the fee schedule to all lawsuits thereby creating a mechanism for alleviating the tremendous financial incentives for the trial bar to litigate – a phenomenon that is having a substantial devastating effect on New York State's economy.

The Medical Society has long argued that the negligence adjudication system is broken and needs to be fixed. We are greatly concerned that the repeal of the contingent fee controls will immediately produce more litigation and larger awards against physicians which will result in an increase in the cost of medical malpractice insurance, an increase in the cost of health care and a major exacerbation of the serious problems of lack of access as well as the growing number of those without adequate health insurance or, in some cases, any insurance at all.

It is for all of these reasons that the Medical Society strongly opposes this bill and requests as vigorously as we can that it be defeated.

Respectfully submitted,

ELIZABETH DEARS KENT, ESQ.

6/17/15
MMA - oppose