The Need for Medical Liability Reform

New York physicians continue to pay liability premiums that far exceed those in any other state. After 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, medical liability premiums have continued to steadily rise. Many New York physicians continue to pay outrageous liability premiums that far exceed $100,000, and some even exceed $300,000! 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.

Little wonder, as malpractice payouts in New York State continue to be far out of proportion to the rest of country. For example, in 2013, 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, New York State 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%.

We can no longer sustain such an expensive, inequitable, and fatally flawed medical liability adjudication system if we wish to assure that our healthcare system will be able to accommodate the demand that will inevitably come as our population ages and becomes more resource-dependent, as well as the nearly 1,000,000 newly insured patients who are starting to receive coverage through New York's new health insurance Exchange. We need comprehensive reform of our flawed civil justice system and reduction in our medical liability costs, not legislation that increases costs and exacerbates existing problems.

MSSNY supports legislation to create alternative systems for resolving medical liability cases, such as medical court or a Neurologically Impaired Infants No-Fault fund. We also strongly support legislation to enact medical liability tort reforms enacted in other states which would: place reasonable limits on non-economic damages; identify and assure qualified expert witnesses; eliminate joint and several liability; identify a physician supplying a Certificate of Merit; immunize statements of apology or regret; and provide immunity for physicians providing pro bono care.

Preventing Untenable Expansions of Liability

MSSNY will continue to strenuously oppose any measure to expand the damages recoverable in medical liability actions, including legislation that would:

- Create a “date of discovery” rule for New York's statute of limitations for medical liability actions – Estimated to increase premiums by 15%;
- Expand “wrongful death” damages to permit “pain and suffering” – Estimated to increase premiums by 53%;
- Permit the awarding of pre-judgment interest – Estimated to increase premiums by 27%;
- Eliminate the current statutory limitations on attorney contingency fees in medical liability cases – Estimated to increase premiums by over 10%;
- Prohibit ex-parte interview by defense counsel of the plaintiff's treating physician;
- Change loss-share rules regarding non-settling defendants.

Enactment of any of these measures would have calamitous consequences on our health care system. Efforts to reform our medical liability adjudication system must be comprehensive!

Reform of New York’s Exchange

New York officials are to be praised for their efforts to create a highly effective health insurance Exchange largely free of the glitches faced by many other states and the federal government. However, there are shortcomings with many of the health insurance products sold through New York’s Exchange that must be fixed in order to be sure our patients receive the care they expect to receive in obtaining this coverage.

These issues have included: significant insurer-website inaccuracies, regarding which physicians are actually participating in these Exchange networks; limited networks; vague communications that fail to clearly specify that physicians are being directed to participate in Exchange products unless they opt out; failure to specify payments for care delivered to patients enrolled in Exchange products; and, for many, discovering that the payments for such care are grossly inadequate compared to other products offered by that insurer with whom the physician was participating. Exacerbating these problems is the fact that there are virtually no coverage options enabling patients to see the physician of their choice.

A Senate hearing in January 2014 provided a necessary forum to examine these concerns. Moreover, there was significant media coverage of patients enrolling in Exchange plans believing their physicians were network participants when in fact they were not. We very much want to work with policymakers to see New York’s Exchange fulfill its promise to provide New Yorkers with a marketplace to purchase affordable and comprehensive health insurance coverage. We urge legislation to require that health insurers: Offer
plans with comprehensive networks to assure enrollees receive timely needed care; have accurate network listings; and offer patients the option of receiving care from a physician outside the plan’s network.

**Addressing Health Insurer Administrative Hassle** Health plans routinely engage in an array of tactics to inappropriately delay and deny needed care and treatments for patients when coverage for such care is requested, and delay and deny fair payment to physicians when needed care is delivered. These tactics hurt patients and make it harder and harder for physicians to remain in practice to deliver the care expected by our patients.

One of MSSNY’s top priorities remains legislation to enable independently practicing physicians to collectively negotiate relevant patient-care terms with insurance companies in regions of the state where only a few insurance companies dominate. In addition, MSSNY supports the following reforms:

**Reduce Administrative Burdens to Delivering Care**
- Require health plans to use appropriate specialty care guidelines when reviewing medical necessity;
- Require medical necessity determinations be made by physicians practicing in the same or similar specialty as the physician recommending treatment;
- Require a health plan to have an expedited manner to override a health plan step-therapy protocol;
- Require use of uniform prior authorization forms;
- Assure Continuity in Prescription Drug Coverage when formularies/prescription tiers change;
- Assure inclusion of patient cost-sharing information on Health Plan ID cards; and
- Assure greater transparency when a physician contracts with a rental-network entity.

**Assure Fair Payment for Providing Needed Patient Care**
- Require insurer payment to physicians for advocating for patients to receive necessary care or testing;
- Require insurers to follow uniform code-review policies;
- Reduce the time frame in which health plans may recoup payments made to physicians;
- Prohibit health plan recoupment based upon lack of coverage where health plan previously confirmed eligibility;
- Prohibit health plans from using extrapolation to determine a refund-demand amount;
- Assure fair payment for facility fees for physicians performing office-based surgical practices; and
- Requiring insurers to permit patients to assign payment to their out-of-network treating physicians.

**Assuring Fair Workers Compensation/No-Fault Reform** MSSNY commends the New York Workers Compensation Board for its efforts to attempt to reengineer New York’s often-criticized Workers Compensation program to reverse the trend of physicians dropping out of the WC program. We very much want to work with the Board to assure injured workers in New York have access to a wide array of quality physicians to provide timely needed care so as to facilitate their ability to return to work. A number of reforms have been advanced, but some are in serious need of revision. MSSNY will advocate for:

**Assuring fair payments for medical care to injured workers.** According to studies, New York WC program spends far less on medical care, on a percentage basis, than most other states. A recent report by the Workers Compensation Research Institute indicated that payments to New York physicians for WC were actually, on average, among the lowest in the country. Yet New York State has proposed to change its fee schedule methodology to mirror that of Medicare.

While it would provide long-overdue increases for some physicians and perhaps increase primary care access, it could also impose disastrous cuts to other physicians, and severely jeopardize injured workers’ access to needed care. In some cases, it could trigger staggering cuts of 50-60% for services frequently provided to injured workers, and perhaps even drive some of these physicians out of business altogether. A recent survey by the New York State Society of Orthopedic Surgeons concluded that over 80% of orthopedists would be less likely to treat injured worker patients in response to these cuts. MSSNY will advocate to assure fee-schedule changes enhance patient access to needed care, rather than diminish it.

**Reducing undue administrative burdens including streamlining burdensome claim forms.** It is estimated that the hourly practice expense for physicians who accepted workers’ compensation patients is 2.5 to 3 times the hourly practice expense with caring for Medicare patients. A few years back, the WCB had to suspend the use of new C-4 medical claim reporting forms in the Rochester region of the state in response to many physicians dropping out of the program due to the complexity of the form. Physicians want to care for injured workers but cannot realistically do so because of this overwhelming paperwork requirement. The new medical portal for submitting claims should be helpful, but in addition the complexity of the reporting forms must be reduced.

**Assuring carriers pay claims timely.** Too often carriers ignore physician submission of claims, leading to unfair payment delays and unnecessary frictional costs for the program. We are pleased that the Board will now have a greater ability to punish insurance carriers who unfairly delay payments as a result of a new requirement that claims be submitted to a WCB medical portal rather than to the individual carriers.

**Assuring continued access by auto accident victims to necessary care.** MSSNY opposes carrier-driven efforts to impose
overbroad restrictions on the ability of physicians to be fairly compensated by No-Fault carriers for the care they provide to auto accident victims, and supports legislation to assure coverage for care provided to intoxicated drivers.

**Federal Health Care Reform**

The Need for Reform of the Medicare Sustainable Growth Rate (SGR) Formula

Unless action is taken by Congress, physicians face a draconian 21% cut in their Medicare payments on March 31, 2015. While Congress has passed several measures in recent years to prevent the imposition of similar scheduled cuts, the short-term fixes and recent tendency of Congress to retroactively fix the cuts after permitting them to go into effect has left many physicians concerned and doubtful whether their offices can sustain continued participation in the Medicare program. These cuts are driven by the flawed SGR formula, which penalizes physicians by lowering their payments when growth in the use of medical care exceeds the GDP. While physician overhead costs have gone up dramatically in the last decade, and other health care providers have received annual increase, Medicare physician payments are on average at the same level as they were 10 years ago. This law must be fixed!

Also essential is the enactment of laws which would:

- Permit Medicare patients to have the option to privately contract with the physician of their choice, regardless of such physician's participation status in Medicare;
- Prohibit the implementation of the ICD-10 code set, a massive administrative and financial undertaking for physicians, requiring education, software, coder training, and testing with payers;
- Repeal of the Independent Payment Advisory Board (IPAB).

**Enhancing Quality of Care**

Attracting & Retaining Physicians in New York State

The Center for Health Workforce Studies reported recently that the in-state retention of new physicians has gradually declined from a high of 54% in 1999 to the lowest since the survey began of 44% in 2012. This is particularly troubling as demand for physician services continues to outpace physician supply, particularly in ophthalmology, urology, psychiatry, pathology, general internal medicine, general/family medicine, and otolaryngology. There are areas of the state and populations that are already underserved by the current physician supply. The implications of the forecasts for these areas and populations are dire. New York must do more to attract and retain physicians.

New York must:

- Reduce the overhead burden shouldered by physician practices through meaningful civil justice reform;
- Assure fairness in contracting by leveling the playing field for physicians in their negotiations with health insurers;
- Continue an adequately funded Excess Medical Liability program to assure that physicians will have the coverage needed to protect them from personal financial exposure to escalating medical liability awards;
- Prevent the imposition of costly and burdensome CON requirements on physician offices and equipment purchases;
- Put additional resources toward the Doctors Across New York program to allow for more awardees and modify eligibility to assure a more equitable balance of awards between institutionally based and private practice physicians;
- Create income tax credits for physicians who practice in specialty shortage areas;
- Continue Medicaid reimbursement of primary care rates at Medicare levels beyond 2015;
- Defeat any proposal to directly or indirectly tax medical services, medical devices or products or sites of service; and
- Defeat any proposal to increase the biennial physician registration fee.

Enhancing Quality of Care Through Peer Review

Current law impedes peer review by permitting attorneys access to statements made at a peer-review meeting by a physician who subsequently becomes a party to a malpractice action which involves the conduct which was the topic of discussion at the peer-review meeting. MSSNY will work to enact legislation which would extend existing confidentiality protections to all statements and information volunteered at peer-review quality assurance committees within hospitals, in office-based settings, and across integrated care settings including multi-group and accountable care organizations. MSSNY will also advocate to protect from discovery by OPMC any statements made or information obtained during the course of a peer-review proceeding.

Enhancing Care Through e-Prescribing

E-prescribing is one of several solutions advanced to improved patient safety and quality of care through clinical decision support and ready access to patient medication history. The I-STOP law mandated the electronic submission of all prescriptions by March 27, 2015. The law requires that the Prescription Monitoring Program (PMP) registry be compatible with e-prescribing technology, which for the first time will facilitate the electronic transmission of controlled substances. The federal regulations specifically require software with two-factor identification for e-prescribing of narcotics. These products are being certified and marketed. Not all physicians, however, are interested in purchasing e-prescribing technology. Moreover, in many cases, vendors will not be able to be ready. The law does provide certain exceptions to the e-prescribing mandate and allows
for the issuance of a one-year renewable waiver to physicians who can demonstrate economic hardship, technological limitations that are not reasonably within the control of the physician, or other exceptional circumstance. MSSNY will work to assure that the waiver process is available to physicians for whom purchase and implementation of e-prescribing technology is impractical. MSSNY will also work to assure that the technologies used as part of the prescription drug monitoring registry are compatible with all e-prescribing systems so that physician consultation with the PMP registry is streamlined.

**Enhancing Quality & Integration Through HIT** The State Health Information Network of New York (SHIN-NY) is a secure network for sharing clinical patient data across providers of health care in New York State through Regional Health Information Organizations (RHIOs). The SHIN-NY is coordinated by the New York e-Health Collaborative (NYeC) in conjunction with the New York State Department of Health, and the state’s 11 RHIOs. All medical records, whether they are stored electronically or in paper files, are protected under HIPAA. In New York, a patient must grant consent (“opt in” authorization) before health care providers may access the patient’s electronic medical record. MSSNY will work to protect the patient’s right to privacy in the intraoperative exchange of patient health information.

MSSNY, however, is unalterably opposed to any effort to link physician participation on the SHIN-NY to the re-registration of a physician’s license. MSSNY will support a permanent funding stream to enable the SHIN-NY to operate, provided no surcharge or fee is imposed on physician services. MSSNY will vigorously oppose the imposition of a user fee or additional interface fees. MSSNY will work collaboratively to ensure that the standards developed to make such technology operational in communities across New York State will, in an affordable and user-friendly manner, improve efficiency and accuracy in the delivery of healthcare in New York State. MSSNY will also work to assure that standard interfaces are used by EHR vendors to enable intra-operative communications and plug-and-play connectivity at no added cost to physicians.

**Eliminating Health Disparities** MSSNY’s Committee to Eliminate Health Care Disparities works to ensure that all New Yorkers receive the best possible care. This work includes attracting a more diversified physician workforce, increasing the numbers of minority faculty teaching in medical schools, expanding medical school pipeline programs in rural and urban areas to address the shortage of physicians in medically underserved areas of New York State, and, where appropriate, support for legislation that addresses the root problems of health care disparities. MSSNY’s committee, in conjunction with the American Medical Association, conducts Doctors Back to School programs, in which physicians go into middle and high schools in areas with high minority populations and talk to students about choosing medicine as a career. This program has become increasingly popular with schools repeatedly asking the physicians to return for programs year after year. Cultural competence and health literacy are both extremely important aspects of providing optimum health care to minority populations. Securing private reimbursement for language services for patients with limited English proficiency is essential. The collection and aggregation of health care and demographic data on a regional and institutional level is also necessary to facilitate analysis by race and ethnicity. MSSNY’s long-standing commitment to finding real solutions to improve access to high-quality medical care for all New Yorkers is reflected in the work of its Committee to Eliminate Health Care Disparities.

**Quality Through Physician-led Team-Based Care** There are many different types of health care providers who each provide essential care for our patients. They are an important part of our health care system. However, patients benefit most from the combined care of a team, headed by a physician whose education and training enables them to oversee the actions of the rest of the team to provide the patient with optimal medical treatment. MSSNY supports this concept and will continue to work toward achieving this goal. MSSNY opposes any expansion of the scope of practice of non-physician health care providers that will enable them to practice beyond their education and training. Also, MSSNY will oppose legislation to allow corporately owned retail clinics and any alteration of the corporate practice of medicine doctrine.

MSSNY supports enactment of legislation or promulgation of regulation to:

- Preserve the term “physician” for the exclusive use of MDs and DOs, or their foreign equivalents;
- Define “surgery” and limit its performance to licensed physicians, dentists, and podiatrists, as appropriate;
- Assure that the advertisements of all health care professionals adequately inform the public of their professional credentials and require that all health professionals wear badges which identify their professional title;
- Enable otolaryngologists to dispense hearing aids at fair market value;
- License medical assistants, anesthesia assistants, and assistants in orthopedic surgery; and
- Protect against pharmacists who inappropriately advertise what immunizations they are allowed to administer.

**Assuring Clinical Clerkship Slots for US Medical School Students** The New York State Education Department has approved fourteen “Dual Campus” International medical schools (DCIMS) to send students to New York to perform mandatory long-term clinical clerkships. Half of these are located in the Caribbean. In recent years the class sizes of LCME/COCA accredited U.S. Medical schools in New York State have increased. At the same time, the offshore schools, especially in the Caribbean, have proliferated and have experienced rapid increases in their class sizes as well. According to the NYS DOH, approximately 4,000 clinical clerkship slots are needed for U.S. medical school students. Offshore medical students also need over 2,000 clinical clerkship slots. However, the DCIMS have not been accredited by any national or international accrediting agency comparable to the LCME/COCA and do not have the infrastructure within their home countries to provide clinical rotations to their students. Consequently, they rely on sending their students to the hospitals in the U.S., particularly to hospitals located in New York, to provide clinical rotations. The DCIMS pay hospitals in New York, especially in the New York City area, as much as $18 million per year to secure these slots, to the detriment of U.S. medical students, who cannot secure clinical rotations in their desired locations, or possibly even in New York State. MSSNY will work with the Associated Medical Schools of New York (AMSNY) to
secure legislation to prohibit the sale of clerkship slots to medical schools that are not LCME or COCA accredited.

**Protecting Public Health** The primary prevention of disease is vitally important to the health of all New Yorkers, and the best way to prevent diseases is by immunizations. Numerous cost analyses have shown that it is cheaper to prevent a disease than to treat it. Vaccines are responsible for the control of many diseases; however, New York State is experiencing an outbreak of measles and pertussis due to many individuals choosing not to be immunized or have children immunized. MSSNY will place an emphasis on programs that will improve adult immunization rates and will continue to advocate for use to the adult and child schedule for immunizations as developed by the Advisory Council on Immunization Practices. The Medical Society will continue to oppose any further religious, medical, or philosophical exemptions to New York State immunization law. The Medical Society continues to support programs for prevention and management of chronic disease that includes tobacco cessation, obesity, diabetes, cardiovascular disease, and asthma. MSSNY supports legislation that would limit the promotion of all tobacco products, including e-cigarettes and nicotine delivery devices, to anyone under age 21 and supports increasing the purchase age for all tobacco products, e-cigarettes, and nicotine delivery to 21.

The recent world outbreak of Ebola and the rapid spread of enterovirus-D68 (EV-D68) clearly show the need to ensure that physicians and New York State residents are prepared for a public health emergency. Additionally, the state has seen large increases in hurricanes and flooding disasters that have caused severe disruptions in people’s lives and, indeed, health. MSSNY remains committed to preparing the public and physicians for the next public health emergency.

In 2013, MSSNY adopted a policy to support a moratorium on natural gas extraction until valid information is available to evaluate the process for its potential effects on human health and the environment. Additionally, MSSNY supports the planning and implementation of a health-impact assessment to be conducted by a New York State School of Public Health and will continue to advocate for the establishment of an industry-funded, independently arbitrated state trust fund for people that may be harmed as a result of hydraulic fracturing. MSSNY will oppose any non-disclosure provisions related to the practice of hydraulic fracturing that interfere with any aspect of the patient-doctor relationship and/or the ready collection of epidemiological data for future health-impact studies.

Preserving the ability for women to have access to reproductive and sexual health care services is a key public health component that MSSNY has long held. Efforts will continue to help reduce the rate of unintended pregnancy and maternal mortality in New York State. The Medical Society supports efforts to expand access to emergency contraception, including making emergency contraception pills more readily available and will continue to support sexual health education programs amongst adolescents. The Medical Society will oppose any legislation that criminalizes the exercise of clinical judgment in the delivery of medical care.

The **Medical Society of the State of New York (MSSNY) was created in 1807** to contribute to the professional and personal development of member physicians by representing the profession as a whole and advocating health-related rights, responsibilities, and issues to promote a favorable environment for the practice of medicine and improvement of the health of the residents of New York State.

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