



The Medical Society
of the State of New York

**TESTIMONY OF DR. SAM UNTERRICHT, MD
THE MEDICAL SOCIETY OF THE STATE OF NEW YORK
AT A
NEW YORK STATE SENATE HEARING ON REGULATORY
REFORM
OCTOBER 8, 2013
NEW YORK, NY**

Good morning. My name is Dr. Sam Unterricht. I am an ophthalmologist in Brooklyn and President of the Medical Society of the State of New York. We appreciate the opportunity to testify on behalf of the physician community regarding the ever increasing administrative and financial burdens we face in seeking to assure our patients can get the care they need and deserve. We look forward to working with you to lessen these burdens.

As my colleague Dr. Tom Madejski did when he testified at the Buffalo hearing, I think it is important to begin with reminding the panel that New York is an exceedingly difficult state in which to deliver the care which our patients - and your constituents - expect to receive. This is due to confluence of a number of factors, led by the extraordinarily high medical liability insurance costs as compared to premium costs incurred by physicians in other states. At the same time physicians must endure insurers policies and practices which impose additional roadblocks to delivering patient care and continue to reduce, deny and delay payment for necessary care delivered. We also face the burdens facing many other businesses, such as a ridiculously high tax burden, and ever increasing other overhead costs. State government legislative and regulatory mandates significantly add to this burden and take time away from delivering patient care.

These problems must be considered and addressed as policymakers hope to assure an adequate health care safety net for the hundreds of thousands of New Yorkers who will be likely be

obtaining health insurance coverage for the first time through the State's Health Insurance Exchange which opened for enrollment last week.

Recently MSSNY conducted a survey with over 800 physician respondents to gauge physician perspective of a variety of issues relating to New York State's health care delivery system. Notably, over one-third (34%) of the respondents indicated that they were "seriously considering" retiring from practice in the next two years, and over 37% indicated that they plan to reduce the services they deliver over the next two years. Also, 16 % indicated they are "strongly considering" leaving the state in the next 2 years.

The study also showed that only 35% of physicians would affirmatively recommend to their children or younger family members that they become physicians and **only 22%** of physicians would affirmatively recommend to medical students that they practice in New York State.

These statistics are a frightening indictment of our already fragile health care system. What will this mean for our health care delivery in the future?

Certainly, there are many issues that must be looked at, but as the theme for your hearing today is insurance, I will focus my remarks on insurance related issues.

A. WE NEED TO REFORM NEW YORK'S LIABILITY SYSTEM

Many New York physicians, particularly those right here in New York City as well as in Long Island and the lower Hudson Valley, must pay extraordinary medical liability insurance premiums to be able to continue to deliver care to their patients. While physicians in many other states have seen their premiums reduced in the last several years, New York physicians' liability premiums continue to rise, and face far greater liability insurance costs and exposure than their colleagues in other states.

And while some may argue that it's the fault of the insurance companies, New York's Department of Financial Services must actually approve the rates that are charged by the medical liability insurance companies, to prevent insurers from overcharging for this essential coverage. The situation is actually even worse, since some New York insurance companies may have inadequate reserves. By the criteria that other states use, those companies would not be allowed to write insurance, and if they were challenged would not be able to pay large claims, exposing both patients and physician personal assets.

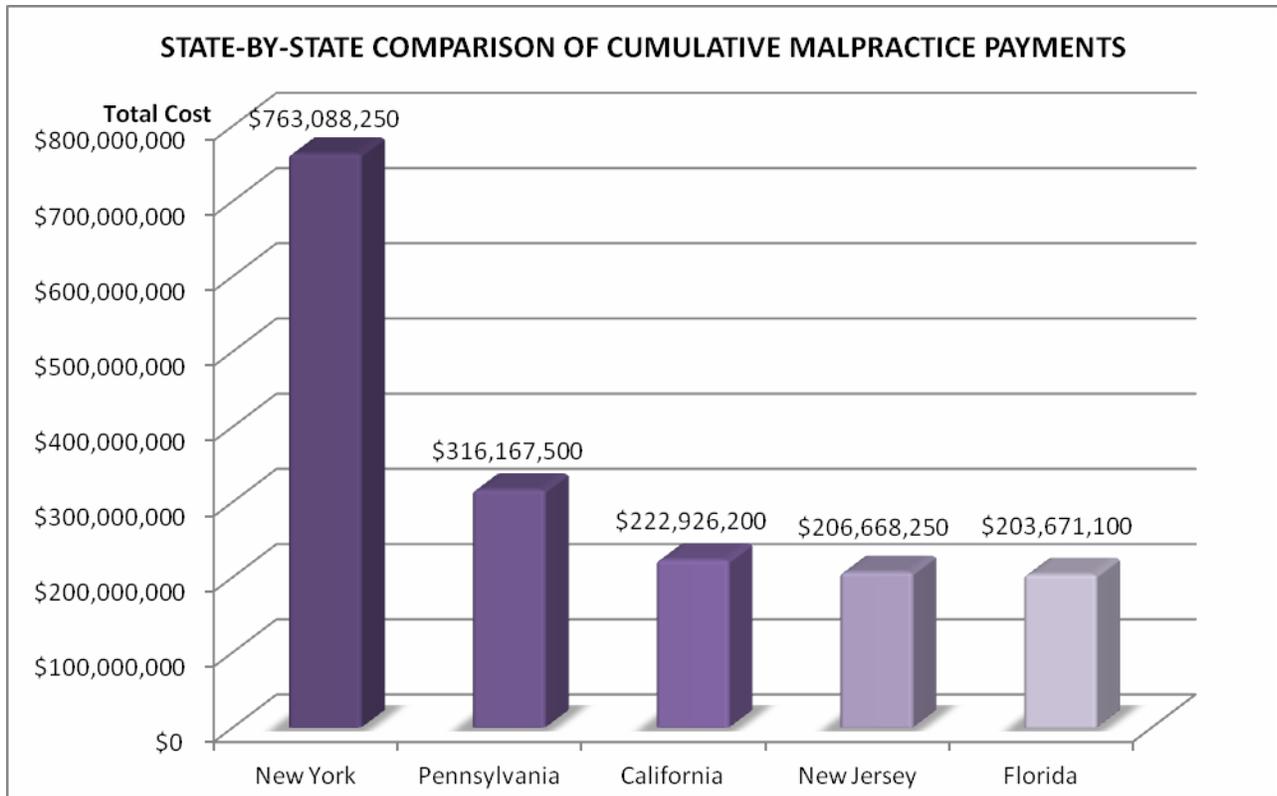
There are numerous hospitals which cannot afford to purchase malpractice coverage at all and self-insure; one large award would wipe out these hospital's assets. Despite these potential insufficiencies in coverage, our premiums keep trending higher and, for physicians in the NYC-metropolitan area, are among the very highest in the nation.

By way of example, a neurosurgeon practicing on Long Island must pay an astounding \$331,295 for just one year of insurance coverage and an OB-GYN practicing in the Bronx or Staten Island must pay \$192,412. Other high risk specialties include cardiac surgery, vascular surgery, bariatric surgery, orthopedic surgery and reconstructive surgery, pay well over \$100,000 per year! Our physician survey showed that nearly 40% of the respondents indicated that medical liability insurance costs consumed at least 10% of their practice revenue, and nearly 16% indicated that it consumed at least 20% of their practice revenue. And nearly 40% said high liability costs are the biggest or second biggest impediment to delivering care in New York.

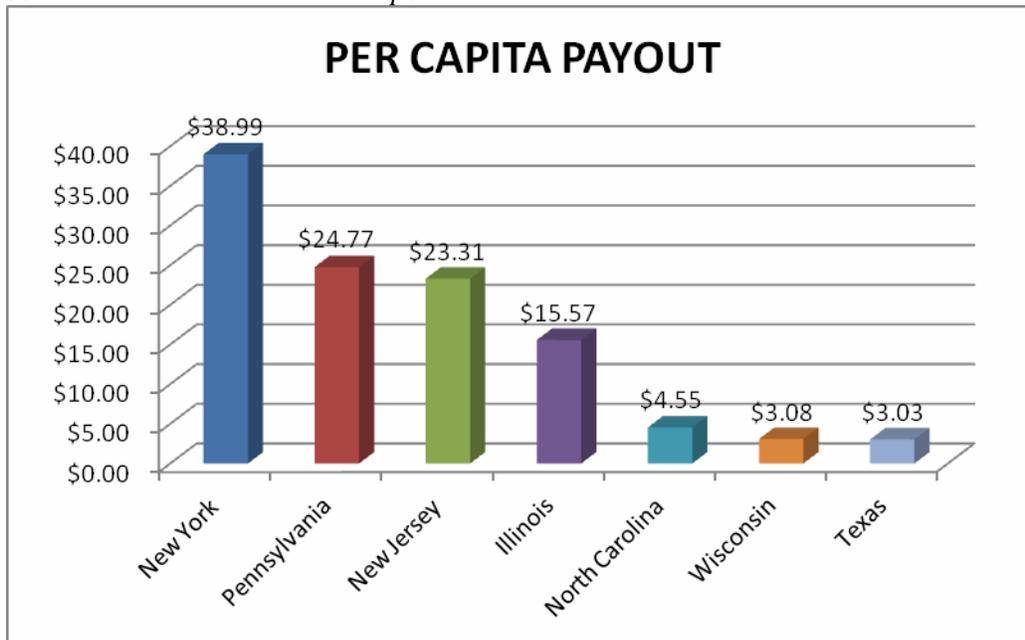
And while many other states passed liability reforms which have resulted in reduction in premium costs for their physicians, New York physicians' premiums continue to rise every year. Something has got to give.

According to one report, there were over \$760 million in medical liability payments in New York State in 2011, nearly 250% higher than the state with the second highest total (Pennsylvania, \$316 million) and nearly 350% higher than California (\$222 million) and Florida (\$203 million).

Remarkably, New York's per capita medical liability payment of \$38.99 far exceeds the second highest state Pennsylvania (which is \$24.77) and third highest state New Jersey (which is \$23.31). And even highly urbanized Illinois is nearly three times less at \$15.57.



Source: Deidrich Healthcare Report

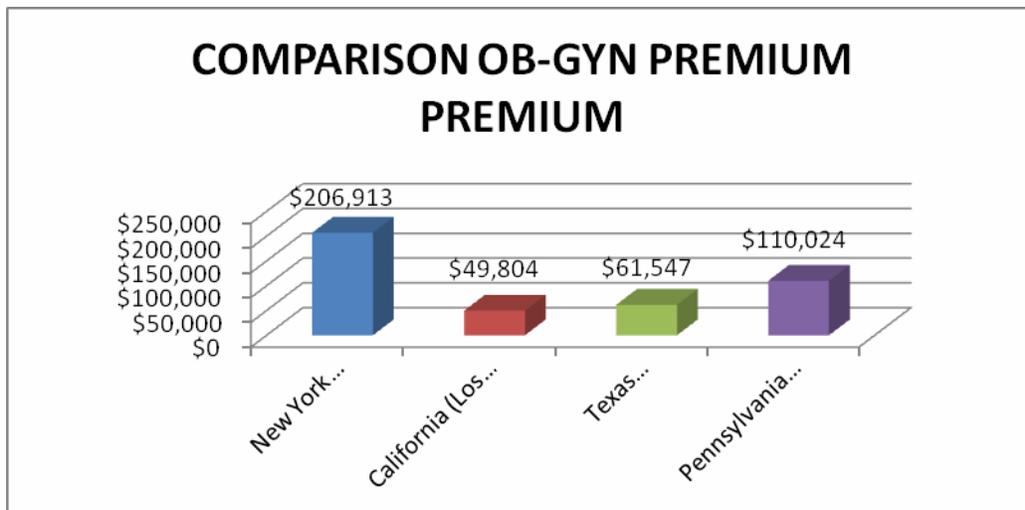


Source: Deidrich Healthcare Report

Faced with similar problems, many other states have passed comprehensive medical liability reform legislation. And it has demonstrated significant results in reducing liability insurance costs. According to

the Texas Alliance for Patient Access, 90% of Texas physicians have seen a minimum 30% reduction in their premiums since the enactment of comprehensive reform there in 2003. And according an article in a 2012 edition of the *San Antonio Business Journal* by an expatriate New York female Ob-GYN who left to go to Texas because she couldn't deliver enough babies to meet her overhead costs, of the more than 27,000 physicians that have been licensed to practice in Texas since 2003, nearly 2,000 did their training or had an active practice in New York

It is also noteworthy that in Los Angeles, California, in a state where strong medical liability reforms were enacted in the mid-1970s, OB-GYNs pay less than 1/4 the premiums that OB-GYNs in Nassau and Suffolk County pay. Why must we be so disadvantaged when compared to other states?



Source: Medical Liability Monitor

In addition to the impact on physicians and patients, there is also a larger societal issue - the impact on cost of all health care, and its attendant impact on health insurance premiums paid by businesses and the State. 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. The exact impact varies based upon which studies you read, but many show its cost to be significant. For example, a 2009 study by the Congressional Budget Office (CBO) showed that enactment of medical liability reforms would reduce the federal deficit by \$54 billion over 10 years largely due to reducing defensive medicine. And I would note that the group Patients for Fair Compensation recently estimated that

enactment of comprehensive medical liability reform could actually reduce defensive medicine costs by \$650 billion.

Some modestly positive steps have occurred to begin to address this problem, including the passage of the Medical Indemnity Fund by the Legislature in 2011 and Office of Court Administration demonstration projects to facilitate early negotiation of medical liability allegations. While promising, these programs have yet to produce any tangible premium relief to physicians. As noted previously, while physician premiums in other states continue to go down, ours continue to go up.

We must do more.

New York must follow the lead of the many, many other states who have passed legislation to bring down the gargantuan cost of medical liability insurance. Some of these necessary reforms include:

- Creating Alternative Systems for Resolving Medical Liability Cases such as a Neurologically Impaired Infants No-Fault fund or legislation to implement medical courts;
- Assuring Adequate Funding for the state funded Excess Medical Liability Insurance program, and reducing the minimum coverage necessary for obtaining this coverage. We thank the Legislature for rejecting language proposed in the Governor's Executive Budget earlier this year that would have cut the funding, and limited the coverage to certain high-risk specialists and those physicians who participate in the notoriously low and slow-paying Medicaid program.
- Enact reforms to address some of the flaws in New York's litigation process that promote gamesmanship and lengthy litigation including:
 1. Identifying and Assuring Qualified Expert Witnesses – many other states have enacted laws requiring experts to practice in the same specialty as the defendant physician and no other state has a law that shields the identity of a testifying expert.
 2. Identifying the physician who supplies a Certificate of Merit enabling a medical liability lawsuit to be initiated
 3. Reasonable limits on certain non-economic damages as has been enacted in over 30 other states
 4. Immunizing statements of apology or regret

5. Immunity for physicians providing pro bono care

B. WE NEED TO PREVENT UNTENABLE EXPANSIONS OF LIABILITY

At the same time that physicians and hospitals faced these extraordinary costs, remarkably there are some interest groups continuing to pursue legislation that would radically increase these costs. We urge you as strenuously as we can to 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, which is estimated to increase premiums by 15%.
- Expand “wrongful death” damages to permit “pain and suffering”, which is estimated to increase premiums by 53%.
- Permit the awarding of pre-judgment interest in tort actions, which is estimated to increase premiums by 27%
- Eliminate the current statutory limitations on attorney contingency fees in medical liability cases, which is estimated to increase premiums by over 10%.
- Prohibit ex-parte interview by defense counsel of the plaintiff’s treating physician.
- Require a non-settling defendant to choose *before* trial whether to reduce their liability by either 1) the amount paid by the settling defendant or 2) by the equitable share of the settling defendant as determined by the jury

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!

C. WE NEED TO CREATE ADMINISTRATIVE SIMPLIFICATION IN INSURANCE COMPANY TRANSACTIONS

We strongly support legislation or other means to create greater administrative simplicity in the submission of claims to insurers and facilitating requests for needed patient care. Greater uniformity could produce greater savings in the health care system. One recent study showed that physicians spent the equivalent of three work weeks annually on administrative tasks required by health plans, with a cumulative cost of \$31 billion, and a per physician cost of nearly \$70,000. MSSNY supports a number of measures to reduce the administrative hassles experienced by physicians, and reduce the paperwork headache that gets in the way of delivering patient care, including

- **Assuring greater uniformity in claim submission forms** - Right now New York State Medicaid, Workers compensation and No-Fault all have their own unique claim submission forms mandated by the State Department of Health, the Workers Compensation Board and Department Of Financial Services, respectively. And all these forms are different than the forms physicians submit to commercial health insurers. In some cases, these forms can be incredibly burdensome to complete. For example, in 2010, the Workers Compensation Board decided to withdraw the required use of new injury report forms after a huge number of physicians dropped out of the workers compensation program, particularly in the Rochester area, in response to the complexity of the forms. We are pleased to hear that the Board is undertaking a complete re-evaluation of its claim adjudication process, and hope it will lead to a simplified process that reduces administrative hassles.

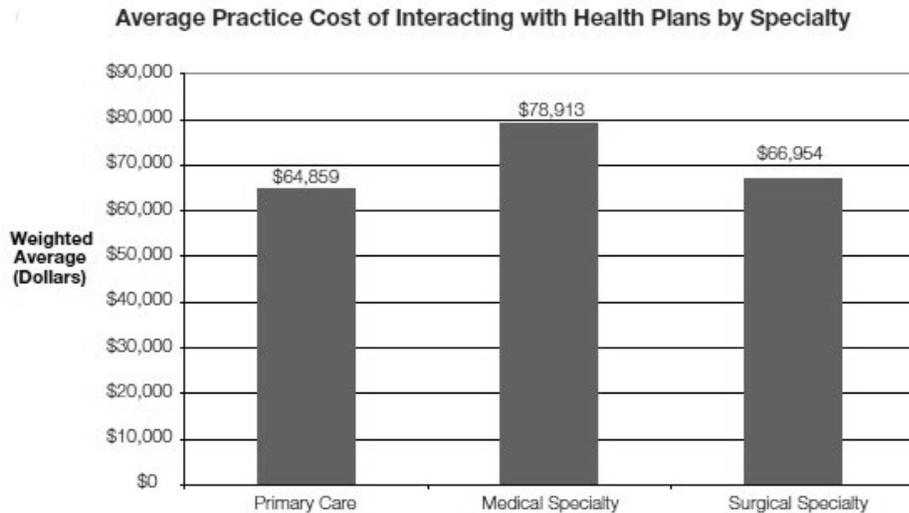
- **Assuring uniformity in request for needed patient care** – In 2012, the NYS Legislature passed a law mandating the use of a uniform prior authorization form for prescription for our patients enrolled in Medicaid and Medicaid Managed Care. Other states have gone much further and required these uniform prior authorization forms for all medical claims and all forms of health insurance coverage. New York should do the same.

- **Assuring uniformity in health plan care review guidelines** - health plans should use appropriate specialty society-developed treatment care guidelines when reviewing medical necessity determinations; and assure medical necessity determinations are made by physicians practicing with similar clinical training as the physician recommending treatment;

- **Assure**
Continuity in our patient’s prescription Drug Coverage when formularies/prescription tiers change;

- **Assure**
inclusion of patient cost-sharing information on Health Plan ID cards;

- **Assure**
greater transparency when a physician contracts with a rental network entity (i.e. MagnaCare, MultiPlan)



Source: *Changes in Healthcare Financing & Organization, March 2010*

D. WE NEED TO REJECT NEW MANDATES.

Furthermore, there are a number of other proposals under consideration that would impose additional potentially costly mandates on physicians that will interfere with the timely availability of quality patient care, and may very well drive up the cost of health care. We note our strong opposition to the following proposals that have been introduced or under consideration in certain state agencies:

- Opposition to proposals under discussion at the State Public Health and Health Planning Council (PHHPC) that would require physicians to undergo prohibitively expensive Certificate of Need approval if they wish to perform certain medical procedures that are routinely performed in non-hospital settings. We should be reducing Certificate of Need requirements to bring about more competition in health care, not enacting new requirements which may very well place a stranglehold on efforts by physicians to establish collaborative care ventures with other physicians as well as new models for delivering timely quality care.
- Opposition to proposals under discussion by the New York eHealth Collaborative (NYeC) that would mandate physicians adopt inter-operable Electronic Medical Records system and participate on the SHIN-NY.
- Opposition to legislation that would mandate course-specific continuing medical education coursework (such as pain management). MSSNY supports a general requirement for physicians to obtain 50 hours of CME on a biennial basis, but opposes legislative or regulatory mandates for specific courses that may have no connection to a physician's medical practice.

Again, we appreciate your efforts to identify ways to reduce the administrative burdens faced in the delivery of care so that patients are in a better position to obtain the timely quality care they deserve. I would be happy to answer any questions you may have.