

MEDICAL SOCIETY of the STATE OF NEW YORK

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Division of Governmental Affairs
MEMORANDUM IN OPPOSITION

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A.242 (WEINSTEIN)

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S.287 (DEFRANCISCO)

AN ACT to amend the civil practice law and rules, in relation to enacting the patient privacy protection act

This bill would amend the civil practice law and rules to prohibit a physician's defense counsel in a medical liability action from conducting an interview with the plaintiff's treating physician. **The Medical Society of the State of New York opposes this legislation and urges that it be defeated.**

This legislation would overturn a very important New York State Court Appeals decision that was issued in 2007 that affirmed a long-standing principle in our legal system that no party has a proprietary interest in a particular witness in a civil liability action. Were this decision to be overturned through legislation, it would present significant problems for a physician defendant in seeking to defend himself or herself in a medical liability action by limiting the opportunity to fully examine the plaintiff's health condition to evaluate the merit of the plaintiff's claim.

New York physicians, particularly those in the New York City metropolitan region of the State, already pay extraordinary costs for obtaining medical liability insurance, costs that far exceed what physicians in virtually all other states must pay. Therefore, it is extremely problematic to advance a "stand-alone" measure that would actually make this problem even worse without enacting other measures to fix the failures of our medical liability adjudication system, to bring down these extraordinary costs.

Many New York physicians continue to pay medical liability premiums that are among the very highest in the country. Many of these premiums 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

In large part this is the result of the fact that 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, the report indicated that the New York per capita medical liability payment of \$38.83 far exceeded was far away the highest in the country, exceeding the second highest state Pennsylvania by 57% (\$24.76), the third highest state New Jersey by 67% (\$23.24), and the fourth highest state Massachusetts by 74% (\$22.37). Remarkably, it was nearly 13 times greater than Texas!

As New York physicians continue to drown in a sea of overwhelming overhead costs, other states are passing measures to assure patients can continue to access necessary physician care. For example, in the last few years, three more states, North Carolina, Oklahoma and Tennessee, enacted laws to provide meaningful limits on non-economic awards in medical liability actions bringing to over 30 the number of states who have enacted limitations on non-economic damages in medical liability actions. The time for change is now!

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. For example, in one recent review of closed claims in the *New England Journal of Medicine*, it was shown that nearly 30% of the time a patient was awarded payment where no negligence was committed, or a patient was not awarded payment where there was negligence.

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 over 2,000,000 newly insured patients who are starting to receive coverage through New York's new health insurance Exchange. In addition to exorbitant liability premiums, New York physicians face significant cuts in their Medicare payments as a result of being unable to comply with burdensome administrative requirements, as well as significant cuts in payments from health insurance companies, not to mention the fact that primary care physicians just took a 40% cut in their Medicaid payments due to Congress' failure to extend an ACA primary care payment program. As a result of all these factors, thousands of physicians across New York have been essentially forced to sell out their practices to large health care systems, impairing continuity of care for many patients.

Unfortunately, this bill would do nothing to address these problems facing our health care system, and would instead make these problems worse. Physicians need liability cost decreases, not increases!

For all of the reasons stated above, we respectfully urge that this measure be defeated.

Respectfully submitted,

ELIZABETH DEARS KENT, ESQ.

6/5/14

MMA – Oppose