TO: MSSNY Officers, Councilors and Trustees

FROM: MSSNY’s Legislative & Physician Advocacy Committee

DATE: November 5, 2015

RE: RESOLUTION 65 i PATIENTS’ COMPENSATION SYSTEM

The following resolution was referred to the Council by the House of Delegates. The resolution was forwarded to the Legislative and Physician Advocacy Committee for further study and recommendation for the Council’s consideration:

RESOLVED, That the Medical Society of the State of New York recognize the benefits of a patient compensation system including the following components.

1) Malpractice actions would no longer be brought through the court system but instead through a newly created patient compensation system
2) The total pool of funds would be less than that currently paid in malpractice premiums
3) Patients claiming injury, via a patient advocate or lawyer, would appeal to the system to investigate his or her injury.
4) The full record would be reviewed by a rotating collection of medical experts in the relevant field. If this panel agreed that the injury was avoidable, the case would be referred to a compensation committee to make payment.
5) To qualify for compensation, the panel would, use the following criteria:
   Diagnosis, where all of the following criteria exist:
   A. The provider performed a medical treatment on the applicant;
   B. The applicant suffered a medical injury with damages;
   C. The medical treatment was the proximate cause of the damages; and
   D. Based on the facts at the time of medical treatment, one or more of the following:
      i. An accepted method of medical services was not used for treatment;
      ii. An accepted method of medical services was used for treatment, but executed in a substandard fashion; and be it further

RESOLVED, That MSSNY integrate the patient compensation system into our current legislative agenda; and be it further

RESOLVED, That the Medical Society of the State of New York work with hospital associations, patient advocacy groups, the business community and other partners to seek meaningful and timely reform to our failed system.

Resolution 65 asks MSSNY incorporate into its legislative program support for a proposal to create a patient compensation system in New York where malpractice actions would no longer be brought through the court system but instead through a patient compensation system where the claim would be reviewed by a rotating collection of medical experts. If this panel agreed that the injury was avoidable, the case would be referred to a compensation committee. The standard would be whether:

i) An accepted method of medical services was not used for treatment; or
ii) An accepted method of medical services was used for treatment, but executed in a substandard fashion;

At the House of Delegates, the reference committee noted that it agreed with the concerns that brought about this resolution since malpractice insurance costs, even with some leveling in recent years, continue to be far above those in most other states. As a result, for many years, medical liability reform has been one of the top legislative priorities of MSSNY. However, the reference committee recommended that the resolution be referred to the MSSNY Council for further consideration since it was advised that the Physician Insurers
Association of America (PIAA), of which MLMIC is a member, expressed strong concerns in other states where this proposal was advanced that it could actually increase claim costs. The delegates agreed with the recommendation of the Reference Committee.

There were no comments in support or in opposition to this resolution when it was brought up for discussion at the September 9, 2015 meeting of the Legislation & Physician Advocacy Committee. However, there were several comments in opposition to this resolution expressed during the October 14 meeting.

For decades commentators have suggested that medical liability claims be removed from the current tort system and instead be addressed through a No-Fault system that is suggested by this proposal, going back to first commission to study New York’s medical malpractice system in the mid-1970s. Part of the problem is that there is a well-documented disconnect between medical negligence and when payouts occur. There are many cases where payouts occur despite lack of negligence, while others injured by medical negligence do not sue. MSSNY has adopted multiple policies (130.953 and 130.993) calling for support for legislation to establish a No-Fault system for adjudicating the claims of neurologically impaired infants. However, the Patient compensation system contemplated by this resolution goes far beyond the claims of N/I infants and MSSNY has not adopted policy in either support or opposition to creating a broad No-Fault system for medical liability cases.

It should be noted that, while one of the ßwhereasôclauses to this resolution referred to Georgia and Florida adopting No-Fault systems, that is not accurate. Instead, those states are considering legislation that would achieve what is proposed in this resolution. During a recent call convened by the American Medical Association on this topic, it was reported that the Florida Medical Association and the Medical Association of Georgia have actually opposed previous iterations of this proposal as a result of concerns expressed about whether such system could bring a significant increase in the number of claims brought against physicians as well as increased liability costs. Moreover, a resolution from the Tennessee Medical Association was introduced for consideration at the 2015 Interim House of Delegates meeting urging the AMA to oppose a No-Fault system for medical liability claims. In addition to additional claims and costs, concerns have been raised that claims paid through such a Patient Compensation system would still have to be reported to the National Practitioner Data Bank.

As part of a document setting forth why it opposes this proposal, PIAA noted ßProponents of the no-fault approach (sometimes referred to as a patient compensation system) fail to note several important facts, one of which is that 70% of all medical liability claims filed are found to be meritless and result in no payment. The no-fault approach would change the system by paying most if not all of these claims. In addition, it would likely pay additional claims that so obviously lack merit they are not even filed today. The end result is that dramatically more funds will be paid to individuals who are not victims of medical negligence.ô

Because it was believed that a No-Fault system could address the well-documented disconnect between actual medical negligence and medical liability awards, staff originally recommended to the Committee a ßwait and seeôapproach based upon whether any other state enacts such a law, and whether it could be shown that such No-Fault actually reduced medical liability costs for physicians. However, staff suggested ßmiddle groundôapproach was rejected by the Committee as it was noted that MSSNY already has many other preferable tort reform advocacy goals contained within its Legislative Program, such as a cap on non-economic damages, expert witness reform, Certificate of Merit reform and medical courts, for which MSSNY should continue to devote substantial advocacy efforts.

In summary, given the concerns with the possible costs of this proposal as well as the numerous other liability reform measures being sought by MSSNY, the Committee urged that the Council not adopt this resolution.

RECOMMENDATION: That the MSSNY Council NOT ADOPT Resolution 65.