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TO: MSSNY's Officers, Councilors and Trustees

FROM: MSSNY's Legislative & Physician Advocacy Committee

DATE: October 20, 2016

**RE: Resolution 62 – 2016 House of Delegates
Medical Malpractice Reform to Medical Injury Compensation (No-Fault)
*Introduced By Dr. Zebulon Taintor***

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 MSSNY urge New York State to institute a system to compensate patients for injuries arising from medical treatment, omitting the requirement that the clinicians involved be proven negligent.

The resolution was referred to Council after hearing diverse testimony at the MSSNY House of Delegates. There was testimony in support of the resolution as to the successful use of a No-Fault medical liability system in several other countries, and that it helped to ensure that the awards are provided to the injured party rather than on attorneys' fees. On the other hand, the Reference Committee also heard extensive testimony in opposition this resolution. The committee was advised that legislation such as that suggested in this resolution has been opposed by other state medical societies, including Florida, Georgia and Tennessee. Specifically the Professional Insurers Association of America (PIAA) has argued that "Proponents 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."

It was also noted that last year a similar resolution was not adopted by the MSSNY Council and the Legislation and Physician Advocacy Committee after it was referred from the HOD. The rationale for the non-adoption was that, since 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, MSSNY should continue to devote substantial advocacy efforts to achieving these goals.

At the September 7 meeting of the Legislative & Physician Advocacy Committee, similar arguments in support and in opposition were discussed. Staff received extensive information from the sponsor of the resolution as to the success of the program in many other countries around the world, which included arguments as to how implementing a No-Fault system could potentially improve the quality of care since it is well-documented that the existing dysfunctional medical liability adjudication system impedes efforts to improve quality care. There was also extensive discussion of whether claims paid in a

No-Fault system would be reportable to the National Practitioner Database. Some have argued that because payments under a No-Fault system are not specifically a payment to resolve an allegation of medical malpractice, it would not be reportable. Others have argued that all payments for claims would have to be reported (regardless of how a state defined such “payment”) to the NPDB pursuant to federal law.

It was also discussed that a similar resolution was brought to the AMA House of Delegates at the 2015 Interim House of Delegates where it was referred for further study. The resolution, brought by the Tennessee Medical Association, called on the AMA to “engage its leadership and staff, those of the national medical specialty societies, and other stakeholder organizations to provide resources and technical assistance to efforts throughout the federation to defeat no fault medical liability legislation”. A report back to the AMA House of Delegates is due for the November interim meeting. A preliminary review of the BoT report available from the AMA website indicates that the AMA Trustees shares the concerns regarding Patient Compensation Systems (PCS) that were articulated by the Tennessee Medical Association in its original resolution. Specifically, in its “Conclusion” section, the Board noted:

“Though some aspects of PCS proposals are consistent with AMA policy, significant aspects of the proposals to date are inconsistent with AMA Health Court Principles and AMA medical liability reform policy, including policies on the standard of care for medical liability cases, expert witness requirements, and reporting to the NPDB. Moreover, analyses of PCS proposals – even those prepared on behalf of PCS advocates – demonstrate the potential for a PCS to vastly increase the cost of a state’s medical liability system.”

Since the AMA House of Delegates will not meet until November 12-15, the outcome of this report will not be known until after the meeting of this Committee and the MSSNY Council.

Therefore, given the ongoing evaluation of such systems, and the fact that legislation has been introduced but not adopted in several other State Legislatures, staff recommended, and the Committee agreed, that it would be best if MSSNY adopted a “wait and see” approach to such proposals, rather than either expressly supporting it or rejecting it.

RECOMMENDATION: That the MSSNY Council adopt the following substitute resolution in lieu of Resolution 62.

RESOLVED, that MSSNY continue to examine the feasibility of a No-Fault system for adjudicating medical liability claims and support such a proposal if there is demonstrable evidence that it would significantly reduce the cost of medical liability insurance coverage.