

**February 28, 2022**

**TO: MSSNY'S OFFICERS, COUNCILORS AND TRUSTEES**

**FROM: PAUL PIPIA, CHAIR**  
**MSSNY LEGISLATIVE & PHYSICIAN ADVOCACY COMMITTEE**

**RE: RESOLUTION 51 – Uniform Standard of Care in Liability Cases**

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At the 2021 MSSNY House of Delegates, the following resolution was considered, and referred to Council.

RESOLVED, That the Medical Society of the State of New York seeks legislation declaring that in the case of an allegation of medical malpractice committed by an allied health professional practicing without direct supervision of a licensed physician, the standard of care is to be based on the nature of the negligent care, with a uniform minimally acceptable standard of care for the treatment of a specific diagnosis, not the licensee's profession.

At the House of Delegates, the reference committee heard much testimony in support of this resolution, but also several comments that raised concern that this resolution could in effect help advance the arguments of numerous non-physicians to obtain inappropriate scope of practice advancement. There were also requests that MSSNY consult with malpractice insurers and legal counsel to ensure that the intent of the resolution is reflected in the final wording. That may take time to complete. Upon initial discussion with one medical liability carrier regarding this resolution, they questioned the premise of the resolution that non-physicians practicing independently were held to a different standard of care than a physician providing the same type of care. Therefore, your Reference Committee recommended that the resolution be referred to Council for further study. That recommendation was accepted by the full HOD.

It appears that what this resolution is trying to ensure that if, for example, a nurse practitioner or physician assistant practicing in a hospital fails to diagnose a patient's stomach pain as appendicitis, then that NP or PA would be held to the same legal standard of care as a physician in a subsequent legal proceeding. Or if an optometrist fails to diagnose a patient's glaucoma, that they are held to the same legal standard as an ophthalmologist. A 2018 article in *Healthcare Finance News* reporting ([Healthcare Finance News](#)) on a detailed study of nurse practitioner liability concluded that diagnosis-related and medication-related claim allegations were similar for NPs and primary care physicians. The final diagnoses in diagnosis-related allegations were similar in both groups as well.

MSSNY staff shared with the Committee comments from MLMIC regarding their thoughts on the original resolution as well as various suggested revisions for their consideration. They noted that, while they "sympathize with the frustration of physicians regarding the ever-increasing proposals to expand the scope of practice for non-physicians, MLMIC notes that the resolution is still contrary to black letter law, common law of negligence and medical malpractice, and the rules and regulations of New York. While we understand that the impact of this resolution may be less adverse to physicians practicing solo or without extenders, it would be extremely detrimental to physicians practicing in small or large groups and with extenders because they would be subject to liability for the actions of these non-physicians and holding the non-physicians to a physician standard of care would inevitably result in both more liability verdicts and higher monetary verdicts."

Furthermore, when we asked for their thoughts regarding whether a recommendation that the resolution be narrowed to apply only to extenders acting independently would help mitigate the greater liability exposure, they indicated that they did not think that it would.

As many of you are aware, there has been extensive discussion on this resolution by Committee members, both at the February 16<sup>th</sup> meeting and in numerous follow up e-mails, regarding their thoughts on how to proceed this resolution. Some of the committee member physicians who support the resolution highlighted that there is no good reason for maintaining separate legal standards for negligence based on the profession of the person delivering care if both the physician and non-physician are authorized by state law to provide the same health care service. Other committee members opposing the resolution raised concerns about the potential additional liability risk for physicians co-treating a patient if the liability risk for the non-physician increases, even if the physician is not supervising the non-physician. It was also noted that standards of care for various health care practitioners are not decided through statute but through court decisions, which makes legislation not necessarily the best method to achieve the goals of this resolution.

In an attempt to balance concerns expressed by committee members, staff suggested a compromise between the various perspectives that MSSNY support, on a case-by-case basis, the concept of equating standards of care for certain non-physicians and physicians, provided that such health care practitioners are authorized by the state to practice without physician oversight, and it would not increase physician liability. Because there also was general agreement from most committee members that the real issue was the need to advocate to defeat inappropriate scope expansion proposals that endanger patient safety, it was also suggested that an additional resolved be added to re-state MSSNY's efforts to collaborate with relevant specialty society and patient advocacy groups to support patient-led team care

When this recommendation was offered as a substitute to the original resolution, the response from the Committee was mixed. Of those physicians who responded with a recommended Committee action, several physicians (5 votes) responded in support of the suggested substitute resolution. Several physicians (8 votes) responded in support of the original resolution. Several physicians (8 votes) responded that the resolution should be defeated altogether. Since there was a greater cumulative total of committee members who either wanted to adopt the original resolution or adopt the substitute resolution, as compared to those who wanted to defeat the resolution, it is my recommendation to the MSSNY Council (or, at least, to initiate the discussion) is to adopt the substitute resolution.

**Recommendation:** That the MSSNY Council adopt the following substitute resolution:

**RESOLVED, that MSSNY support the concept that the standard of care applied in legal proceedings evaluating whether patient care was negligent should not vary based upon the licensure of the health care practitioner providing the care, provided that 1) the practitioner delivering the care is permitted to do so without physician supervision under state law and 2) it would not potentially subject physicians to greater liability exposure; and be it further**

**RESOLVED, that MSSNY continue to work with other physician associations and patient groups to forcefully oppose legislation, regulation or Executive Orders that endanger patient safety through inappropriate expansion of scope of practice by non-physicians**

