

Testimony Before:

**Senate Codes, Health & Insurance
Committees**

Tuesday, December 1, 2009

10:00 a.m.

**Hearing Room B, Legislative Office Building
Albany, NY**

Presented By:

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Legislative Chair

**NY Chapter of the American College of
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<http://www.youtube.com/watch?v=xTiSDwstFmU>

The above link is for the NYS Medical Malpractice Hearing video, should anyone find they would like to watch.

Chairmen Breslin, Duane and Schneiderman and members of the Senate Insurance, Health and Codes Committees, first let me thank you for holding this hearing. The timing of your hearing could not have been more appropriate. As you are aware, in New York State and across the country we are looking to reform our health care system but recognize we are unable expand the system without cutting some costs. Malpractice Reform presents us with that rare opportunity as both the American Medical Association and the Trial Lawyers Association agree that we spend \$60 billion a year or 3 percent of our overall medical spending in the current malpractice system. These costs are driven by not only the direct costs of this broken system but the indirect costs associated with physicians practicing defensive medicine(NYT-- September 23, 2009). These are dollars that should not be wasted on a tort system given the fiscal needs we have all discussed here and on the national stage over the last few months.

I am Dr. William Doscher, I am speaking on behalf of the 4581 fellows of the four Chapters that comprise the American College of Surgeons of New York State. The American College of Surgeons, was founded in 1913 to raise the standards of surgical practice and to improve the care of the surgical patient. The College has more than 74,000 members and is the largest organization of surgeons in the world. The Collage is dedicated to the ethical and competent

practice of surgery. Its achievements have significantly influenced the course of scientific surgery in America and have established it as an important advocate for all surgical patients. This is evidenced by the College's "National Surgical Quality Improvement Program" to enhance patient safety. The program tracks the outcome of surgical procedures to provide data to assist hospitals in their efforts to improve patient safety and the quality of surgical care at their institutions.

The problem is clear, consumers across the country and in New York have faced ever increasing costs as a result of the current tort system which we have seen accelerated since the 1990s. These include:

- **Out-of-Control Litigation...** New York is ground zero for out of control litigation with more than 50% paid in medical liability claims than any other state in the nation.
- **Mega-Verdicts Rising...**
- **Medical Liability Premiums Are Rising...** Doctors across America are facing double-digit increases in liability premiums, driven by excessive litigation and Powerball-sized jury awards (*PIAA, Medical Liability Monitor*). A general surgeon's liability insurance costs in New York State have risen 72-80% since 2003.

- **Excessive Administrative Costs...** A 2004 New England Journal of Medicine article found that 60% of every dollar expended on the system is absorbed by administrative costs (predominately legal fees).

Our College has long advocated for provisions that would bring balance and fairness back to the New York State system and save a significant part of that 3% of health care costs for New York's health care consumers. These would include:

- A \$250,000 cap on non-economic damages;
- Requiring that the certificate of merit accompanying a medical malpractice lawsuit also include a signed affidavit from the physician who has indicated that there is a reasonable basis for the lawsuit to go forward. Importantly here, such a physician should be credentialed and re-credentialed in that area of medicine;
- Repeal of the law that permits the plaintiff's attorney to shield the identification of an expert witness to appear in a medical malpractice lawsuit; and
- Reform of the joint and several liability rule to ensure that a defendant is only liable for their proportionate share of damages in a lawsuit.

There are numerous states across the country that have enacted effective tort

reform measures. Most rely on caps on non-economic damages. An example of progressive tort reform is the Medical Injury Compensation Reform Act of 1975(MICRRA) enacted in California. MICRA limits non-economic damages to 250,000, limits joint and several liability, and allows for periodic payments of damages. The statistics from California are impressive:

- In the time since California passed its reforms in 1975, liability premiums for California doctors have increased 283 percent, compared to 925 percent for the rest of the United States. (NAIC Profitability By Line By State, 2004);
- A recent study found no evidence that California's liability reforms have reduced patients' access to the courts or to obtaining compensation for their losses. The average number of malpractice lawsuits filed in the last 7 years is in fact 22 percent higher than the average number filed in the seven years preceding MICRA's enactment. (Hamm, Wazzan & Frech, "MICRA and Access to Healthcare," February 2005).

These reforms have been widely endorsed and not just by members of the medical community as witnessed by the recent remarks of California's Planned Parenthood: If the current MICRA cap is lifted, our premiums will go up, period. As non-profit health care providers, we can't transfer those costs to our patients. You have to reduce costs somehow and the only option is to see fewer

patients,” said Katherine Kneer President Planned Parenthood Affiliates of California.

These reforms are not a cure-all, but they stabilized rates after they were enacted. Reforms such as these are the centerpiece of the College's efforts at the federal level and would be a good first step in New York State. But let's not stop there, we should consider other ideas. Here are some of the suggestions some of my fellow surgeons have raised:

- 1.** Aspire to improve care in an open environment that allows for discussion of adverse events with patients, their families, all involved providers, and quality oversight agencies.
- 2.** Clearly defined standards of care by the specialty societies and physician associations that are based upon medical science and evidence based studies
- 3.** Care should be measured by the process used to deliver the care by adherence to defined standards of care not by the outcomes.
- 4.** Establish a Medical Grievance Commission to hear complaints. The commission would be comprised of physicians from various specialties who are respected in their fields, lay persons and attorneys. The state should consider this and other alternative resolution forums such as special medical

courts and/or the establishment of a No Fault or Health Care Indemnity Fund system for certain claims.

5. Rather than a cap on pain in suffering, a schedule of injury payments could be created that would fix the non-economic damages portion of an award based upon the type and severity of the injury.
6. Require that potential lawsuits be reviewed by a committee to determine who should be included in a suit rather than simply naming everyone whose name is legible in the medical record.
7. The state should assist in the development of Risk Retention Groups. These organizations have developed protocols, review processes and electronic medical records that may improve patient care while reducing administrative cost.

Finally, we want to thank the Senate working together with the Assembly and the Governor in enacting moratoria on medical premium increases for the 2008-2009 and 2009-10 policy years. These actions prevented premium rate increases that would have gone up 55-80%. Rates that, given the unrelenting real dollar reduction of reimbursement to physicians in both the public market(Medicare, Medicaid) and private markets(HMOs), are increasingly unaffordable. However, we all recognize that we cannot simply freeze rates

forever. We must address the underlying issues that cost consumers \$60 billion nationwide. The American College of Surgeons of New York State stands ready to assist you. Thank you.