



# FY 2022 Joint Legislative Health Budget Hearing

NYS SOCIETY OF ORTHOPAEDIC SURGEONS, INC TESTIMONY  
FEBRUARY 25, 2021  
JOHN DIPRETA, MD FAAOS, PRESIDENT

Good afternoon Chairs Krueger, Weinstein, Rivera and Gottfried, and members of the New York State Senate and Assembly members. My name is John DiPreta, M.D., President for the New York State Society of Orthopaedic Surgeons, Inc (NYSSOS). On behalf of NYSSOS and the 1,600 physicians, fellows and residents we represent, let me thank you for providing us with this opportunity to present our views on the executive budget proposal. NYSSOS maintains a specific focus on improving access to care, promoting public health and facilitating improvement of patient safety and quality of care. Respectfully, this is the lens through which we will provide our comments.

### **ORTHOPAEDIC VALUE**

Musculoskeletal (MSK) disorders can result in pain, loss of active lifestyles and the inability to return to the workforce and decline in mental health. Working with orthopaedic specialists, patients who experience these injuries must decide what treatment option(s) will work for them, both financially and physically.

Studies have shown that early intervention by an orthopaedic surgeon for musculoskeletal injuries decreases the overall cost of care by allowing the musculoskeletal expert to develop a treatment plan that may or may not involve surgery. Studies also show that delays in direct, appropriate care can result in high percentages of patients not returning to work, essentially increasing costs to the overall system. For instance, literature shows that if a spine patient is out of work for 6 months, there is only a 50% chance that he/she will return to work.

### **PUBLIC PERCEPTION ON HEALTHCARE SAFETY**

The healthcare industry is confronted with the reality that COVID-19 has changed its relationship with the public. We now face a new challenge to overcome, correcting public perception about the safety of engaging with the healthcare system. Our communities have endured a generational public health crisis and New Yorkers are still adjusting to a new normal. Due to policies that prohibited “elective surgeries” to be performed and despite enhanced safety protocols and progress in the fight against COVID-19, thousands of patients in New York State with debilitating pain remain hesitant to re-engage with the healthcare system and are delaying care. These delays in surgeries and procedures will ultimately result in significant medical deterioration or materially impact patient's prognosis, morbidity and/or treatment plans. The

Society is working towards rehabilitating the relationship between physician and patient and we will seek your support as we roll out this important public health campaign.

### **IMPACT ON PHYSICIAN PRACTICES**

In addition to the impact on patient care, the healthcare workers privileged with such care were also compromised. Most, if not all, orthopaedic surgical practices were required to eliminate elective surgical procedures, required to reduce the patient visits and access to care and required a significant reduction in the workforce of providers through layoffs, furloughs and in some cases, termination of employment. For example, a local ambulatory surgery center (ASC) reduced operating room activity by 66% with a reduction to case volume of approximately 23% of pre-Covid volume. This was only possible with a concomitant reduction of layoffs off, approximately 13%, and staff working alternate weeks to minimize reduction in staffing.

### **THE NEED FOR SYSTEMATIC MEDICAL LIABILITY REFORM**

The impact on community-based physicians' ability to remain open is real and is compounded by "stand-alone" measures presented in this year's executive budget that will only exacerbate the effects of an already stressed delivery system and present practices with undue decisions as to whether or not they can remain open and available to see patients. The Governor proposes to require Section 18-eligible physicians and dentists to pay 50% of the premium for excess professional liability coverage, to be paid by these physicians and dentists in 12 monthly installment payments, or in another manner as agreed to by the physician or dentist. We are strongly opposed to this proposal and advocate that systematic medical liability reform is necessary to improve the overall health care system.

As you may be aware, the Excess Medical Malpractice Insurance Program provides an additional layer of \$1M of coverage to physicians with hospital privileges who maintain primary coverage at the \$1.3 million/\$3.9 million level. New York policymakers properly decided that the State must pay for the excess coverage of physicians undergoing important surgical procedures in hospitals so that there would be both adequate coverage for the insured physician and equitable compensation for those negligently injured by the insured physician. Compensation amounts are unpredictable and inconsistent from case to case and not necessarily related to negligence or adverse events. Physicians legitimately fear that everything they have worked for all their professional lives could be lost because of one aberrant jury verdict.

This fear continues today as New York routinely leads the U.S. in the monetary amount of medical malpractice payouts, both as a total monetary amount and per capita with New York almost always paying around \$200 million to \$300 million more than the second highest paying state while often those truly injured by negligence do not pursue litigation. New York State has failed to enact meaningful liability reform to ameliorate this risk. The size of medical liability awards in New York State has continued to rise significantly and the risk of severity is rising due to the COVID-19 epidemic.

The outcome of this proposal will expose providers, patients, and hospitals risk of loss from large claims more than the primary coverage. In extreme cases, it could lead to injured patients not receiving full compensation in cases of actual malpractice. This proposal must be placed in context of the dramatic losses in income suffered by physicians in 2020 due to the COVID – 19 pandemic. As I mentioned before in my example, the pandemic devastated orthopaedic practice revenues and we are not the only specialty impacted.

NYSSOS supports systematic medical liability reforms that improve patient access to care, enhance patient-physician communication, facilitate improvement of patient safety and quality of care, reduce defensive medicine and wasteful spending, decrease liability costs, and compensate negligently injured patients promptly and equitably.

We ask that the legislature restore the full funding for the program so that the Section 18 excess insurance policyholders do not have to bear the financial burden for this program.

### **PHYSICIAN DUE PROCESS IN DISCIPLINARY HEARINGS**

NYSSOS would also like to raise its objections to the Governor's Budget proposal that will bypass existing essential due process protections for physicians when a complaint has been filed with the state disciplinary board.

We are very concerned that this proposal will unfairly cause great harm to a physician's professional reputation without any reasonable opportunity for him or her to defend themselves.

Orthopaedic surgeons have great interest in protecting the public and our leadership has committed their time on serving on the Board of OPMC as well as serving as experts to review the care of patients. We believe an appropriate balance is needed.

It is important to note that New York already has the power to bypass existing due process protections and "summarily suspend" a physician from practicing in certain instances where it would be clearly imprudent to wait for final disciplinary action by OPMC. It also has the power to disclose information to the public about a physician under investigation when the OPMC has determined that the case has enough merit to formally bring charges. It has not been demonstrated why these existing laws are inadequate to protect the public. Very few complaints made to the state's disciplinary board, the Office of Professional Medical Conduct (OPMC), ever result in actual findings of misconduct. Most are dismissed after an initial investigation and an unproven allegation could forever and permanently scar a physician's reputation.

We welcome discussions to improve the disciplinary system and address gaps to help protect the public. However, these proposed changes create the impression that an accusation automatically equates to wrongdoing and relinquishes important due process protections. We urge this proposal be rejected and we urge the legislature to focus on interventions that support patient safety and the patient-physician relationship.