



# WESTCHESTER PHYSICIAN

September 2014

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## PRESIDENT'S MESSAGE

“If you don’t like it, wait a minute and it will change!” This was said of New England weather by Mark Twain but could easily and correctly be applied to the state of medicine today. Indeed at times it seems the change is incessant and comes at a breakneck pace. It is hard to keep abreast of all this change and manage to take care of patients at the same time. Regulation from Washington and Albany including the HITECH Act mandating Meaningful Use of EMR, The Affordable Care Act and its myriad rules and formulations - such as ACOs and Health Exchanges, and state laws such as ISTOP have turned the practice of medicine into an “I-dotting and T-crossing” endeavor with little thought of the impact these schemes will have on the traditional interaction between patient and physician. The upcoming adoption of ICD-10, which will impact all aspects of patient care, billing and reporting to government agencies, was rightly recognized earlier this year as the straw that broke the doctor’s back and was delayed until next October. All this regulatory foment consumes significant time, staff and financial resources.

***Who is it that will speak for all of us and our patients when access to care is threatened by out-of-control malpractice liability, insurance company fraud and abuse, or regulatory overreach? The answer is the Westchester County Medical Society.***

Increasing regulation plus the continued negative pressure on payment for physician services has placed enormous strain on the practice of medicine nationwide.

Physicians and health care facilities have responded with unprecedented consolidation and integration to cope with this change. In our neighborhood here in Westchester, every hospital now either has or is seeking a relationship with a larger partner. Physicians have been flocking to employed positions with hospitals and multispecialty groups to protect themselves from the economic and regulatory uncertainty inherent in the changing environment, and others are moving toward larger single specialty groups or

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**LOUIS F. MCINTYRE, MD**  
*President, WCMS*

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### UPCOMING EVENTS

- Academy Golf Outing  
Thursday, October 2nd at 11:30 a.m.  
Westchester Country Club  
Rye, NY
- Doctors of Distinction Awards  
Thursday, October 30th at 5:30 p.m.  
The Bristol  
Armonk, NY
- Holiday Party  
Friday, December 12th, 6-9 p.m.  
Orienta Beach Club  
Mamaroneck, NY

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**FROM THE EDITOR...****LIP SERVICE****PETER J. ACKER, MD**

A number of years ago I moved to Northern Westchester which has lengthened my commute considerably. Prior to this, I lived within a 20 minute walk to my office and I often left the car at home on days I wasn't on call. In this way, exercise was programmed into my daily routine. I miss those walks to the office, but I have to say, I enjoy the 25 minute drive because it gives me the opportunity to listen to books on CD and I have gotten through dozens of novels that I'm not sure I would have ever been able to fit into my hectic schedule. Of more somber note, it has allowed me to observe the driving habits of others along a 20 mile stretch of 684. I may be wrong, but I have the definite impression that people are driving faster and more recklessly these days. I frequently see a car hove into my rearview mirror closing in a seeming warp speed until it swings abruptly into the adjoining lane and whizzes by me. Another not uncommon sight is a driver on his cell phone or, even worse, bent over a cell phone texting.

Witnessing this, I confess that at times, I silently wish for that speedy driver's comeuppance – not a serious accident of course, but maybe a near miss that would abruptly allow that driver to see how risky his behavior is. I had the pleasure last winter of watching a driver, who raced by me in snowy conditions that dictated extreme caution, skid off the road some 200 hundred yards ahead of me onto the central highway divider. As he slid through the snow, it produced a plume of snow that shot skyward into a rooster tail arc, before becoming to a stop in about 2 feet of snow. "He'll be there for a while." I thought silently as I resisted the urge to give him a honk and a wave.

It is more than just annoyance – I get angry that some drivers feel entitled to risk the lives of others around them simply to get some place faster. I walk my dogs on a small cul-de-sac, and often cars speed up the hill startling me and my dogs – and this is when they are merely a few hundred yards away from their destination at the end of the dead end. So they are saving perhaps ten seconds of time. I take it personally. It reminds me of Yossarian, the protagonist of Joseph Heller's novel *Catch-22* who complains that people are trying to kill him.

"They're trying to kill me," Yossarian told him calmly. "No one's trying to kill you," Clevinger cried. "Then why are they shooting at me?" Yossarian asked. "They're shooting at everyone," Clevinger answered. "They're trying to kill everyone." "And what difference does that make?"

In very rare instances, I see that a highway patrolman has pulled over the guy "who was trying to kill me." It is all too rare, unfortunately, and a bit like sighting an ivory billed woodpecker. I wonder to myself, why is enforcement seemingly so lax? Though I do not know the statistics, I cannot imagine that so many would speed with such impunity if they are was any reasonable chance of them getting caught. And that leads me to the next obvious

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**PRESIDENT'S MESSAGE** *(continued from page 1)*

umbrella-type mergers with other doctors to create economies of scale not possible with solo or small group practices. These trends have been evident now for two decades but have recently proceeded at an accelerated pace in response to legislative and regulatory developments since 2009. Still, however, our charge to patients and their care has not changed or diminished. We still must attend to their needs and concerns regardless of our practice situation and environment. As always, we need help in advocating for our patients and their access to our services whether we are in private solo practice or an employee of a large hospital system that has 2000 physicians.

Who is it that will speak for all of us and our patients when access to care is threatened by out-of-control malpractice liability, insurance company fraud and abuse, or regulatory overreach? The answer is the Westchester County Medical Society. WCMS is dedicated to physicians and their patients without concern of where or in what circumstance they practice. We are on the forefront statewide in dealing with all of the issues that affect doctors and their ability to practice medicine. We actively and vigorously interact with our legislators in Albany and Washington to ensure our expertise is included in the legislative process. In conjunction with the Medical Society of the State of New York, we champion legislation that will preserve access to care for all New Yorkers such as this year's protection of out-of-network benefits. We speak with regulators to make sure that the rules they promulgate will not present an undue burden. We advocate for fair payment rates with entities such as the Worker's Compensation Board to insure timely access to quality care.

These issues are not restricted to those in private practice but apply universally to all physicians. WCMS provides real value to doctors and patients regardless of their practice situation. That value lies in our advocacy efforts, our promotion of Physicians of Distinction, our partnership with local businesses that provide goods and services to doctors and our commitment to Continuing Medical Education.

Change is upon us now and for the foreseeable future. Don't wait and just let it happen without your voice being heard. You will be receiving your 2015 dues shortly, if you haven't already. Renew your membership in the Westchester Medical Society and encourage your colleagues to become part of a change agenda that includes the concerns of patients and doctors in all practice types. **If you bring four new members to WCMS your dues for 2016 will be free.** If you have any questions or would like a membership application contact Karen Foy, Director of Membership at [kfoy@wcms.org](mailto:kfoy@wcms.org).

**LIP SERVICE** *(continued from page 2)*

question - why not? Highway accidents are a leading cause of mortality and morbidity. We have, of course, benefited mightily from engineering advances that have made automobiles increasingly stable and crash resistant. We have the technology to enforce - a simple device in each car that would detect speed similar to E-ZPass and would generate a ticket every time someone goes say 10 or more miles over the speed limit, would quickly bring this public health problem to its knees. I was heartened recently to read about speed detection devices being setup near schools in response to a spate of accidents that would do just that. Unfortunately, like gun control and the high sugar content of processed foods, we lack the political will to tackle this problem that is so imbued with our culture of wide open highways and endless resources.



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## **DUTY OF EMPLOYER TO ENGAGE IN INTERACTIVE PROCESS WHEN EMPLOYEE WITH DISABILITY REQUESTS AN ACCOMMODATION DONALD R. MOY, ESQ.**

A recent ruling of the New York State Court of Appeals in *Jacobsen v. New York City Health and Hospitals Corporation*<sup>1</sup> gives guidance to employers with respect to the distinctly different legal standards under the New York State Human Rights Laws (State HRL) and the New York City Human Rights Law (City HRL). Employers in New York City are warned that the City HRL is stricter than the State HRL.

The plaintiff was employed by the NYC Health and Hospitals Corporation (HHC) as an assistant facilities planner. In this position, the plaintiff was required to visit HHC construction sites which would expose him to various types of environmental dust. Plaintiff was diagnosed with an occupational lung disease and requested a prolonged leave of absence. Eventually, the plaintiff's physician determined that the plaintiff could not be exposed any further to airborne irritants and dust, and recommended that the plaintiff no longer be involved in construction site visits. HHC concluded that making construction site visits was an essential function of the plaintiff's job duties, and because the plaintiff could no longer perform these responsibilities, HHC terminated the plaintiff's employment. The Plaintiff sued under both the State HRL and City HRL.

The Court of Appeals reversed lower court rulings that granted summary judgment to HHC. According to the Court, although there are differing legal standards between the State HRL and City HRL, both laws require an employer to respond to a disabled employee's request for a reasonable accommodation by engaging in a good faith interactive process with the employee to explore whether a reasonable accommodation would be available that would enable the employee to reasonably perform the essential job duties.

If an employee has a physical impairment that prevents the employee from performing the essential functions or core duties of his or her job, and no reasonable accommodation is feasible that will enable the employee to perform the essential functions of the job, then the employee is not protected under State HRL and the employer is free to take adverse employment action. However, if a "reasonable accommodation" would enable the employee to reasonably perform the essential functions of the job, the employer must provide the accommodation, unless such accommodation would cause the employer "undue hardship."

The Court of Appeals held that under the State HRL, the employee bears the burden of proving that a reasonable accommodation would enable the employee to reasonably perform the essential functions of the job.

The City HRL is stricter than the State HRL. Unlike the State HRL, the City HRL places the

*(continued on page 5)*

**DUTY OF EMPLOYER TO ENGAGE IN INTERACTIVE PROCESS** *(continued from page 4)*

burden of proof on the employer to show that no reasonable accommodation was available and to show that any accommodation requested by the employee would place an undue hardship on the employer.

The Court of Appeals held that when a disabled employee requests a reasonable accommodation, the employer must give an individualized consideration of that request and may not arbitrarily reject the employee's proposal without further inquiry. The Court held that the State HRL and the City HRL require "reasonableness" and there could be nothing more "reasonable" than an open minded discussion that could result in compromise.

Because the employer did not engage in the good faith interactive process to determine whether a reasonable accommodation was available, the employer could not obtain summary judgment under the State HRL. However, the plaintiff still has the burden of proof, and may ultimately lose under the State HRL if the plaintiff cannot prove that a reasonable accommodation would have been available to enable him to reasonably perform the essential functions of the job. However, it will be more difficult for the employer to prevail under the City HRL. Having not participated in an interactive process to determine whether a reasonable accommodation was available, the employer may have "formidable obstacle" to prove that no reasonable accommodation existed.

**Lessons Learned**

Employers need to keep updated and accurate job descriptions that include a clear description of the essential functions of the job. Essential functions include the duties that must be performed.

If an employee claims disability and requests an accommodation, be prepared to engage in an interactive process with the employee to determine if the requested accommodation is reasonable and would enable the employee to reasonably perform the essential functions of the job. If the requested accommodation would cause undue hardship to the employer, document why it is believed that the requested accommodation would cause undue hardship. Remember, what constitutes and "undue hardship" depends upon numerous factors, including the resources of the employer. A requested accommodation may constitute an undue hardship to a small employer with limited resources. Document the interactive process. Consult HR and legal counsel in appropriate cases.



<sup>1</sup> Jacobsen v. New York City Health and Hospitals Corp., 22 N.Y. 3d 824 (March 27, 2014)

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*Kern Augustine Conroy & Schoppmann, P.C., Attorneys to Health Professionals, is solely devoted to the representation and defense of physicians and other health care professionals. Mr. Moy may be contacted at 1-800-445-0954 or via email at DMoy@DrLaw.com.*

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## **MEMBERSHIP DOESN'T COST, IT PAYS!**

**KATHLEEN SELLERS, JD, CLU**  
**ASSISTANT VICE PRESIDENT**  
**CHARLES J. SELLERS & CO.**

Charles J. Sellers & Co. works with physician members of county medical societies across New York State. When we say that “membership doesn’t cost, it pays,” we are usually referring to the fact that the savings from the insurance programs that we administer and which are endorsed by the Westchester County Medical Society can more than offset your dues. (Of course, there are many other membership benefits as well).

Obtaining insurance coverage through our agency can pay in a broader sense, too. We’ve helped thousands of New York physicians and medical practices over the last 70 years to put the right coverage in place. Our experience in working with physicians means that we can help you protect yourself from serious financial problems. Taking advantage of your society’s relationship with our agency is a decision that can pay off down the road.

These are some of the benefits that we provide to Westchester County Medical Society members. Eligibility for these programs is based on policy provisions and underwriting requirements set by the Insurance Companies.

1. Many members have purchased Disability Income protection from our agency. We offer an exclusive program available only to the members of the county and district medical societies with which we work. This program offers excellent coverage at rates that are reasonable due to the group purchasing power of members. In addition, we handle claims for this program here at our agency, ensuring prompt, accurate, personalized service if you become disabled.
2. We also offer an exclusive program for Business Overhead Expense insurance, which helps cover your practice’s costs in the event that you are disabled. Again, the society’s group purchasing power makes this coverage very affordable.
3. We offer Group Level Term Life insurance with excellent rates, available only to Medical Society members and their spouses.
4. Many groups purchase Group Long Term Disability coverage, which can serve as an important employee benefit to retain key employees, or which can be structured to add solely to the physicians’ existing personal disability coverage. We offer a

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# POOL PARTY & BARBEQUE

On Saturday, August 9th, Drs. Robert & Kira Geraci Ciardullo once again opened their beautiful home to the members of the Westchester County Medical Society. About 80 people, including members, their families and guests enjoyed the day and beautiful weather. A delicious barbeque was enjoyed by all and many took a dip in the beautiful pool.

***We extend a big thank you to the Ciardulos for graciously hosting and to Park Avenue Benefits Planning, Inc., Charles J. Sellers & Co., Inc., and Dr. Thomas T. Lee for their very generous sponsorship.***



Drs. Nahid Shirazy-Majd and Kira Geraci-Ciardullo



Dr. Tom Lester and Anastasia Lester



Eileen Sellers Fitzgibbons, Dr. & Mrs. Wojcik



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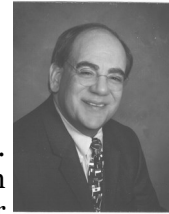
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## A DOCTOR'S BILL OF RIGHTS

### GINO C. BOTTINO, MD



Doctors have been watching the steady decline of our profession on many levels. Our Medical Societies have been working hard to stem the tide but have not been able to make a difference that is obvious and has drawn doctors back into their societies!

We are becoming the hired help; being told by non-medical professionals what to do, how to do it, and in what time to do it. As such, physicians are losing all their professional rights.

At the same time, the brunt of implementation and burden of payment for governmental cost savings and the implementation of recent health care initiatives has fallen only on physicians.

The Insurance Industry has used the governmental "reforms" to decrease payments and services and cut back on covered services. This has led to the largest growth of their profits ever! Many of the salesmen of pharmaceutical products, medical testing companies, and durable medical equipment are paid better than the doctors they serve.

I believe that the "corporatization" of Medicine is a poor and inappropriate model for the practice of medicine. With many adverse ethical outcomes the corporate pyramid model of workers and progressively higher levels of supervision, do not apply to the inherent responsibility and acquired abilities of physicians; nor can it ever supersede the patient-doctor relationship. When I started in medicine, the CEO's of hospitals were all prior physicians, who worked for less than what they were making as doctors. The job was better with fewer hours, no weekends, holidays or night call, and a lot less drama with no possibility of being sued for tens of millions of dollars. Now our CEO's are drawing larger salaries than many physicians, while our average income of about \$200,000.00 a year for doctors in NY State, and has not changed in years.

Worse are the invasive medical guidelines, developed by government and insurance industry panels, that have inherent conflicts of interest, being financed to reduce cost and increase profit, and are not patient oriented. They are meant to tie our hands, control us to control costs. We are in a position of begging to do what we feel is the right thing to do for our patients, while someone looking at a computer screen determines the outcome. And how many of us can take the unpaid time and effort to appeal this outcome?

Have these guidelines, along with the mandated Electronic Medical Record (EHR), really reduced medical mistakes and reduced health care costs as they were touted to do? Is the EHR a tool for improvement, or actually being used for cost control and data mining to limit care to our patients? Performance measurement through EHR uses "validated clinical measures" that are nothing more than a check list by "bean counters" meant again to decrease cost by decreased pay to doctors with incentives that are more of a stick than a carrot. Recent studies have shown that as many as 1 in 20 cases in the ER and clinic setting are misdiagnosed. It is clear that the cost of medicine has continued to sky-rocket, and government intervention as it does in many industries, has only made things worse.

These Medical guidelines, used by Government and Insurance companies, are being treated as mandatory rules, that physicians must conform to, or payments for tests, treatments and services are withheld. Do you really believe this is the way medicine should be practiced?

These Medical guidelines, used by Government and Insurance companies, undermine the sacred patient-doctor bond, preventing physicians to fulfill our duty to the patient by mandate, while we remain liable for everything that happens despite being forced to comply with such guidelines.

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**A DOCTOR'S BILL OF RIGHTS** *(continued from page 10)*

Of course we can appeal, while not being paid arguing for our patients benefit to very well paid people whose main job is to limit care and increase profit. Does this sound right or ethical to you?

Is this what we became doctors for? Is this the right way to practice medicine? And now, under the "affordable care act" access to established patient-doctor relationships are being terminated based on Insurance Company plans and Governmental plans; and they are also manipulating access to physicians by substantially changing prior established fee schedules.

We are Doctors of Medicine, empowered by our profession, to use *our judgment and knowledge* to care for our patients. Medicine has always been more art than science, and we have allowed ourselves to be manipulated as professionals into thinking that only "evidence based" science produces good medicine. So why are there more mistakes than ever? Why are there more medical malpractice suits against us than ever?

We are true professionals, who take an oath to a higher power than government, or the insurance industry, to protect and heal our patients. Only we do this, and this is used against us every day. It puts us in the position of working for free for others, who are greatly profiting because of our work, while our patients get less and less benefit from our work. We let them steal our intellectual "fruit" for their benefit, not the patient's. Even if government is not profiting, they treat us as criminals who are "stealing" their money. They publish bounties on our heads, and continue to hire agents by the thousands to find our fraud. They blame us for the high cost of medicine, while our elected officials enjoy all the money they get from medical industry companies that are really the main cost of medicine.

Ethically we should not be under contract to any of them; we are not just a part of their "Team of Providers."

Remember that our Hippocratic Oath instructs us that we are obligated to take care of each other and the profession of medicine.

Therefore, I resolve to put forth a Doctor's Bill of Rights, for which MSSNY should seek implementation by legislation, to not only NYS Health law, but Federal law and future protection:

**Physician Bill of Rights**

1. The right that Physicians are Doctors of Medicine and deserve to be called and referred to as Doctor or Physician.
2. The right to practice our profession in a friendly, supportive, and nurturing atmosphere, free from abuse, maltreatment, threats of punishment or retribution to our income or licensure, from employers, government and insurance industry through policies made by these agencies.
3. The right to express our spiritual beliefs, cultural practices and holistic practices that do no harm to our patients or interfere with the care of the patient.
4. The right to refuse treatment to anyone, while giving them a reasonable time to find an alternate physician.
5. The right to use our judgment and experience in the Art of Medicine to over ride Guidelines issued for clinical practice.
6. The right to have access to a regional Medical Ethics Committee for a patient's case, or when a patient makes an ethical accusation against a physician.
7. The right to obtain the tests and procedures that we deem necessary for our patients and to over ride any contradictory policies by external agencies or companies; without having to undergo a prolonged appeals process.

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**MEMBERSHIP DOESN'T COST, IT PAYS!** *(continued from page 7)*

program through The Hartford specifically designed for physicians. If the physicians in the group are all Westchester County Medical Society members, there is a 7% discount on the typical rates.

5. We offer insurance for your practice, including Businessowners Office Packages, Workers' Compensation, and New York state Disability Benefits (DBL). Members are eligible to participate in a Workers' Compensation program that pays a dividend back to participants if the loss experience of the group permits. Dividends have been returned to participants in many past years, but cannot be guaranteed.
6. Another way that we help members to save money while obtaining the right coverage is through the Travelers Benefits Plus Personal Lines program, available to physician members. This program provides a 7% discount on homeowners insurance and a 5% discount on auto insurance. Many physicians work with us for their home, auto, umbrella, and boat coverage, and we help you select the appropriate levels of liability protection for your income, family considerations, and lifestyle. Members can also make this program available to office staff as an employee perk that won't cost the practice anything.

We are happy to meet with Medical Society members to review their coverage without cost or obligation. Investing some time every couple of years to update your insurance can help you meet many of the challenges that life can present.

We have been continuously endorsed by the county medical societies across the state since 1941. We are proud of this history and strive to provide every benefit that we can for the society's members. There are many reasons to belong to this great organization, and we are proud that the products and services we provide are among them.



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Kate Sellers can be reached at:

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# LEGAL CORNER

*News on medical-legal developments affecting physicians and health care professionals from WCMS General Counsel Kern Augustine Conroy & Schoppmann, P.C.*

## **CMS Finalizes Rule Extending Stages of EHR Meaningful Use**

**Question:** I am concerned I'm not going to meet meaningful use this year, as I have had numerous setbacks with implementing the new technology. Are there any alternatives for certifying meaningful use for 2014?

**Answer:** Yes. CMS has finally taken the official step of enacting its draft rule, first proposed in May Of 2013, which postpones the implementation of Stage 3 guidelines until at least January 1, 2017, and most importantly, adopts all of the recommended flexibility standards for meaningful use certification in 2014. These changes were made in response to the difficulties many providers have met implementing the 2014 certified EHR software and hardware. Providers unable to adopt the 2014 certified EHR technology (CEHRT) may:

- i. Demonstrate the 2013 Stage 1 standards of Meaningful Use, see <http://ow.ly/BkHkX>, with 2011 Edition CEHRT;
- ii. Demonstrate the 2013 Stage 1 standards using a combination of 2011 and 2014 Edition CEHRT; or
- iii. Demonstrate 2014 State 1 standards, see <http://ow.ly.BkHsV>, using 2014 Edition CEHRT.

At this time, CMS will require the use of the 2014 Edition CEHRT in 2015. For more information, see <http://ow.ly/BkHXd>.

If you have any questions, please contact Managing Partner, Michael J. Schoppmann, Esq. at 1-800-445-0954 or via email at [MSchoppmann@DrLaw.com](mailto:MSchoppmann@DrLaw.com).



## **Ebola Crisis**

The current Ebola crisis in West Africa is undermining the very existence of the fragile societies it has invaded. Thousands of innocent men, women and children are dying and millions are at risk. The suffering of this horrible illness is a modern day plague that threatens our entire world. The people, churches and governments of West Africa have reached out to the world community and are asking for intervention in the Ebola outbreak. They need the necessary supplies and equipment to strengthen their capacity to deal with the current crisis and future healthcare emergencies. The United States and other Western countries will not be able to avoid this scourge if it is not brought under control soon.

Dr. Joe Marotta, an orthopedic surgeon from Menands, NY, founded Medicus Christi as a non-profit organization to bring modern healthcare to the people of Western Africa. He has initiated the Break Ebola campaign to help relief efforts combating the outbreak. Please consider donating to this important campaign to assist the people affected by the virus establish the necessary medical infrastructure and supplies needed to treat those afflicted and contain the disease. More information and a link for donations is available at <http://medicuschristi.com>.



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## ***SAVE THE DATE!***

THE ANNUAL WCMS & ACADEMY  
HOLIDAY PARTY WILL BE HELD ON  
FRIDAY, DECEMBER 12, 2014  
6~9 P.M.

ORIENTA BEACH CLUB  
MAMARONECK, NY

### **A DOCTOR'S BILL OF RIGHTS** *(continued from page 11)*

9. The right to be provided adequate representation by an attorney in a government, hospital, or insurance mandated review or Medical inquiry.
10. The right to have any review performed by at least 50% of the reviewing board as practicing physicians in the same specialty, defined as those having 85% or more of their income derived from clinical practice, and in the same field and county as the physician being reviewed.
11. The right to have malpractice actions, brought against physicians involving known complications of medical procedures or FDA-approved medications, reviewed by an independent board containing locally practicing physicians in the same field, before being accepted by a court.
12. The right to have records of our medical care of patients completely confidential. Government agencies and insurance companies are not allowed by contract to make physicians and patients waive this right.
13. The right to be profitably compensated for any time, service, drugs or equipment spent on a patient, including direct patient contact and any other indirect and necessary involvement such as, but not limited to, telephone calls with the patient or family, committee meetings, and time needed to research and review patient cases in detail.
14. The right to be paid adequately for our services, commensurate with our years of training, degrees obtained, and the duties we perform; and commensurate to the liability of the work done.
15. The right to expect reasonable compensation for government mandated training time and testing.





Westchester County Medical Society  
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