Loser Pays Resolution

I am tired of getting emails that say call your legislator today: “Dangerous expansion of medical malpractice is before the legislature" I am tired of medical organizations like ours and MSSNY touting holding the line with disastrous medical liability system as a victory. It is time we went on the offensive. I think we is an Academy need to do something very specific and very public that we can talk about. Loser pays, or the “English rule" levels the playing field and makes things much more fair. Legislation modeled after this resolution puts not just plaintiff, but more importantly large personal injury law firms on the hook for cost of defending unjustified lawsuits. In theory, American tort law operates under the "American rule."-That is each side pays its own attorney's fees. However in practice this is not how personal injury lawsuits legal costs are paid. We have all seen the ads for the "No Fee Guarantee." In our personal injury world, defendants who win pay their own legal fees and defendants who lose pay the legal fees-through the award and contingency fee, not only of the defendant who sued them but also of defendants who lost and were not charged a fee.

I strongly urge us to keep this broad and talk about personal liability in general, and not just medical malpractice. The public in general is actually less aware of personal injury attorney abuses of the liability system against doctors, because it is unpopular to attack physicians as a group in their ads. You will note that they always talk about the big insurance companies." Small businesses, individuals who have been sued unjustly, and municipalities are natural allies with whom the public at large can identify

It is interesting that when I did an Internet search on this subject the majority of hits were papers written by personal injury attorney's associations trying to debunk the "myth that Loser Pays is fair." Personal injury lawyers are clearly defensive about this. They always cite the "little guy" plaintiff against the giant corporation. This ignores the giant personal injury law firm against the little guy. They love to portray the insurance companies as big corporations-not pointing out that we all have to buy liability insurance and those are pass through costs to individuals, businesses and municipalities.

The reference committee may wish to fine-tune this, saying that we advocate for loser pays when the plaintiff wins as well-separating award from legal fees. Wouldn’t it be good to the de-link plaintiff’s lawyers’ fees from the size of the award?

I would urge the reference committee not to water this down to just a general statement that we need progressive liability reform. We really need to suggest seeking a sponsor for specific legislation that we can announce, generate a discussion in the media, and hopefully about which there will be hearings. Even with the aid of municipalities and small businesses-which I would see as our chief and most effective allies-we cannot match the advertising budget of the personal injury lawyers. With all their advertising now, I do not think we need to fear stirring up a hornets nest since the hornets are already on the attack.

Time does not allow exploring the nuances of this in detail or experience with it elsewhere. However just like “single-payer," this system is the norm in most other Western developed countries. New Zealand has taken it a step further and created a no-fault system, where physician negligence is handled separately from compensation for injury. My son, who practiced there for six months recently, tells me this had a dramatic effect for the better on physician attitudes and doctor-patient relationships.  
Benefits of this include shifting us from a defensive posture, public dialogue and changing the public’s perception when they are part of litigation. (Plaintive, defendant or Juror) I have no illusion that this sort of legislation would pass anytime soon. However just having the discussion robustly would be of extreme benefit, and a vast improvement on our current defensive posture

Other opportunities for progressive personal liability reform include regulating attorney advertising to dispel the quote I won the lottery" myth of gigantic awards, of course caps on pain and suffering, of a more robust arbitration option, and a no-fault system modeled on the New Zealand system.