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The Honorable Eliot Spitzer
Governor
The State of New York
State Capitol
Albany, NY 12224

Dear Governor Spitzer:

The Health Law Committee of the New York City Bar Association appreciates the time and attention you have given to mapping out a vision for the health care of New Yorkers. We eagerly anticipate your administration's initiatives for dealing with this most challenging and important issue of our time.

Our Committee is comprised of legal and medical practitioners who are involved in many different aspects of New York's health care system. What follows is a summary of those issues that our Committee considers the most critical for the years ahead.

Increasing Health Insurance Coverage in New York State

Our Committee is greatly concerned with the increasing numbers of New Yorkers who lack health insurance. We understand that there are many political and economic obstacles to the realization of universal health care coverage in our State. Nevertheless, we believe this is the time to act. Maine, Massachusetts, Hawaii and Vermont have already enacted laws to make health insurance coverage widely available throughout their states, New Jersey is seriously entertaining such a program, and the Governor of California just this week proposed near universal coverage as well. New York, with its large population, can prove itself a most effective laboratory of innovation in this area, and lead the way in developing a program that thoughtfully and equitably finances the health care needs of everyone. Doing so could finally create sense out of a system that is already well on the way to universal government-sponsored

health coverage,[1] while eliminating the estimated 20 to 31 percent of health care expenditures that now go toward the administrative costs required to support multi-payer arrangements.[2]

At a minimum, New York should alleviate the plight of the uninsured by removing unnecessary barriers to coverage for those who are already entitled to public insurance. One-half of New York's 2.6 million uninsured are eligible for Medicaid, Family Health Plus, or Child Health Plus but are not enrolled, or have lost coverage, as a result of administrative obstacles not mandated by federal or state law. Therefore, we strongly support your proposals for reducing the bureaucratic hurdles that keep eligible people from enrolling in Medicaid and other need-based health insurance coverage programs, or that complicate these programs with needless disenrollment and re-enrollment requirements.

For example, we advocate attestation of income (rather than requiring paper documentation) at the time of recertification by adults who provide a social security number and who are not self-employed, with verification through the State wage database and subject to audits by the Department of Health and health plans. We also advocate twelve month continuous eligibility for children to the extent such coverage does not already exist in Medicaid or in Child Health Plus, and for adults in Medicaid managed care and Family Health Plus. Moreover, if a child becomes ineligible for Medicaid such child should automatically be enrolled into Child Health Plus, if he or she is so eligible.

In addition, we support your proposals for incremental expansion of coverage programs. We agree with your proposal for universal health care coverage for children. This could be accomplished by raising the income eligibility level for Child Health Plus. Likewise, employer partnership programs should be expanded. Legislation introduced in the Assembly's 2005-2006 session proposed a partnership between employers and the State, under which employers could buy in-to Child Health Plus, Family Health Plus and Medicaid. Employers would be allowed to buy Family Health Plus and Child Health Plus for all employees, regardless of eligibility, as long as the employer would pay at least 80% of the premium. For those employees who are eligible for Family Health Plus, Child Health Plus or Medicaid, the employer would be charged the state-share of coverage for that employee. This would save the State money since the employer would be paying the state's share of such insurance. An approach such as this would promote employer participation in health care coverage for employees eligible for public health coverage and provide a lower-cost health insurance option for employers through the employer buy-in.

[1] Gross, Daniel, "National Health Care? We're Halfway There", *New York Times*, Dec. 3, 2006 § 3, p.4, col. 1.

[2] Woolhandler, Steffie, Campbell, Terry & Himmelstein, David, "Cost of Administration in the United States and Canada", 2003 N. Eng. J. Med, vol. 349 at 768-75 (Aug. 21, 2003), http://content.nejm.org/cgi/content/abstract/349/8/768; Sheils, John and Haught, Randall, The Health Care for All Californians Act: Cost and Economic Impacts Analysis, Lewin Group (Jan. 19, 2005) at 6, http://www.healthcareforall.org/lewin.pdf, *each cited in* Bernaske, Anna, "Health Care Problem? Check the American Psyche", *New York Times* Dec. 3, 2006 § 3 p.3 col. 1.

Family Health Care Decisions Act (A5406B)

Currently in New York in the absence of a health care proxy, medical treatments (with the exception of cardiopulmonary resuscitation) must be continued regardless of the consequences to the patient unless "clear and convincing evidence" can be shown as to the patient's wishes to the contrary. [3] New York is only one of three states[4] that apply this demanding standard, which imposes an undue burden on families, and burdens health care providers and the courts while needlessly prolonging the suffering of patients. The current state of the law also disregards the reality that close family members are almost always best situated to represent the wishes, needs and interests of a person who cannot speak for himself or herself. For these reasons, the Committee has for the past thirteen years been an advocate for the Family Health Care Decisions Act and its predecessor bills, which would afford families their proper role in medical treatment decisions for incapacitated patients.[5]

Unfortunately, the bill died yet again in June 2006 due to political stalemates involving language ancillary to the core purpose of the law. We strongly urge you to support the passage of the Family Health Care Decisions Act in the upcoming legislative session so as to enable New Yorkers to make humane treatment decisions on behalf of their loved ones.

Restructuring the Health Care Infrastructure

The Berger Commission. We understand that you have endorsed the findings of the Commission on Health Care Facilities in the 21st Century, a/k/a the Berger Commission, as a necessary step in "rightsizing" our hospital and nursing home system. While our Committee shares your view that the health care delivery infrastructure needs an overhaul, recent lawsuits filed to challenge the Commission's December 2006 report indicate that the means by which it was created, conducted its business, and arrived at its recommendations are controversial.

In light of your call in your January 3, 2007 State of the State speech to "strengthen transparency and accountability" in government, and to focus on the ultimate purposes being sought in the reform of the health care system -- i.e., to eliminate inefficiency, drive up the development and use of facilities that furnish primary and preventive care, and reduce over-utilization of costly and unnecessary facilities and treatments -- we ask you move past the Commission process to develop a blueprint for New York that will lead to these results. Only with a unified vision, framed by an understanding of how populations access the health care system depending on

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[3] *Matter of O'Connor,* 72 N.Y.2d 517, 531 (1988).

[4] The other two states are Michigan and Missouri. *see* http://www.ascensionhealth.org/ethics/public/issues/clear.asp, *see also In re Michael Martin,* 200 Mich. App. 703, 1993; *In re Michael Martin, a Legally Incapacitated Person,* Michigan Supreme Court, Nos. 99699, 99700, August 22, 1995; *Cruzan v. Director, Missouri Dept. of Health,* 497 U.S. 261 (1990).

[5] *See* When Others Must Choose: Deciding for patients without capacity, New York Task Force on Life and the Law (1992).

geography, illness, resources and other factors, can we end up with the health care infrastructure that New Yorkers deserve.

Regional Health System Agencies. One way of approaching this goal is to revive Regional Health System Agencies ("RHSAs"), which were legislatively designed for the very purpose of developing unified approaches to the efficient allocation of health care resources. While there still exists a statutory mechanism for RHSAs in Public Health Law § 2904-B, such agencies have not been funded for several years. Previously, RHSAs played a key role in vetting hospitals' proposals to purchase large equipment or making large changes. We propose that RHSAs be funded again so that they may help control the efficiency, quality and costs of the delivery of care through hospitals.

Prescription Drug Reform

A number of bills have been introduced in the New York Legislature that would improve New Yorkers' access to prescription drugs at lower cost. For example, a proposal would create a negotiating pool for prescription drugs used in the Medicaid Program, EPIC, for state public employees, for certain private health plans and for any individual who wishes to be part of the program in which the State negotiates the cost of the prescription drugs. Another would simplify the manner in which pharmacy benefit managers ("PBMs") must deal with health plans, and would make the transactions between drug manufacturers, PBMs and health plans more transparent. We ask you to consider these initiatives.

Uniform Anatomical Gift Act

The National Conference of Commissioners on Uniform State Laws adopted a revised Uniform Anatomical Gift Act ("UAGA") in July 2006. It was last revised and adopted by New York in 1987. In the intervening years, medical and technological advances have soared. There are now chronic shortages of many kinds of organs which, if available for transplantation, could prolong and improve the quality of life for many people. The newly revised UAGA is meant to facilitate an increase in donation of organs and other tissue and facilitate transplantation. We encourage you to place the updating of this act on your legislative agenda.

Electronic Health Records

The federal government has announced initiatives to encourage the development of electronic health records to replace paper records throughout the health care industry. This development will ultimately improve the quality and efficiency of care for everyone who receives health services in our nation. Unfortunately, this goal has proven difficult to realize due to its cost, and due to the complexity and decentralization of the health care industry.[6] The development of an effective network of electronic health records is further complicated by legitimate concerns

[6] Freudenheim, Milt & Pear, Robert, "Health Hazard: Computers Spilling Your History", *New York Times* Dec. 3, 2006, § 3, p. 1, col.1

regarding the confidential nature of health records in general[7] and various privacy laws in states such as New York with respect to the most highly sensitive information such as mental health records, substance abuse records and HIV status.

New York State, as a leader in health care delivery and research, should also lead in this area by expanding the availability and interoperability of electronic health records, and removing unnecessary legal and practical obstacles that face practitioners while balancing privacy concerns. In its reform efforts, New York State government must also consider whether greater access to records requires a heightened standard of care, what standards will appropriately minimize security risks, whether widespread dissemination of records can compound damages, what should be the standard for patient authentication, and what rules should apply to the sharing of records among organizations. Finally, it should consider ways in which medical providers of care can be financially incentivized to implement the costly systems that are required,[8] including by means of grants that allow them to make the large infrastructure investments that are needed to make universal electronic health records a reality.

Pain Management Legislation

Inadequate pain management has been well documented by leading medical specialists, who trace the causes to insufficient clinical awareness of proper treatment, along with a pervasive fear in the medical community of criminal and regulatory sanctions for prescribing pain medication. Legislation that affords incentives for improved palliative care medical education, as well as safe harbors for the proper use of pain medication, would go far in alleviating this problem. We hope that your Administration will recognize the importance of this issue and will work vigorously with the legislature and the healthcare community to address it. The quality of many vulnerable people's lives depends upon it.

Thank you for giving consideration to our Committee's recommendations. We wish you success as you take the helm at this time of historic change in New York.

Respectfully submitted,

Joyce Tichy, Chair

[7] Id.; Francis, Theo, "Spread of Records Stirs Patient Fears of Privacy Erosion", *Wall Street Journal*, Dec. 26, 2006 § A, p. 1, col 1.

[8] See Alliance for Heatlh Reform Brief, "Linking Providers via Information Networks", Dec. 2006, http://www.allhealth.org/publications/pub_39.pdf