December 5, 2014

William Roeder, Executive Director
State Board of Medical Examiners
P.O. Box 183
Trenton, New Jersey 08625-0183

Submitted electronically at: www.NJConsumerAffairs.gov/proposal/comment/

Re: Proposed amendments to N.J.A.C. 13:35-6.15; Continuing Medical Education on End-of-Life Care; proposed at 46 *N.J.R.* 2009(a); **PRN 2014-167**.

Dear Mr. Roeder:

The Medical Society of New Jersey (MSNJ) is the largest physician organization in the state representing physicians from all specialties, including those who practice primary care, internal medicine, radiology, pathology, and ophthalmology, among others. As such, we attempt to represent physicians at large in the state and to implement our mission to further the "delivery of the highest quality medical care...in an ethical and compassionate environment." [See MSNJ Mission Statement accessible at http://www.msnj.org/p/cm/ld/fid=25]. Our mission also requires that we "enlighten public opinion in regard to the problems of medicine" and that we "advocate for the rights of patients and physicians alike."

MSNJ supported the enabling legislation, the Physicians Orders for Life Sustaining Treatment Act (POLST), for two reasons. First, and foremost, it was becoming apparent that many patients were receiving heroic, but futile, medical treatment at the end-of-life, which they would not have wished to receive had they fully understood the discomfort and limitations of the treatments. Second, it was becoming clear through academic studies, such as the Dartmouth Atlas report, that New Jersey had the highest spend for end-of-life care in the nation. These were both important issues to the physician community and our patients. We did not, however, support the requirement that all physicians complete two CME credits on a biennial cycle as a condition of licensure. Indeed, MSNJ has policy that objects to virtually all topic-specific mandates of CME. We believe that physicians will voluntarily learn about end-of-life treatment, particularly those who are directly involved in this care.

We appreciate the flexibility that the Board has shown in terms of what programs and topics are acceptable to satisfy the CME requirement. Please accept our comments in the spirit that they are meant. We believe the Board has authority and discretion to be flexible in implementing the underlying legislation. We appreciate the opportunity to comment on the Board's proposed regulations to implement the POLST act.

The Rule Should Allow Physicians to Satisfy the Statutory Requirement with Either Category 1 or 2 Credits

MSNJ is attempting to strike a balance between the need for physicians to provide meaningful information on end-of-life care and for physicians to have discretion in their choice of CME courses depending upon their specialty, the nature of their practice, and the likelihood of counseling on end-of-life care in their practices.

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The proposed regulation states that:

> Commencing with the biennial renewal period beginning on July 1, 2013, two of the 40 credits in Category I courses shall, pursuant to P.L. 2011, c. 145 (*N.J.S.A. 45:9-7.7*), be in programs or topics related to end-of-life care.

We understand that the Board believes that the two required CME courses must be in Category 1 and that it does not have authority to deviate from the statutory mandate. However, our review of the enabling statute and the legislative history has found no indication that the Legislature intended that the courses be Category 1. The law is silent on the issue of CME category. *See* N.J.S.A. 45:9-7.7 which states that:

> The State Board of Medical Examiners shall require that the number of credits of continuing medical education required of each person licensed as a physician, as a condition of biennial registration pursuant to section 1 of P.L.1971,c.236 (*C.45:9-6.1*), include **two credits of educational programs or topics related to end-of-life care**, subject to the provisions of section 10 of P.L.2001, c.307 (*C.45:9-7.1*), including, but not limited to, its authority to waive the provisions of this section for a specific individual if the board deems it appropriate to do so. [N.J.S.A. 45:9-7.7 (a)]

Consequently, if the legislative history provides no guidance, we must look to the words of the statute itself. We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission et al. v. GTE Sylvania, Inc. et al.*, 447 U.S. 102 (1980). The statute only specifies "educational programs or topics related to end-of-life care." While this certainly requires that there be CME credits, it does not mandate that they be Category 1. The fact that the statute recognized that the waiver from this CME credit should be available suggests that the **Legislature understood that there would be physicians whose practices would not require them to be studied in end-of-life care.** Since the CME waiver provision was already codified and available to physicians, the Legislature must have realized that some physicians, by the nature of their practice, would not need this education on an ongoing basis. Otherwise, there would be no reason to reiterate the availability of the waiver.

Moreover, this Board does have authority to decide whether credits should be in Category 1 or 2. The enabling statute on CME clearly delegates this power to the Board. It states:

> [T]he State Board of Medical Examiners shall require each person licensed as a physician, as a condition for biennial registration …to complete a requisite number of credits of continuing medical education, **all of which shall be in Category I or Category II** as defined by subsection (i) of this section. [N.J.S.A. 45:9-7.1(a)(emphasis added)].

Clearly, the Board has both the power and the discretion from the Legislature to allow physicians to satisfy the statutory requirement of two credits in either Category 1 or 2.

MSNJ believes that some specialists will have little to no patient contact requiring this education. For example, pathologists do not interact with patients, though the Board's proposed regulation would require them to take two credits of Category 1 credits every two years. Pathologists might be better served, and might better serve their patients and the public, if their Category 1 course choices are more

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related to the skills and technological advancements that will be utilized in their practice specialty. Similarly, radiologists are highly unlikely to be in a position where they may share end-of-life counseling with patients. They, too, may be better served by selecting other CME courses more directly related to their practice. Ophthalmologists, will have little reason or opportunity to discuss end-of-life choices with their patients. Patients visit specialists for their expertise and expect that they will stay abreast of all new developments in their area of expertise.

MSNJ and the AMA have policy objecting to mandates for topic specific CME training. MSNJ's policy "recognizes the essential role of continuing medical education in the provision of high-quality health care, but opposes state-imposed topical CME in virtually all circumstances." [Policy & Strategy Panel (October 18, 2007); Board of Trustees (October 28, 2007]. MSNJ's policy was developed with the advice and support of MSNJ's Committee on Medical Education, then considered by our Policy & Strategy Panel, and finally adopted by the MSNJ Board of Trustees. Underlying the policy is the belief that physicians should have discretion to select courses that will best enhance the skills needed for their particular practice. We believe that physicians will make the correct choices and fear that mandates for specific courses will take many away from courses better suited to their individual needs and the skills required of their specialty. In fact, the AMA policy encourages medical societies in states which already have content-specific CME requirements to consider ways to rescind or amend those mandates. [H-300.953 accessible at https://ssl3.ama-assn.org/apps/ecomm/PolicyFinderForm.pl?site=www.ama-assn.org&uri=%2fresources%2fhtml%2fPolicyFinder%2fpolicyfiles%2fHnE%2fH-300.953.HTM].

MSNJ appreciates that all physicians should be familiar with, and able to converse on, end-of-life planning. Physicians may be approached by members of their community at any time on almost any medical subject. MSNJ strongly supports end-of-life planning. We urge members to encourage patients and their family members to engage in end-of-life planning. All physicians should be familiar with the need for advance directives and knowledge of how to complete POLST forms. They should be able to direct patients and their families to other resources, including their primary care physicians, to discuss end-of-life planning. Knowledge of end-of-life care will enhance the physician's ability to discuss and assist their patients and others in the community. However, we question the need for all physicians, regardless of specialty and type of practice, to take two Category 1 credits on end-of-life care every two years as a condition of licensure.

The Board Should Carefully Consider Each Request for a Waiver from the CME Requirement

As noted above, in enacting the POLST legislation the Legislature specifically referenced the waiver provision that would be available to physicians seeking to be exempt from the end-of-life CME requirement. Since the waiver provision was already available we must assume that the Legislature's reiteration of the provision was deliberate and purposeful. We believe that the Legislature recognized that the need for end-of-life training, particularly the amount and Category of credit, would vary depending on the nature of the physician's practice. Therefore, in implementing the regulation we respectfully urge this Board to carefully consider whether a physician requesting a waiver has satisfied the legislative intent once he/she has completed two credits of Category 1 credit in end-of-life care. We respectfully urge this Board to consider whether a physician who has little to no patient contact should be required to complete two credits in end-of-life care on a recurrent two year basis when his/her practice skills will not be furthered by this specific content requirement.

We are confident that it is entirely within the authority and discretion of this Board to waive the CME requirement in the above circumstances.

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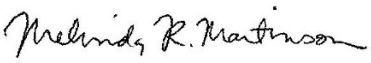
The Board Should Convene its Continuing Medical Education Advisory Board to Evaluate Comments Filed

According to the statute on continuing medical education, this Board is required to:

> [C]reate an advisory committee to be comprised of at least five members, including representatives of the Medical Society of New Jersey, the Academy of Medicine of New Jersey, the New Jersey Osteopathic Association, the New Jersey Podiatric Medical Association and such other professional societies and associations as the board may identify, to provide guidance to the board in discharging its responsibilities pursuant to this section; … N.J.S.A. 45:7.1(b)(4).

MSNJ has identified the chair of our Committee on Continuing Medical Education as our representative to serve on the Advisory Committee. Our chair was not consulted on the rulemaking and it appears that the Advisory Committee was not convened. To our knowledge none of the identified associations was consulted. Therefore, we respectfully request that the Advisory Committee be convened to consider comments filed and the authority, discretion, and flexibility that we believe this Board has in implementing the enabling statute. For all of the above reasons, MSNJ respectfully submits that it is entirely within the Board's authority and discretion to implement the statute's required two credits of end-of-life care by allowing the credits to be in either Category 1 or Category 2. Alternatively, the Board should require Category 1 credits only in this current 2013 biennial cycle (or the first license year of a new licensee) and permit either Category 1 or 2 credits in the succeeding cycles. We trust that physicians will choose the most appropriate category based on the nature of their practice and that those who have a need to keep current on end-of-life care will take two Category 1 credits at a minimum.

Respectfully submitted,



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