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Dorcas O'Neal, Executive Director
Physician Assistant Advisory Committee
124 Halsey Street
PO Box 45035
Newark, New Jersey 07101

**Re: PRN 2010-184; Proposed Amendments to NJAC
13:35-2B.4 and 2B.10 concerning Physician Assistants; 42 NJR
2001 (a) (September 7, 2010)**

Dear Ms. O'Neal:

The Medical Society of New Jersey (MSNJ) appreciates the opportunity to provide comments to proposed amendments expanding the scope of practice of physician assistants on behalf of our members. MSNJ represents 9,000 physician members in the state of New Jersey, many of whom employ physician assistants.

The Board of Medical Examiners (the Board) is proposing to amend NJAC 13:35-2B.4 (a) 6 which currently allows a physician assistant **to facilitate** the referral of patients **to healthcare facilities and other agencies and resources** in the community. The Board's proposal would expand the permitted scope of practice to allow the **actual referral** of patients, rather than only permitting the facilitation of such a referral. The Board would further expand the regulatory language to allow the actual referral to health care practitioners, significantly, **to other physicians.**

The board also proposes to amend the regulation concerning supervisory ratios from two to four in the practice setting. Currently, NJAC 13:35-2B.10 (b)(5) sets the supervisory ratio at two physician assistants per physician in the private office setting and four physician assistants per physician in hospital or institution-based facilities. The proposal would create parity in the supervisory ratio in all settings.

MSNJ objects to the proposed expansion of the physician assistants' scope of practice concerning referral authority. The proposal would expand the physician assistants' scope of practice in two significant ways; by allowing the actual referral—the medical

analysis and decision-making; and, by expanding the referral authority to healthcare providers--the professionals and allied health professionals to whom referrals are made.

MSNJ believes that the proposal is not permitted by the authorizing statute. The regulation, NJAC13:35-2B4 (a) 6, is a restatement of the authorizing statute, NJSA 45:9-27.16 7 (a) (6). When the Legislature passed the law delineating the scope of practice for physician assistants, it specifically limited the referral power of physician assistants to:

Facilitating the referral of patients to, and promoting their awareness of, health care facilities and other appropriate agencies and resources in the community. [NJSA 45:9-27.16 (7)(a) (emphasis added)].

Clearly, if the Legislature intended for physician assistants to make actual referrals (rather than to facilitate referrals), to healthcare providers, (rather than to facilities and agencies), it would have simply said so. The Board cannot expand the physician assistants' scope of practice beyond the enabling statute. It is well-settled in law that an agency's power is limited by the enabling statute. Indeed, the New Jersey Superior Court Appellate Division recently reminded the medical community that the physician assistants' scope of practice is strictly limited by statute in *Selective Insurance v. Rothman*. We quote from that case:

The Legislature's intent is the paramount goal when interpreting a statute and, generally, the best indicator of that intent is the statutory language. *DiProspero v. Penn*, 183 N.J. 477, 492 (2005)(citations omitted). We ascribe to the statutory words their ordinary meaning and significance. *Id.* (citations omitted). Furthermore, it is not our function "to rewrite a plainly-written enactment of the Legislature [] or presume that the Legislature intended something other than that expressed by way of the plain language." *Id.* (citations omitted.)

In addition to the statute's plain language limiting the physician assistants' scope of practice is the statute's serious penalty for any physician who allows a physician assistant under his supervision to exceed the scope of practice:

Any physician who permits a physician assistant under his supervision to practice contrary to the provisions of this act shall be deemed to have engaged in professional misconduct in violation of [the act] and shall be subject to disciplinary action by the board....[NJSA 45:9-27.17 (8)(b)].

Clearly, the Legislature expected the physician assistants' scope of practice to be strictly construed, not a slippery slope, and to be enforced by physicians.

MSNJ believes that the Legislature's intent to limit the referring authority of physician assistants must be honored. Indeed, if a party wished to expand the physician assistants' scope of practice to include referrals it must seek legislation to that effect. To expand the scope by regulation in the face of the clear statutory language would be deemed *ultra vires* by a reviewing court.

While the reasons that the Legislature reserved the referral power to physicians need not be examined, they are well-founded.

First, the actual referral from a licensed physician to another licensed physician requires medical analysis and decision-making based on the specific clinical case. It also requires the exercise of judgment and discretion to ensure the best possible referral for the patient's specific medical condition as well as a match with the patient's personality and personal preferences in terms of treatment style.

The board is well aware of the education and training requirements for physicians and those for physician assistants. They are vastly different. The educational requirements of a physician assistant are not equivalent to those of even a first year resident. Physician assistants are not in an equivalent position to make the medical, clinical judgments for referrals. Patients expect that significant medical judgments—such as referrals—will be made by a professional who has completed medical school and training.

Second, the physician-patient relationship is built upon trust in large part. That trust includes the implicit promise between physician and patient that the physician will always act in the best interest of the patient. Acting in the patient's best interest includes referring the patient to another physician when it is prudent and medically necessary. Allowing physician assistants to make such decisions dilutes the physician-patient relationship and could result in fractures in the continuity of care.

Third, while the supervising physicians must "regularly review" the physician assistant's practice, NJAC 13:35-2B.10(b)(e), in the office setting the physician is only required to sign-off on orders in

charts within seven days. NJAC 13:35-2B.10(b)(4)(ii). Permitting physician assistants to directly refer to physicians essentially removes this medical judgment from the purview of the supervising physician. Since referrals may occur more quickly than the supervisory standard, it is possible that a physician assistant could effect a referral to another physician without the advice and oversight of the supervising physician. This could result in an increase in the cost of care if the referral is not necessary, appropriate or based on sound medical judgment. This, too, could result in a continuity of care issue.

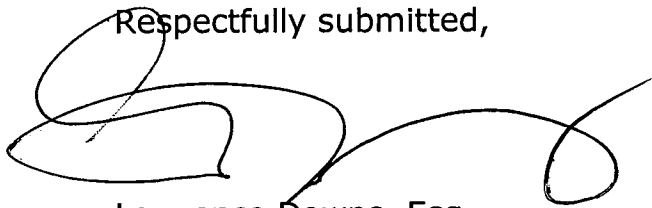
Similarly, allowing direct referrals to facilities for advanced imaging services such as CTs or MRIs may not be medically necessary or appropriate. Allowing these direct referrals by physician assistants for advanced imaging services may result in over-utilization, unnecessary radiation exposure, and an unwarranted increase in costs. All of this goes against current healthcare reform initiatives.

Finally, MSNJ believes that patients expect that significant medical judgments—such as referrals—will be made by a physician who has completed medical school and training. This is part and parcel of the physician-patient relationship that should not be diminished.

It bears noting that none of our members has asked that the physician assistants' scope of practice be expanded to include actual referral authority to other healthcare providers, including their peers, without the advice and oversight of the supervising physician.

The regulation setting supervisory ratios is not limited by statute and is entirely within the purview of the board with the counsel of the Physician Assistant Advisory Committee. It is appropriate to defer to the judgment and recommendation of the Physician Advisory Committee to equalize the supervisory ratio in all settings. MSNJ defers to the committee and board on the issue of supervisory ratio parity for all settings.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Lawrence Downs', with a large, stylized flourish extending to the right.

Lawrence Downs, Esq.
General Counsel
MSNJ

Cc: Board of Medical Examiners