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**Attn: Gerald S. Smith, Senior Counsel in Charge**

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Re: Proposed Regulation of the State Board of Medicine:  
49 Pa. Code §16.52: Expert Witnesses

Speaker

Mark D. Burd, MD  
Middletown

Dear Mr. Smith:

Immediate Past President

Russell S. Breish, MD  
Philadelphia

On behalf of the over 4,800 members of the Pennsylvania Academy of Family Physicians ("PAFP"), we are pleased to provide input to the State Board of Medicine in its development of regulations which directly impact family physicians in Pennsylvania. The PAFP offers the following comments and concerns with respect to the Board's proposed regulation establishing criteria for the qualification of expert witnesses appearing before the Board and its Hearing Examiners.

Executive Vice President

John S. Jordan, CAE  
Harrisburg

The Board has proposed the adoption of the criteria for qualifying expert witnesses established by § 512 of the Medical Care Availability and Reduction of Error Act ("Mcare Act"), Act of March 20, 2002, P.L. 154, No. 13, 40 P.S. § 1303.512. Section 512, however, is specifically designed to set parameters for expert testimony in "a medical professional liability action against a physician." 40 P.S. § 1303.512(a).

A "medical professional liability action" is defined by the Mcare Act as "any proceeding in which a **medical professional liability claim** is asserted, including an action in a **court of law or an arbitration proceeding.**" 40 P.S. § 1303.103. A "medical professional liability claim" is further defined as "any claim seeking the **recovery of damages** or loss from a health care provider arising out of any tort or



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breach of contract causing injury or death resulting from the furnishing of health care services which were or should have been provided." *Id.* (emphasis added)

**By definition and specific reference in the Mcare Act, the expert qualifications governed by § 512 apply solely and only in the civil tort claims context.**

By contrast, cases against physicians initiated before the Board under Sections 904 and 905 of the Mcare Act (40 P.S. §§ 1303.904 and 1303.905) are administrative **licensure** actions implicating the **very core of a physician's right to practice medicine** in Pennsylvania and are **distinctly different from tort claim actions where only the payment of money is involved**. Administrative claims are distinct and different from civil claims. Huhta v. State Board of Medicine, 706 A.2d 1275 (Pa. Cmwlth. 1998).

The Medical Practice Act of 1985, Act of December 20, 1985, P.L. 457, No. 112, as amended, 63 P.S. § 422.1 *et seq.* (the "MPA"), provides direct and unequivocal guidance to the Board as to the applicable standard of care which must be applied in administrative proceedings where the standard of care, and deviation from that standard which implicates negligent practice, is at issue. Section 41(8)(ii) of the MPA provides pertinently:

A practitioner departs from, or fails to conform to, a quality standard of the profession when the practitioner provides a medical service at a level beneath the accepted standard of care. The board may promulgate regulations which define the accepted standard of care. In the event the Board has not promulgated an applicable regulation, **the accepted standard of care for a practitioner is that which would be normally exercised by the average professional of the same kind in this Commonwealth under the circumstances, including locality and whether the practitioner is or purports to be a specialist in the area.**

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40 P.S. § 422.41(8)(ii) (emphasis added)

A Pennsylvania physician must be judged in an administrative proceeding before the Board in reference to (1) the care exercised by an average professional of the same kind, including area of specialty, (2) under the circumstances involved, (3) in the locality within Pennsylvania where the physician provided the care. **The broader expert witness qualifications of § 512 of the Mcare Act** are not consistent with, and – as will be described in detail below -- in fact **run counter to, the MPA.**

The Board derives its regulatory authority from the MPA, and only minimally from the Mcare Act. Regulatory action must be within the strict and exact limits defined by the enabling statute in language that is clear and unmistakable. Pennsylvania Medical Society v. State Board of Medicine, 546 A.2d 720 (Pa. Cmwlth. 1988). A regulation which exceeds the Board's authority or conflicts with the legislative authority will be stricken as invalid and unenforceable. Rand v. State Board of Optometry, 762 A.2d 392 (Pa. Cmwlth. 2000).

The only regulatory authority granted by the Mcare Act to the Board is found at § 904, which provides that the Board "shall develop criteria and standards for review based on the **frequency** and **severity** of complaints filed against a physician." 40 P.S. § 1303.904(a). **The expert qualifications regulations proposed by the Board are not authorized by the Mcare Act; rather, the authority must be derived from the MPA.**

The MPA provides specific guidance on the standard of care against which a Pennsylvania physician must be judged. The Board has not in its entire history, for reasons that are obvious, promulgated a regulation or even contemplated that a physician practicing in Pennsylvania should be judged by or held to a standard of care outside of or unrelated to the practice of medicine in this Commonwealth. It makes no legal or logical sense that a physician can lose his license to practice in Pennsylvania because he deviated from some standard of care adopted by California, for example, or any other U.S. jurisdiction.

Similarly, the Pennsylvania State Board of Medicine has consistently taken the position that the evaluation of medical care and treatment and rendering an opinion thereon constitutes the practice of medicine in Pennsylvania and requires a license in this Commonwealth. The Mcare Act as it applies to administrative licensure proceedings before the Board has not negatively impacted this rational position.

As a practical matter, a physician who has never practiced in Pennsylvania, or practices in a geographic or demographic area different from the practice of the physician whose license is on the line, cannot reasonably offer credible testimony about the standard of care in Pennsylvania. The PAFP submits that a physician who intends to serve as an expert witness in a case before the State Board of Medicine must also hold a license to practice medicine in Pennsylvania to exhibit actual familiarity with the standard of care in Pennsylvania, in the locality and the specialty in which the physician who has been charged will be judged.<sup>1</sup>

The PAFP does applaud the Board for recognizing specialty certification by agencies other than an American Board of Medical Specialties ("ABMS") at subsection (c)(3) where appropriate in the qualification of an expert witness.

In light of the above, the PAFP suggests that the following amendments be made to the proposed regulation:

**§ 16.52. Expert witnesses.**

**To enhance the quality of expert testimony given in disciplinary proceedings before the Board and its hearing examiners, the Board adopts the criteria for qualification as an expert established by section 512 of the Medical Care Availability and Reduction of Error (Meare) Act (40 P.S. § 1303.512), as follows following criteria for expert witnesses shall apply:**

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**(2) *Medical testimony.***

**(i) An expert testifying on a medical matter, including the standard of care, risks and alternatives, causation and the nature and extent of the injury, shall:**

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<sup>1</sup> Contrary to the Board's apparent misapprehension of the PAFP's commentary during the drafting stage of the proposed regulation, any expert who opines on the standard of care involved in a case before the Board should meet the Pennsylvania licensure requirement, whether testifying for or against a physician whose license is on the line.

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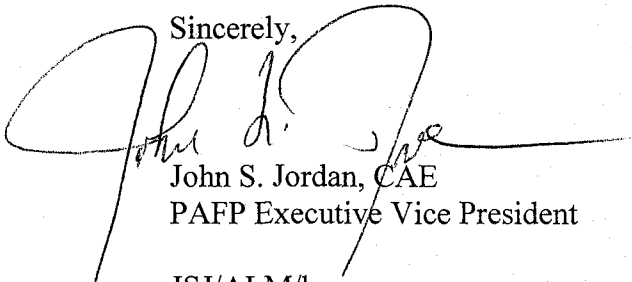
**(A) Possess an unrestricted physician's license to practice medicine and surgery in ~~any state or the District of Columbia~~ Pennsylvania.**

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With the above amendments, the PAFP supports the proposed regulation as a reasonable and helpful clarification of the expected level of proof required justifying the imposition of disciplinary action against a physician's license to practice medicine in Pennsylvania.

The PAFP appreciates this opportunity to articulate its comments and concerns with the regulatory proposal and looks forward to working with the Board as the regulatory process continues in this important matter.

Sincerely,



John S. Jordan, CAE  
PAFP Executive Vice President

JSJ/ALM/kr  
Enclosures

cc: Jane A. Corson, M.D., PAFP President  
Bradley Fox, M.D., PAFP President-Elect  
Charles I. Artz, Esq., PAFP General Counsel  
April L. McClaine, Esq., PAFP Counsel