



BOARD OF DENTISTRY

Steven L. Beshear
Governor

312 Whittington Parkway, Suite 101
Louisville, Kentucky 40222
Phone: (502) 429-7280
Fax: (502) 429-7282
<http://dentistry.ky.gov>

David J. Beyer
Executive Director

May 8, 2015

Mr. David J. Beyer
Executive Director
Kentucky Board of Dentistry
312 Whittington Parkway
Louisville, Kentucky 40222

Dear Mr. Beyer:

You sent me three emails asking me to opine regarding several issues, some but not all of which were definitively addressed by my "Opinion Concerning KBD Members, Regional Testing Agencies, and Examinations Used by the Board to License Dentists in Kentucky dated March 13, 2015." I will reiterate the answers I gave, but also address the questions you've asked regarding the actions the Board can or should take in response to that Opinion. I also will add one bit of advice at the end to all Board members concerning their actions within the collegial body that is the Kentucky Board of Dentistry corporate.



The first question you ask is:

Regarding your prior written legal opinion about testing agencies, what is your opinion about the continued involvement of board members with the testing agencies; specifically, some board members have expressed a desire to be an officer, on the board of the testing agencies, or involved with various committees of these testing agencies? In addition, some board members have indicated they will continue to participate in the testing.

Please reference my answers to Questions 3 and 4 of my March 13, 2015, Opinion. In answer to Question 3, I stated,

Executive Order 2008-454 states the action a board member with such a conflict of interest must take: (1) the member must publicly disclose his or her role with the testing entity or with ADEX; and (2) the board member abstain from “all decisions concerning his or her interest if the decision should affect him or her as a member of a . . . profession . . . in a manner different from other members of the . . . profession” Decisions about the examinations used by the Board to issue licenses can affect the continued status of the board member, positively or negatively, with the testing organization. This would not be an outcome that applies to all the Board’s licensees, some of whom are not part of the entities’ boards or committees.

Simply put, this means Board members who are testing agency committee members must recuse themselves from any Board discussion or decision about testing. This includes discussions and decisions about one testing agency, even a different one than the agency on whose committee the Board member sits; about a company who develops a test; about whether the Board should continue to use tests; or even about whether a licensee has successfully passed a test used by the Board to approve licensees.

Later in this letter, I will suggest one course of action the Board may take should a Board member decide to participate in a testing agency committee, disclose that participation to the Board, and recuse themselves from discussions and decisions of the Board regarding testing. That advice will follow from these two rhetorical questions:

- Whose interest is served when a Board member disqualifies themselves from Board activity by taking personal action in conflict with their Board duties: the Board’s interest or their own interest?
- Although recusal does not subject Board members to disciplinary action when they take such personal actions, do Board members act contrary to the best interests of the Board and the public by disqualifying themselves from the role for which they were appointed?



You also asked about Board members’ continuing to proctor licensing tests. In answer to Question 4 in my March 13, 2015, Opinion, I stated,

[A] board member would be able to proctor [an] examination, but could not be paid by the testing entity for that service.

More broadly concerning voting Board members’ receipt of compensation—whether that receipt is current or in the future—in return for membership on a testing agency committee or for proctoring exams, that Board member would violate KRS 313.020(2). That violation would subject their dentistry or dental hygiene license to discipline by the Board. Obviously, Board members can volunteer their services to proctor exams.



You asked follow up questions concerning the discussions or decisions a Board member would be disqualified from making should he or she continue as a committee member of a testing entity. Specifically, you asked,

What discussions or decisions by the Board must a Board member be excluded from if they have been or are involved with testing agencies, i.e., may Board members currently involved with testing agencies participate in discussions or decisions by the Board about testing agency matters such as those issues in items 3, 4 and 7 of the agenda for Saturday's meeting?

I addressed the scope of disqualification regarding Agenda Item 7: those disqualified Board members could not participate in the discussion or decision on this item. Affected Board members would be disqualified from participation in the discussion and decisions of the Board regarding Agenda Item 4 as well.

Regarding Agenda Item 3, obviously the affected Board members could not discuss or vote about the monies they have received after the March 13, 2015, Opinion. Receipt of those monies after that Opinion subjects voting Board members to discipline by the Board. Obviously, the affected Board members would be excluded from the Board's deliberations concerning disciplinary action the Board might pursue against such a Board member.



The remainder of this letter will address actions the Board may take. The Board's Agenda Item 3 calls for the Board to address Board members' continued involvement in testing agency committees after my March 13, 2015, Opinion. Your third question asks,

Should the board members who are not conflicted out of the discussions and decision in questions #1 above, vote to direct those involved with the testing agencies to terminate their involvement with the testing agencies?

While I will not say that the Board should direct its members to terminate all formal association with testing agencies, whether compensated or not, the Board most certainly can so vote. The Board acts as a body corporate. The will of the Board is expressed through the votes it takes. If a majority of a quorum of the Board votes to direct Board members to terminate activities that disqualify those members from their ability to participate in the Board's work to protect the public, that would be the will of the Board, which individual Board members would be obliged to follow. Further, as previously stated, those Board members who are currently testing entity committee members would be disqualified from the quorum that discusses and votes on this question.

You ask what the Board should do if Board members were to disregard the direction of the Board, by vote, to step down from those positions. You ask,

If the Board votes to direct members currently involved with testing agencies to terminate their involvement what, if any, remedies are there for failure to abide by that directive?

Currently, the Governor's office refers alleged violations of its Executive Orders to the Executive Branch Ethics Commission. That office will investigate the matter and make a recommendation to the Governor's office about whether a violation has taken place. Although no specific consequence is spelled out in any law or other source, if the Governor's office believes a Board appointee has acted in direct contravention of a Board vote that he or she terminate association with an entity because that involvement does not allow the Board member to perform the duties for which the appointment was made, the Governor could rescind that Board member's appointment. Hopefully, that action will never have to be taken.



Finally, you explained that “[p]reviously, the Board entered into written agreements/contracts with each of the testing agencies. Pursuant to these agreements, the Board agreed to abide by the bylaws of these agencies and provide members to committees and other positions within the testing agencies.” Then you ask ,

Should the Board itself rescind or withdraw from agreements or contractual entanglements with the testing agencies?

The short answer is yes, the Board should rescind these agreements for the reasons that follow. The Board should not enter into agreements that constrain its ability to act independently of the by-laws of third party organizations. Additionally, based on my March 13, 2015, Opinion, which construes Executive Order 2008-454, Board members' membership on third party organizations' committees disqualifies those Board members from Board discussion/action that would affect their status with the organization. Further, their membership on these committees presents an unavoidable conflict of interest that prevents their unbiased participation in discussions about the entity with whom they have an association and discussions about any other competitor organization. All discussions about these third party entities would always present these conflicts and would always require these Board members' recusal. Thus, I advise the Board to rescind these agreements.



One final suggestion to all Board members. No one Board member can act for the Board. In the absence of an authorizing statute or regulation, only the Board as a whole can act or empower a Board member to act on behalf of the Board. If any Board member is asked to perform a role in another organization because of their status as a Board member, that Board member should, in fact, must first receive approval from the full Board by its vote. Otherwise, a Board member is assuming authority he or she does not have.

On a related note, if a Board member wants the full Board to consider action of any kind, the Board member should not send emails to other Board members explaining their request or soliciting support or otherwise discussing the matter outside a full Board meeting. All such requests should be sent to your Executive Director, who, in cooperation with your Chair and Vice-Chair, will put the matter on the agenda for a future meeting.

∞

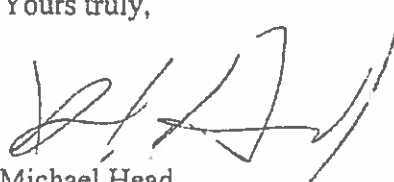
As a last matter, let me be clear. The problem I am identifying is this: voting Board members should consider the prudence of refraining from formal association with any entity regulated by the Board, or any entity whose activity is regulated by the Board. Informal associations—such as attendance at conferences hosted by such entities or memberships in such entities—are permitted. The informal association means activities that do not include accepting committee appointments, officer positions, and the like with such organizations, or receiving compensation such attendance. It also means that voting Board members should consider refraining from attending such entities' meetings, conferences, or any other function hosted by such an entity in any manner that gives the appearance that such attendance is as a representative of the Board, unless the Board has approved the Board member's attendance on its behalf. Additionally, formal associations with entities which themselves, or whose activities, are not regulated by the Board are permitted.

∞

I am answering your questions, David. But obviously, my answers are for the Board's edification and to help guide its actions and the actions of its members. Please distribute this letter to all Board members prior to the meeting Saturday. Please also attach your emails in which you asked your questions, and also attach a copy of my March 13, 2015, Opinion.

Let me know if you have any questions.

Yours truly,

A handwritten signature in black ink, appearing to read 'M. Head', with a stylized flourish at the end.

Michael Head
Board Counsel
Kentucky Board of Dentistry