



COMMONWEALTH OF KENTUCKY  
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February 11, 2015

Board Members  
Kentucky Board of Dentistry  
312 Whittington Parkway, Suite 101  
Louisville, Kentucky 40222

Re: Legal Opinion re: Board Member  
relationships with testing companies

Dear Board Members:

I have been made aware of the legal issue concerning board members' ability to receive compensation and/or benefits from companies that create and/or administer the tests used by the board to grant applicants licensee status. I am aware that this issue has not been resolved and continues to be a source of disagreement between board members. As OAG counsel for the board, I think it is best for me to provide the board with an opinion in writing. I also think it best to first solicit all of the board members' thoughts on this issue. I need to know the facts and the arguments being made so I can provide complete and appropriate advice to the board.

In order to prepare my opinion for the board before its next meeting on March 14, I would like any board member who wishes to give me input to write me by February 20. I would like the following information:

- 1) The activities the board member would like to be able to perform;
- 2) The company with whom or for whom the board member will perform these activities;
- 3) The relationship that the company has with the board, including especially the service it performs for the board;
- 4) The benefits, whether monetary or in kind (such as travel, lodging, meals, etc.), that the board member wants to be able to receive in return for or in association with these activities; and
- 5) Why the board member thinks performing the activities and receiving the benefits is permitted by law.

To: Board Members, Kentucky Board of Dentistry  
Re: Legal Opinion re: Board Member relationships with testing companies  
Date: February 11, 2015

My job is not to "take sides" in this matter. It is to advise the board on the activities permitted by law and on how the board members can act in compliance with the law. I welcome input from any member, but I would like that input in writing, which can be by snail mail to the address below, or to my email address, [Michael.Head@ky.gov](mailto:Michael.Head@ky.gov).

Thanks,



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To: Robert Zena, D.M.D.  
Board Chair

David Breyer  
Executive Director

From: Michael Head  
Assistant Attorney General  
Counsel to the Kentucky Board of Dentistry

RE: Opinion Concerning Kentucky Board of Dentistry Members, Regional Testing  
Agencies, and Examinations Used By the Board to License Dentists in Kentucky

Date: March 13, 2015

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I have been asked to provide the Kentucky Board of Dentistry with an opinion concerning several questions related to board members, licensing examinations, and the regional testing agencies that administer those examinations to applicants for licensure to practice dentistry in Kentucky. I asked board members to submit questions and information they believed would need to be addressed. Based on these submissions, the questions presented, and my opinion regarding each, follow.

**Questions:**

- (1) May a voting member of the Kentucky Board of Dentistry receive compensation from an entity whose examination is used by the Board to license dentists in Kentucky?
- (2) If the answer to question (1) is no, when attending conferences hosted by an entity whose examination is used by the Board to license dentists in Kentucky, can a voting board member nonetheless receive travel, lodging, or meal reimbursement from the entity?
- (3) May a voting member of the Kentucky Board of Dentistry serve as an officer for or on the board of directors, committee, or other decision-making body of an entity whose examination is used by the Board to license dentists in Kentucky?
- (4) May a voting member of the Kentucky Board of Dentistry serve as a proctor for the administration of an examination used by the Board to license dentists in Kentucky?
- (5) May a voting member of the Kentucky Board of Dentistry participate in developing an examination used by the Board to license dentists in Kentucky?
- (6) Is an ex officio member of the Board subject to the same requirements and restrictions that a voting member of the Board is subject to?

### **Short Answers:**

1. No. A voting member of the Kentucky Board of Dentistry is statutorily prohibited from receiving compensation from an entity whose examination is used by the Board to license dentists in Kentucky.
2. No. When attending conferences hosted by an entity whose examination is used by the Board to license dentists in Kentucky, voting board members are prohibited from receiving travel, lodging, and meal reimbursement from the entity.
3. Qualified yes. A voting member of the Kentucky Board of Dentistry may serve as an officer for, or on the board of directors, committee, or other decision-making body of, an entity whose examination is used by the Board to license dentists in Kentucky. However, the board member must (1) publicly disclose his or her role with the examination entity; and (2) abstain from decisions by the Board related to examinations used by the Board to license dentists in Kentucky. Also, pursuant to the answers to Questions 1. and 2. above, Board members who so serve shall not receive any compensation for their services.
4. Qualified yes. A voting member of the Kentucky Board of Dentistry may serve as a proctor for the administration of an examination used by the Board to license dentists in Kentucky so long as no compensation is received by the board member.
5. Qualified yes. A voting member of the Kentucky Board of Dentistry may participate in developing an examination used by the Board to license dentists in Kentucky so long as no compensation is received by the board member.
6. Qualified yes. Because an ex officio member of the Kentucky Board of Dentistry is not a voting member of the Board, they are not subject to the compensation prohibition in the Board's statutes. They are, however, subject to the disclosure requirements and abstention requirements applicable to voting board members as described in answer to Question 3. above.

### **Question 1 Analysis:**

The first question to be addressed is whether a voting member of the Kentucky Board of Dentistry may receive compensation from an entity whose examination is used by the Board to license dentists in Kentucky. This is answered by KRS 313.020(2), which strictly prohibits a "voting member" of the Kentucky Board of Dentistry from receiving compensation from or having a financial interest in any entity over which the Board has regulatory authority or for which it sets standards. This prohibition is unequivocal and without exception.

The Kentucky Board of Dentistry regulates the practice of dentistry within the Commonwealth of Kentucky, including licensing dentists, in accordance with KRS Chapter 313 and Title 201 KAR Chapter 8. Regarding licensure of dentists, the



legislature, through KRS 313.021(1)(j), grants the Board authority to “[s]elect the subject matter and standards of proficiency for examinations related to issuance of licenses . . . under this chapter or administrative regulations promulgated hereunder[.]” In addition, KRS 313.035(1) directs the Board “to promulgate regulations . . . relating to dentists,” which regulations “shall include . . . licensure of dentists through examination.” In carrying out this responsibility, the Board promulgated 201 KAR 8:532 Section 2(2), which requires each applicant for licensure to “successfully complete a clinical examination.” The regulation lists five entities whose “regional clinical examinations” the Board “shall accept.” These testing agencies are (1) the Council of Interstate Testing Agencies (“CITA”); (2) the examination of the Central Regional Dental Testing Services (“CRDTS”); (3) the examination of a North East Regional Board of Dental Examiners (“NERB”); (4) the examination of the Southern Regional Testing Agency (“SRTA”); and (5) the examination of the Western Regional Examining Board (“WREB”). Currently, two of the five regional testing agencies (NERB and SRTA) utilize the American Board of Dental Examiners (“ADEX”) examination.

Based on these laws, the Board has regulatory authority over examinations required for dentistry licensure in Kentucky. By virtue of this authority, implicitly and explicitly, the Board has regulatory authority over the entities that create and administer these examinations as well. The Board also sets the standards for the examinations that are required for dentistry licensure and, again, implicitly and explicitly, for the entities that create and administer these examinations. Thus, KRS 313.020(2) unequivocally prohibits a “voting member” of the Kentucky Board of Dentistry from receiving compensation from, or having a financial interest in, any regional testing entity listed in 201 KAR 8:532 Section 2(2) and in any entity that creates a test used by those regional testing entities.

Therefore, a voting member of the Kentucky Board of Dentistry is prohibited from receiving compensation from ADEX, CITA, CRDTS, NERB, SRTA, and WREB. Additionally, pursuant to KRS 313.080(2)(a), a voting member of the Board licensed in Kentucky as a dentist who receives compensation shall be subject to discipline by the Board.

## **Question 2 Analysis:**

The second question asks whether, when attending conferences hosted by an entity whose examination is used by the Board to license dentists in Kentucky, a voting board member nonetheless may receive travel, lodging, or meal reimbursement from the entity. The answer to this question requires consideration of the definition of “compensation.”

The Executive Branch Ethics Commission’s law defines compensation in KRS 11A.010(3). That provision broadly defines compensation as,

any money, thing of value, or economic benefit conferred on, or received by, any person in return for services rendered, or to be rendered, by himself or another.

Travel, lodging, or meal reimbursements, in the circumstances they are sought to be received by board members, qualify under this broad definition as any "thing of value, or economic benefit" "in return for services rendered, or to be rendered." It cannot be argued that the benefit received is not "in return for services rendered," even if the service is only an appearance at a conference. Obviously, the benefit would not be paid to any member of the public. It is paid to the board member, as a board member, because the board member makes an appearance at the conference, even if that appearance benefits the Board as well.

Thus, for the same reasons stated in answer to Question 1, when attending conferences hosted by an entity whose examination is used by the Board to license dentists in Kentucky, a board member shall not receive travel, lodging, or meal reimbursement from the entity. Obviously, attending these conferences without compensation is not prohibited.

As stated previously, pursuant to KRS 313.080(2)(a), a voting member of the Board licensed in Kentucky as a dentist who receives travel, lodging, or meal reimbursement from an entity whose examination is used by the Board to license dentists in Kentucky shall be subject to discipline by the Board.

### **Question 3 Analysis:**

The next question concerns whether a member of the Kentucky Board of Dentistry may serve on the board of directors, committee, or other decision-making body of an entity whose examination is used by the Board to license dentists in Kentucky.

This question is addressed by Executive Order 2008-454, which concerns conflicts of interest of members of policy-making and regulatory boards. The Order states:

A state policy-making or regulatory board or commission member shall disclose to the other members of the board, commission, authority, council or committee of which he or she is a member, any direct or indirect interest in any undertaking that puts the member's personal interest in conflict with that of the agency. This disclosure shall be made in writing or shall be recorded in the minutes of a formal meeting. A member who is required to publicly disclose a direct or indirect interest shall abstain from all decisions concerning his or her interest if the decision should affect him or her as a member of a business, profession, occupation, or group in a manner different from other members of the business, profession, occupation, or group.

The executive order explicitly covers the Kentucky Board of Dentistry.

On January 23, 2009, the Kentucky Executive Branch Ethics Commission issued Advisory Opinion 09-9, which further clarified Executive Order 2008-454. The Advisory Opinion asserts that the Board's responsibility for licensing dentists, including its responsibility over examinations used to license dentists, presents a conflict of interest for a Board President who wishes to serve concurrently as president of one of the four testing agencies listed in 201 KAR 8:220, which is a predecessor regulation to 201 KAR 8:532 Section 2(2). Because the Advisory Opinion identifies the source of the conflict to be found in the Board's regulatory authority over licensing exams, serving on the board of any of the testing entities listed in 201 KAR 8:532 Section 2(2), or on the board of ADEX, which provides the examination to two of those entities, creates a similar conflict of interest.

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.

In addition, for the reasons stated in answer to Questions (1) and (2) above, a voting board member would be prohibited from receiving compensation for serving on the board or committees of any of the testing entities listed in 201 KAR 8:532 Section 2(2), or on the board or committees of ADEX, which provides the examination to two of those entities.

#### **Question 4 Analysis:**

Turning to the fourth question, I have found no law that prohibits a board member from proctoring the administration of an examination used by the Board to license dentists in Kentucky. However, the prohibition against receiving compensation from an entity whose examination is used to license a dentist still applies. Thus, a board member would be able to proctor the examination, but could not be paid by the testing entity for that service.

Again, pursuant to KRS 313.080(2)(a), a voting member of the Board licensed in Kentucky as a dentist who receives compensation for proctoring an examination administered by one of the five regional testing entities listed in 201 KAR 8:532 Section 2(2) shall be subject to discipline by the Board.

**Question 5 Analysis:**

In answer to Question (5), concerning whether a member of the Kentucky Board of Dentistry may participate in developing an examination used by the Board to license dentists in Kentucky, the analysis is the same as the answer to Question 4. I have found no law that would prohibit a board member from developing an examination used by the Board to license dentists in Kentucky, but again, the same prohibition against receiving compensation from an entity whose examination is used by the Board to license a dentist still applies to that board member. Accordingly, a board member would be able to participate in developing a Kentucky dentistry licensing examination, but the board member could not be paid by the testing entity for that service.

The same disciplinary action under KRS 313.080(2)(a) shall be taken against any voting member of the Board licensed in Kentucky as a dentist who receives compensation from one of the five regional testing entities listed in 201 KAR 8:532 Section 2(2), or from ADEX, even if that compensation is for helping to develop their examination.

**Question 6 Analysis:**

Because the compensation prohibition in KRS 313.020(2) applies only to a "voting member" of the Kentucky Board of Dentistry, and because ex officio members of the Board are non-voting pursuant to KRS 313.020(1), ex officio members are not subject to the section (2) restriction on receiving compensation. Thus, ex officio members can receive compensation for sitting on the boards and committees of entities that create or administer the tests over which the Board has regulatory power; they can receive compensation for proctoring tests administered by these entities; they can receive compensation for helping to develop these tests; and they can receive travel, lodging, and meal reimbursement for attending conferences hosted by these entities.

No board member is considered a KRS Chapter 11A "public servant" or "officer" under the definitions found in KRS 11A.010. Thus, ex officio members are not subject to the Executive Branch Ethics Code. But ex officio members are covered by Executive Order 2008-454 to the same extent as voting members of the Kentucky Board of Dentistry. That executive order applies to a "member" of a "state policy-making or regulatory board," and the executive order explicitly includes the Kentucky Board of Dentistry in such boards. The executive order does not qualify its application to "voting" members. Thus, the disclosure requirements applicable to the board members generally, as outlined in answer to Question 3 above, apply to ex officio members as well.

Additionally, it is arguable that the executive order prevents ex officio members from participating in discussions about examinations, or about the entities that administer those examinations, because the ex officio's activities with those entities would raise a conflict similar to the conflict raised by voting members' activities with those entities. Although the executive order requires abstention from the board's "decisions," discussion that may affect those decisions can be considered a part of the decisions.



Obviously, the abstention requirement of the executive order concerning voting does not apply because ex officio members do not vote on Board action.