

KBML Legislative Authority

Not challenged by the *NC Board of Dental Examiners v. FTC* (“the *FTC case*” or “the *NC Dental Board case*”

1

1. Legislature created the KBML to be an “independent board.” (KRS 311.530)

- Membership is dictated by statute to include deans of the medical and osteopathic schools, the commissioner of public health, gubernatorial appointments from lists provided by the KOMA and the KMA + three (3) consumer members
- Unlike other licensing boards, the KBML also licenses and disciplines other closely-related healthcare professionals (physician assistants, acupuncturists, athletic trainers, surgical assistants, etc.) who are represented through advisory committees
- **Board acts through majority vote.**

2

(2) Board carries out the legislative intent.

- **Legislature determined** who is qualified to be licensed + upon what grounds a license may be denied or disciplined
- The Board exercises discretion where it is given by the Legislature because **the Legislature has determined** that the **independent board** is best qualified to regulate, control and otherwise discipline *licensees*
- In some circumstances, the Board may promulgate regulations, but only in regard to subjects the **Legislature has authorized and only by going through a legislative oversight process**
- The Legislature has granted immunity to Board members and staff for the performance of official duties. See KRS 311.603 = *FTC* compliant

3

(3) The KBML has sufficient state supervision

- The KBML cannot unilaterally act against non-licensees. The Legislature requires that the KBML limit its jurisdiction to the licensing and conduct **of its licensees** and may only seek injunctive relief against non-licensees through the judicial process.
- The KBML's actions against its licensees are subject to multiple layers of judicial review to circuit and appellate courts.
- The KBML cannot unilaterally create laws or regulations (regulations) **without legislative oversight.**

4

(4) The Legislature has already ensured that KBML's structure, processes and procedures are compliant with the principles of *NC Board of Dental Examiners v. FTC* ("the *FTC case*" or "the *NC Dental Board case*").

- The *FTC case* was an anti-trust case involving a licensing agency taking unilateral action to stop conduct of non-licensees. The US Supreme Court concluded that it was a violation of anti-trust laws for a regulatory board controlled by market participants to **take unilateral action against non-licensees**, unless the agency was carrying out unambiguous state policy and also had active state supervision.
- The US Supreme Court's *FTC* decision affirmed the lower courts' decisions and the US Court of Appeals decision should be reviewed because it outlines very clearly what constitutes "active state supervision" – including legislative process and judicial review already provided to the KBML. (By the KY Legislature)

5

(5) Reviewing courts have affirmed the actions of the KBML and similar regulatory agencies.

- *Petrie v. Virginia Board of Medicine* – individual disciplinary actions and licensure decisions against the **agency's own licensees are not a violation of anti-trust laws**.
- Also, the most recent district court case analyzing NC Dental Board's antitrust issues: **Jemsek v NCMB**. Jemsek is out of NC too – and the district court dismissed the case on grounds like *Petrie*.
- It is important to note that even NC has **not** reorganized its medical board since the NC Dental Board decision.

6

(5) Reviewing courts have affirmed the actions of the KBML and similar regulatory agencies.

Conrad v. Beshear, et al. - Dr. Conrad challenged the KBML's structure and argued that it violates anti-trust laws and thus must be reorganized.

However, **U.S. District Court, Eastern District of KY (a federal court)** said: KBML is controlled by active market participants is OK and immune from anti-trust liability because it:

- (1) carries out an expressly articulated state policy in regard to its licenses *and*
- (2) has sufficient supervision.

Court cited specifically to the KBML being subject to legislative and judicial oversight.

7

(6) The Attorney General has determined that the KBML structure is compliant with the FTC case

- Opinion (March 2017) – KBML has “**active state supervision**” because it promulgates regulations with legislative oversight and its **disciplinary actions are limited to individual licensees violations of the medical practice act (not against any certain type of practice in general).**

(7) Other states, including NC, have not reorganized their boards because of the NC DB or the NCMB cases.

8

In Summary: The KBML's organization, processes and procedures are compliant with the *FTC* case

1. Legislature gave the Board **authority only over its licensees** and clearly stated the intent and bounds of that authority.
2. Since the *FTC* case, courts have consistently held that board actions involving their own licensees are not anti-competitive or anti-trade.
3. The Legislature has determined who is a qualified/not qualified market participant.
4. Legislature has made it clear to the Board on how to deal with a non-licensed person if they are engaged improperly in the practice of medicine – i.e. get an injunction through the courts.
5. Legislature provided the Board with immunity to its members for performance of *official duties*.

9

There are reasons the General Assembly created KBML to be an “**independent board**”. Maintaining the KBML as independent shields it from political contact and entities that could affect the Board's licensing and disciplinary decisions and would interfere with its ability to be carry out the legislative intent.

The Legislature should guard against allowing the *FTC* case/NC Dental Board case as grounds for reorganization. It is not a valid reason!

The Legislature has already established KBML to be compliant with the *FTC* case.

10

KBML Reorganization Bill

11

Some Thoughts on the Reorganization Bill

- Section 2 of the proposed legislation talks of the reasoning behind introducing the legislation. It is noted they include language talking about fostering and encouraging competition and eliminating unnecessary burdens to market entry.
- This would be a major philosophy change for **KBML as our primary goal is public protection. The Board should have no role in encouraging competition amongst physicians.**
- They also include that the new legislation creates active state supervision but we already know **that a federal court here in Kentucky has already ruled that we currently have active state supervision and are fine as long we continue to focus on the licensees under our authority.**

12

NC Board of Dental Examiners v. FTC case & the KBML

Federal court already reviewed KBML “purpose” and “supervision” structure and found it to be sufficient.
In *Conrad v. Beshear, et al.*, Dr. Conrad challenged the KBML’s structure and argued that it violates anti-trust laws and thus must be reorganized. **However, U.S. District Court, Eastern District of KY (a federal court) said: KBML controlled by active market participants is OK and immune from anti-trust liability as long as it is**
(1) carrying out an expressly articulated state policy and (2) has sufficient supervision.

13

Thoughts on the Reorganization Bill

- Section 4 – The KBML would still be able to appoint Executive Director; however, this provision would possibly open the situation where a new administration could be in the position of not approving the employment of the Board’s ED.

Basically, it could politicize the position.

- Section 13 – It authorizes one or more of its members or staff to review applications or deny issuance of a license without review and action by the board at a meeting.,

I don’t think the Board would ever want the Executive Director to deny a license without Board member review and approval

14

KBML Legal Counsel

- It appears the Board would not be able to hire its own legal counsel.
- **Just states it would be provided.**
- Identifying and choosing its counsel has been very important to the Board in the past for good reasons as the individual provides legal analysis and advice that could keep the Board out of damaging litigation.
- This bill would **allow PPC to pool, replace or decide the Board only needs one attorney and would move legal staff to other boards.**
- In the current litigious climate that would be disastrous and leave the KBML with inexperienced counsel.
 - As in many regulatory agencies in our country the KBML licensees become more and more litigious toward the Licensing Board.
- **The Board’s administrative action level is just the beginning tip of a long litigation cycle.**

15

Here are some numbers regarding how many cases are filled against *the Board/members/staff each year (per court) since 2014.* This data also shows how many cases were *pending* at the close of the calendar year per court) since 2014. These numbers represent the cases filed in civil courts and are NOT the administrative cases filed against physicians by the board at the administrative level.

Litigation *initated* against the Board per Court in each year

	Circuit Court	Court of Appeals	Ky Supreme Ct	Federal Courts	Total
2014	7	2	3	0	12
2015	7	3	0	1	11
2016	1	4	1	0	6
2017	9	3	1	2	15
2018	3	2	2	1	8

Litigation *pending* against the Board per Court at end of each year (December)

	Circuit Court	Court of Appeals	Ky Supreme Ct	Federal Courts	Total
2014	11	1	2	0	14
2015	10	4	0	0	14
2016	4	6	1	1	12
2017	10	9	1	3	23
2018	6	7	2	0	15

16

**The good news is that the courts
overwhelmingly
Rule in KBML favor and affirm Board
actions.**

**(Even if lower courts rule against KBML, it
is only temporary because the higher courts
rule in KBML favor.)**

17

KBML Investigators

- Although the revised bill removed the language about the creation of an office of inspector general; there is nothing that would prevent the administration from reassigning (Non-KBML) professional cases to our investigators.
- KBML investigators (5) are all former state police officers with vast experience in opioids, fraud and other facets critical to KBML investigations. Board would not have the ability to choose who serve as their investigators.
- The statute states the Board has authority to hire and fix compensation, which is deleted. It would be a serious problem if the KBML investigators decided not to continue with KBML.
- These people are a critical component of **investigation, follow-up and ensuring compliance** and giving the Board unbiased reports to ensure informed decisions.
- Each investigator is **responsible for a specific area of the state and conduct investigations on behalf of the Board and also supervise physicians under disciplinary orders.**

18

**NC Board of Dental Examiners v. FTC case & the
KBML**

Federal court already reviewed KBML “purpose” and “supervision” structure and found it to be sufficient. In *Conrad v. Beshear, et al.*, Dr. Conrad challenged the KBML’s structure and argued that it violates anti-trust laws and thus must be reorganized. However, U.S. District Court, Eastern District of KY (a federal court) said: KBML controlled by active market participants is OK and immune from anti-trust liability as long as it

is:

- (1) carrying out an expressly articulated state policy
and (2) has sufficient supervision.**

19

**The Court recognized that the KY legislature has already provided
KBML with both (1) and (2) and so it is OK:**

- (1) Clearly articulated policy given by the legislature: regulate and control the practice of medicine (by licensing and disciplining MDs/DOs)

KRS 311.555 states that the declared legislative intent:

“... to function as an *independent board*, the majority of whose members are licensed physicians, with the intent that such a *peer group* is best qualified **to regulate, control and otherwise discipline the licensees** who practice medicine and osteopathy within the Commonwealth of Kentucky ...”

In other words, the KBML’s jurisdiction extends only over its licensees (not non-licensees) – the legislature gave the KBML authority only to regulate, control and disciplines its licensees, not all healthcare/medical practices in general.

- (2) Sufficient state supervision in 2 forms:

Legislative review: Regulation promulgation through legislative process (including public notice and comment period)

Judicial review: Review of its actions by court system

20

Overall, the new bill still has the same problem as the previous one at its core.

It is simply not necessary.

The Courts have stated the KBML has adequate state supervision.

At its core, this bill could allow others than the legislature to take control and truly politicize what the medical board does.

There was a reason why the Board was created to be **“Independent.”** That purpose is to shield the Board from outside entities that could possibly try and influence Board decisions. **This bill would present a significant potential to remove that barrier to outside influences.**

21

Thank you for your attention!!

22