

PAFUNDA LAW OFFICE

BERNARD PAFUNDA

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August 31, 2015

Hon. William Thro
University of Kentucky
General Counsel
Office of Legal Counsel
317 Wethington Building
Lexington, Kentucky 40536

RE: Dr. Paul Kearney, Administrative Retaliatory Directive, August 28, 2015

Dear Mr. Thro:

The University Health Care Committee voted unanimously to modify the Recommendation of the Appellate Review Panel reaffirming Dr. Paul Kearney's current status as a tenured faculty member. The Health Care Committee, after due deliberation, in executive session, mandated that the following action be immediately taken by the University: 1) allow Dr. Kearney access to campus; 2) allow Dr. Kearney to have an office in an appropriate location; 3) allow Dr. Kearney to communicate with his university colleagues; and 4) lift the suspension of Dr. Kearney's email account.

In light of the Health Care Committee corrective action on behalf of the University, your August 28th email memorandum severely limiting Dr. Kearney's campus access and ability to communicate with colleagues, staff, and students is in clear contravention of the Health Care Committees August 24th directive. Dr. Kearney and I were not informed on Monday, August 24th

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that the President directed the formation of a group to redefine Dr. Kearney's role at the University. The President (and the so-called group) is again engaged in direct action to cut off Dr. Kearney's campus access and his ability to communicate with University personnel. At first glance, this would appear to be aimed at Dr. Kearney under the guise that the administration is the sole arbiter of a tenured professor's status. The danger presented here is twofold: 1) Dr. Kearney's tenured status again is being stripped away without due process; and 2) a directive from the Board of Trustees Health Care Committee is being effectively ignored by reason of administrative *fiat* from the President.

This is the same administration who, without any authority to do so, and under color of law, arbitrarily and capriciously removed a tenured professor from campus and banned him from communicating with colleagues without the requisite due process. This was done in violation of state and federal law. The University Health Care Committee, in an effort to rectify this conduct, undertook immediate, decisive and unequivocal action to reinstate Dr. Kearney to active tenured status.

The Health Care Committee directed that Dr. Kearney have access to campus and communicate with his colleagues. Despite this directive, it is now clear that you intend to restrict Dr. Kearney's access to campus as well as his ability to communicate with colleagues, staff and students under the pretext that Dr. Kearney may not teach or interact with students given his loss of clinical privileges. The Association for College of Graduate Medical Education Program Requirements for Graduate Education in General Surgery does not require a tenured professor to

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have clinical privileges. The tenured professor need only be a licensed physician with the requisite appointment to a teaching post in his/her field with the accompanying board certifications in his/her specialty.

Only the Board of Trustees has the authority to remove Dr. Kearney's faculty appointment in the Department of Surgery. Your statement that Dr. Kearney is no longer part of the Department of Surgery is not true. The statement raises the "red flag" that you intend to present a PR 2 to the Board of Trustees at their upcoming September meeting in hopes of pushing through Dr. Kearney's removal from the Department of Surgery in an attempt to circumvent the Health Care Committee's August 24th mandate.

To further highlight the overreach by this latest administrative action, please note the following:

- Federal law does not prohibit Dr. Kearney from access to patient information or patient safety product
- Mortality and Morbidity Conferences can be attended even by "outside" physicians
- Presentations by visiting Professors or Named Lecture Events can be attended by members of the public
- Teaching settings where House Staff attend can be attended by interested professors
- Recruitment activities for House Staff may be attended by college of medicine professors
- A ban on *any* interactions with medical students is in violation of the Health Care Committee's August 24th directive.

A productive member of the faculty, who enjoys continued tenured status at the College of Medicine, requires campus access and the ability to communicate with staff, colleagues and students.

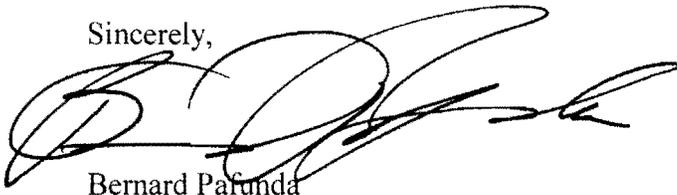
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Given this administration's continued efforts to subvert the Board's directive, we have chosen to put the Board on notice of this administration's most recent action in defiance of the Board of Trustees.

We urge President Capilouto to reconsider the positions announced in your August 28th memorandum and move as soon as possible to reverse course. I have attached the Health Care Committee's Final Action and your August 28th memorandum for your ready reference.

If you have any questions, please contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Bernard Pafunda", written over a horizontal line.

Bernard Pafunda

bp/kef

Attachments: August 28th Thro Memorandum
Health Care Committee's Final Action



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To: Bernard Pafunda
Counsel for Dr. Paul Kearney

From: William E. Thro 
General Counsel

Re: Limitations on Dr. Kearney's Behavior

Date: August 28, 2015

As you know, the University Health Care Committee permanently revoked Dr. Paul Kearney's clinical privileges effective Monday, August 24, 2015. The Committee, acting on the unanimous advice of a panel of three trustees and two panels totaling 16 physicians, determined that Dr. Kearney is unfit to perform the duties of a clinician and to represent the University of Kentucky in our hospital.

Because Dr. Kearney's status has materially changed as a result of the Committee's action, at the direction of the President a group of appropriate persons was immediately formed to comprehensively define Dr. Kearney's roles and responsibilities going forward.

At the same time, because the Committee reaffirmed Dr. Kearney's status as a tenured professor within the College of Medicine, we face the challenge of finding an appropriate role for Dr. Kearney, given his unique status as a tenured faculty member in the Department of Surgery who lacks clinical privileges.

To avoid confusion, we should have informed you Monday that such a review was underway and that we would communicate the results as soon as possible.

Because Dr. Kearney lacks clinical privileges, there are significant restrictions on his access to particular areas of the hospital and to patient information; and on his

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interaction with various members of the UK community. But because he remains a tenured professor within the College of Medicine, he retains certain rights.

The purpose of this Memorandum is to clarify both the limitations on his behavior and his rights. This Memorandum is effective immediately.

1. Under the terms of the *Association for College of Graduate Medical Education Program Requirements for Graduate Education in General Surgery*, "physician faculty must possess current medical licensure and appropriate medical staff appointment" § II.B.3. Therefore, an individual, such as Dr. Kearney, who lacks clinical privileges may not teach or interact with House staff (interns, residents, fellows, or any other person falling under the Association for Colleges of Graduate Medical Education governance) participating in an accredited training program. Moreover, as Dr. Kearney lacks clinical privileges, federal law does not authorize Dr. Kearney to have access to Protected Health Information or Patient Safety Work Product. Accordingly, the University forbids Dr. Kearney from teaching or interacting with House Staff. This prohibition includes, but is not limited to, the following clinical and teaching settings:

- Attending Mortality and Morbidity Conferences;
- Attending Grand Rounds;
- Attending House Staff Conferences;
- Attending Presentations by Visiting Professors or Named Lecture Events;
- Attending any other teaching setting where House Staff attend;
- Attending any recruitment activities for House Staff;
- Engaging in an activity that involves Protected Health Information or Patient Safety Work Product; and
- Engaging in any interaction with medical students except as authorized by the Dean of the College of Medicine.

2. While we further discuss and define Dr. Kearney's role at the University, College of Medicine Dean Fred DeBeer is reassigning Dr. Kearney to the Office of the Dean of the College of Medicine. Because Dr. Kearney may not teach or interact with house staff, it is inappropriate for him to remain a member of the Department of Surgery.

3. Because Dr. Kearney is no longer part of the Department of Surgery, it is inappropriate for his office to be in the Department of Surgery. Dr. Kearney's new office will be Room 124 of the Multi-Disciplinary Science Building. The University currently is renovating this Office and it should be ready for occupancy by September 4, 2015. University employees will pack and move Dr. Kearney's possession from his old office to his new office. In the

meantime, if Dr. Kearney wishes to access his old office, he may contact the Dean's Office.

4. Because Dr. Kearney no longer has clinical privileges, the University immediately modifies his Medical Center Badge Access so he no longer has access to restricted clinical areas.
5. Because Dr. Kearney no longer has clinical privileges at UK HealthCare, it is inappropriate for the University's Medical Malpractice Fund to cover Dr. Kearney's clinical activities in any capacity. Of course, Dr. Kearney retains coverage for his clinical activities before his suspension and revocation of clinical privileges. The Fund will cover Dr. Kearney's clinical activities until December 1 to allow him to identify other sources of malpractice coverage, should he choose to continue such activities.
6. To the extent Dr. Kearney may wish to engage in any consulting or employment outside the University, Administrative Regulation § 3:9 applies. Like all tenured faculty members, Dr. Kearney must obtain prior approval from the Dean of the College before engaging in outside consulting or employment.
7. Because Dr. Kearney's status has materially changed, the University will continue to review every aspect of his employment, including his compensation.
8. The University expects Dr. Kearney to comply with the conditions set forth above. If he fails to do so, the University will take appropriate disciplinary actions.

In light of the above restrictions, we look forward to working with you to identify ways Dr. Kearney can be a productive member of the faculty.

If you have questions, please contact me.

WET/ljs

cc: Timothy Tracy, Provost
Bill Swinford, Chief of Staff
Fredrick C. DeBeer, Dean of the College of Medicine
Robert Cofield, Chief Clinical Operations Officer
Bernard Boulanger, Chief Medical Officer
Susan McDowell, Associate Dean for Graduate Medical Education
Jay Zwischenberger, Chair, Department of Surgery
R. Brett Short, Chief Compliance Officer
Margaret Pisacano, Director of Medical Risk Management

**UNIVERSITY OF KENTUCKY
MEDICAL STAFF BYLAW FAIR HEARING PROCEEDINGS
ON APPEAL TO THE UNIVERSITY HEALTH CARE COMMITTEE**

PAUL KEARNEY, M.D.

AFFECTED INDIVIDUAL

V.

UNIVERSITY OF KENTUCKY

RESPONDING PARTY

**FINAL ACTION OF THE
UNIVERSITY HEALTH CARE COMMITTEE**

The University Health Care Committee voted unanimously to modify the Recommendation of the Appellate Review Panel. The Appellate Review Panel's recommendation was to revoke Dr. Kearney's clinical privileges permanently. The approved modification will revoke the clinical privileges permanently, but reaffirms Dr. Kearney's current status as a tenured faculty member. Specifically, the University will (1) allow Dr. Kearney to have access to campus; (2) allow Dr. Kearney to have an office in an appropriate location; (3) allow Dr. Kearney to communicate with his university colleagues; and (4) lift the suspension of Dr. Kearney's university e-mail account. Dr. Kearney's access to campus will be no greater or less than those of a tenured faculty member who lacks clinical privileges. This reaffirmation should happen immediately.

August 24, 2015