

ALABAMA BOARD OF MEDICAL EXAMINERS
ADMINISTRATIVE CODECHAPTER 540-X-6
CONDUCT OF HEARINGS IN CONTESTED CASES

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540-X-6-.01 Application And Scope.

These rules shall apply to all hearings conducted by the Alabama State Board of Medical Examiners in its capacity as a certifying board under the Alabama Uniform Controlled Substances Act, Code of Ala. 1975, §§20-2-1, et seq., which are conducted under the requirements of Code of Ala. 1975, §20-2-53. These rules shall not apply to the conduct of investigative hearings conducted pursuant to Rule 540-X-5-.09 of the rules of the Board of Medical Examiners or to any interview, investigation, examination of witnesses or documents under subpoena, or other proceeding which is not classified as a contested case under the Alabama Administrative Procedure Act, Code of Ala. 1975, §41-22-1. Nothing contained herein shall preclude the informal disposition of contested cases as permitted by Code of Ala. 1975, §41-22-12(e), and other pertinent provisions of these rules.

Author: Wendell R. Morgan

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540-X-6-.02 Categories Of Hearings.

(1) There are hereby established two categories of hearings held before the Board in its capacity as a certifying board under the Alabama Uniform Controlled Substances Act:

(a) Revocation Hearing. Any proceeding or hearing for the revocation, suspension or restriction of a registrant's

controlled substance registration certificate based on the violation of one or more of the offenses and conditions set forth in Code of Ala. 1975, §20-2-54(a), as amended by Act No. 83-890 (3rd Ex. Sess., 1983). Included within this category is any hearing or proceeding whereby a decision by the Board concerning a previously restricted registration certificate may result in the further restriction, suspension or revocation of the registrant's certificate.

(b) Reinstatement Hearing. Any hearing or proceeding conducted by the Board to consider:

1. The reinstatement of a previously revoked registration.
2. The termination, modification or amendment or any restriction or suspension previously imposed by the Board on a registrant's certificate.
3. The review or reconsideration of any action taken by the Board with respect to a registration.
4. The consideration of any annual renewal application for an unrestricted registration certificate by an applicant whose registration certificate had been previously restricted.

(c) Applications for reinstatement of a controlled substance registration certificate or for removal, termination or modification of restrictions to a controlled substance registration certificate filed with the board less than 24 months following the effective date of the revocation, suspension, restriction or surrender of a controlled substance registration certificate may, within the discretion of the board, be dismissed by the board without a hearing as prematurely filed. Applications filed more than 24 months following the effective date of the revocation, suspension, restriction or surrender shall either be granted by the board or set for a hearing before the board which shall be conducted as a contested case under the Alabama Administrative Procedure Act.

(2) In a revocation hearing the complainant shall have the burden to establish by competent evidence that the registrant has committed one or more of the offenses or conditions specified in Code of Ala. 1975, §20-2-54(a), as such conditions or offenses presently are set forth or may be hereinafter amended, and as they may be further defined by the rules and regulations of the Board. In determining whether the registrant is guilty of any of the offenses or conditions set forth in the complaint, the Board shall not receive evidence of or consider any previous action of the Board concerning the registrant's certificate. After the Board has reached a determination, from consideration of all of the evidence

on the question of guilt or innocence of the registrant with respect to the grounds specified in the complaint, and before the Board determines the appropriate penalty, if any, to be imposed, the Board may, but is not required to, receive and consider all prior actions of the Board with respect to the registrant's certificate of registration and any matters in mitigation or extenuation which the registrant desires to submit. The fact that a member of the Board has previously participated in a hearing, interview or investigation concerning the registrant, shall not disqualify that board member from participation in a subsequent revocation hearing.

(3) In a reinstatement hearing (including any application for reconsideration, application for removal of prior restrictions, application for reinstatement, or removal of probationary conditions or any similar requests based upon a prior action of the Board), the registrant shall have the burden of establishing to the reasonable satisfaction of the Board that the registrant is entitled to the specific relief requested. In a reinstatement hearing the Board shall take into consideration in arriving at its decision the following:

(a) The severity of the offense and/or the seriousness of the violation and the length of time that has lapsed since the action of the Board in revoking, suspending or restricting the certificate of registration.

(b) The occurrence of any new violation of the Uniform Controlled Substances Act committed since the most recent action of the Board; provided however, that it shall not be required that a new violation of any of the offenses and conditions as set forth in Code of Ala. 1975, §20-2-54(a), be established before the Board can deny an application for reinstatement.

(c) The violation of or deviation from any conditions or restrictions previously imposed upon the registrant by the Board.

(d) The hardships imposed upon the medical practice of the registrant by the previous action of the Board.

(e) The likelihood that the violation which gave rise to the previous action of the Board would be repeated in the future.

(f) The protection of the public and the patients of the registrant.

(g) The physical and mental health of the registrant as it may relate to the ability of the registrant to utilize controlled substances in a safe and effective manner.

(h) The extent of medical knowledge, training and experience of the registrant as those factors may reflect upon the ability of the registrant to utilize controlled substances in a safe and effective manner.

(i) Any other conditions, fact or circumstances which may be deemed relevant by the Board in considering an application for reinstatement.

(4) At any time during the conduct of a reinstatement hearing, on the motion of any party or on its own motion, if the Board shall determine that the evidence indicates that the registrant may be guilty of a new violation of the offense or conditions set forth in Code of Ala. 1975, §20-2-54(a), then the Board may discontinue the reinstatement hearing and direct that a revocation hearing be set in accordance with Rule 540-X-6-.02(1)(a). Except as specifically modified by these rules, revocation hearings and reinstatement hearings will be governed by and conducted in accordance with the requirements of the Alabama Uniform Controlled Substances Act, and the Alabama Administrative Procedure Act.

Author: Wendell R. Morgan

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540-X-6-.03 Hearing Officer.

(1) A hearing officer is an individual appointed by the Board to act in such capacities and with such authority as is specified herein. A hearing officer may be an attorney licensed to practice law in the State of Alabama, or may be any person with the experience and qualifications necessary to carry out the duties of the hearing officer. The hearing officer shall be compensated at a rate to be prescribed by the Board for services actually performed pursuant to a contractual agreement entered into between the Board and the hearing officer. Subject to the restrictions concerning participation in prosecution and conflict of interest, a hearing officer may be an employee of the Board.

(2) The general duties of the hearing officer shall be to guide and direct the course of contested cases before the Board, to advise the Board on matters of law and evidence pertaining to those contested cases and to assist the Board in the preparation of orders and decrees resulting from hearings on contested cases. Specifically, the hearing officer shall be empowered to:

- (a) Rule upon any motions contesting or challenging the legal sufficiency of a complaint, order to show cause, or other document which is the basis of a contested case, subject to the limitation set forth in paragraph (e) below.
 - (b) Rule on all prehearing motions by all parties to a contested case except that the hearing officer may not grant a continuance or postponement of a hearing in a contested case without the consent of the chairman of the Board.
 - (c) Order the attendance of parties and/or attorneys at hearings and conferences on matters related to the contested case.
 - (d) Establish on behalf of the Board submission dates, deadlines and time tables which shall be binding on the parties in all matters related to the orderly conduct of the contested case.
 - (e) Enter orders on behalf of the Board when the Board is not in session on legal matters related to a pending contested case, except that the hearing officer is not authorized to dismiss a complaint. The hearing officer may order the complainant to file a more definite statement or to amend his complaint to provide additional information. Dismissal of a complaint will only be upon the order of the Board.
 - (f) Administer oaths and to certify the authenticity of documents when required in the discharge of his duties as hearing officer in a contested case.
 - (g) Direct that evidence relevant to the general character and reputation of the registrant be submitted in writing by affidavit or to place reasonable limitations upon the number of witnesses permitted to testify as to the character and reputation of the registrant.
 - (h) Render advice to the chairman of the Board on the conduct of all aspects of hearings on contested cases.
- (3) Except as limited above, the hearing officer is authorized to rule on all legal matters including motions addressed to the sufficiency of the complaint, objections to the evidence, motions to dismiss for lack of evidence, and any other matters requiring a legal opinion. The ruling of the hearing officer shall be deemed to be the official ruling of the Board unless that ruling is challenged by a member of the Board, in which case the Board shall consider the challenge to the ruling of the hearing officer outside the presence of the parties and may affirm, modify or overrule the decision of the hearing officer.
- (4) The hearing officer shall advise the Board on matters of evidence and law during its deliberations and shall, if requested,

prepare and present for consideration by the Board proposed findings of fact and proposed conclusions of law; provided, however, that the Board in its final decision may, within its sole discretion, modify, alter, amend or disregard such proposed findings of fact and conclusions of law.

(5) When directed by the Board, the hearing officer shall prepare the final order reflecting the decision of the Board in each contested case. The final order shall be executed and authenticated in the manner prescribed by the Board.

(6) When directed by the Board, the hearing officer shall notify all parties to the hearing of the final order of the Board and of all appellate remedies available to any party that is adversely affected by a decision of the Board.

(7) In addition, the hearing officer shall be authorized to perform such duties and functions in each specific case as may be prescribed by the Board, it being the intent of this rule that the hearing officer shall be the chief legal advisor to the Board in the conduct and disposition of all contested cases; however, the Board shall retain the authority in all cases to hear all evidence and argument and be the sole judge of the facts. The Board shall fix the penalty or restriction, if any, to be imposed at the conclusion of a contested case. The Board shall appoint a hearing officer in each contested case unless the case is subject to informal disposition as otherwise provided in these rules.

(8) The person appointed by the Board to act as a hearing officer in the contested case shall not have participated in the investigation or prosecution of the registrant in the matters pertaining to the contested case. The hearing officer shall not have a manifest conflict of interest with any party in a contested case.

Author: Wendell R. Morgan

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540-X-6-.04 Conduct Of Hearings In Contested Cases.

(1) When the Board of Medical Examiners determines that there exists sufficient evidence to believe that a registrant may have committed any of the offenses or conditions as set out in Code of Ala. 1975, §20-2-54, then the Board may direct that a notice and complaint be filed with the Board and served upon the registrant. The notice and complaint shall conform to the requirements of Code of Ala. 1975, §41-22-12(b), and shall set a date for a hearing

before the Board not less than thirty (30) days after the date of service of the notice, or in the case of a renewal of registration, not later than thirty (30) days after the expiration of such registration. Notice may be served by personal service or by certified mail, return receipt requested, to the last known address of the registrant. If the registrant cannot be located at this last known address or if it appears that the registrant is seeking to avoid service of the notice, then the chairman of the Board may direct service of process in any other manner as permitted by law. When the Board has made a reasonably diligent inquiry and cannot establish a valid mailing address for the registrant, then notification to the Board by the U.S. Post Office of attempted service by certified mail, return receipt requested, to the last known mailing address of the registrant, shall authorize the Board to proceed in the absence of the registrant.

(2) In a revocation hearing the registrant shall file with the Board and shall serve upon each party to the contested case or their attorney an answer and response to the allegations set forth in the complaint. Any allegation of fact set forth in the complaint which is not disputed or denied, in whole or in part, by the registrant in his answer may be considered as true by the Board on the hearing of the contested case. In the answer to the complaint, the registrant should set out a brief, concise summary of those facts upon which he intends to rely in the contested case hearing; however, in no event shall the registrant be required to make any statement in contravention of the right against self-incrimination granted under the U.S. and Alabama Constitutions. The answer shall be filed with the Board not later than twenty (20) days after service of the notice of hearing. No answer is required by a registrant in a reinstatement hearing or in a revocation hearing in which the registrant has consented to informal disposition under Rule 540-X-6-.05(6).

(3) In all contested cases the registrant shall be entitled to personally appear before the Board, to be represented by counsel of his own choice at his own expense, to cross-examine witnesses offering testimony to the Board and to examine documents offered into evidence, to call witnesses on his own behalf, to compel the attendance of witnesses and the production of documents and other evidence by subpoena at his own expense and to present evidence and arguments on all material issues arising in the contested case.

(4) The Chairman of the Board shall preside during hearings with the assistance and advice of a hearing officer. A quorum of the Board necessary to hear and decide contested cases is set at six (6) members of the Board. The hearing shall be open to the public, provided, that the Chairman may direct that the testimony of minors or the testimony of a patient relating to his or her confidential medical history be taken in executive session and provided that the Chairman shall direct that any information deemed confidential by state or federal statutes be taken in

executive session. The Chairman may place reasonable limitations upon the number of spectators in attendance consistent with the capacity of the hearing room. No filming or video taping of hearings will be permitted without the express permission of the Chairman. All evidence and argument shall be presented before the Board and no member of the Board shall participate in the final decision unless he has been present during all of the hearing or unless he has considered a complete record of those proceeding which took place in his absence. At the conclusion of the presentation of evidence, the public portion of the hearing will be closed and the Board will deliberate in executive session.

(5) The chairman shall be responsible for the conduct of the hearing and all rulings of the chairman on procedural matters and rulings of the hearing officer on legal matters shall be final and shall be deemed to be the action of the Board unless such rulings are challenged by a member of the Board. All challenges are to be considered and decided by the Board outside the presence of the parties, attorneys and witnesses to the contested case, and only the decision of the Board shall be entered into the record. The chairman may impose reasonable conditions and limitations on the parties' presentation during a contested case including, but not limited to, the prescribing of reasonable limitations on argument, requiring the parties to file briefs and memoranda with the Board, and the imposition of reasonable sanctions and penalties for misconduct of parties and attorneys before the Board. The chairman is specifically authorized to require that any person whose behavior is disruptive to the orderly conduct of the proceedings leave the hearing and may then order the proceedings to continue or to be postponed as circumstances shall dictate.

(6) During the conduct of any contested case the chairman shall permit the members of the Board to direct questions to witnesses offering testimony to the Board but shall ensure that such questions are material and relevant to the issues under inquiry.

(7) The hearing shall be conducted insofar as is practicable in the same manner as a civil action at law. In a revocation hearing the complainant shall have the obligation to proceed first and to present such evidence touching upon the specific allegations of the complaint as will establish at least a prima facie violation of the offenses and conditions as stated in the complaint. In reinstatement hearings the Board shall initially receive into evidence the notice of hearing and a record of all the prior transactions of the Board concerning the registrant and it shall then be the obligation of the registrant to proceed and to present evidence and argument to the Board establishing the right of the registrant to the relief requested. The registrant shall have the burden in a reinstatement hearing of establishing the reasonable satisfaction of the Board that the applicant is entitled to the registration certificate or other relief that is requested under the criteria outlined in Rule 540-X-6-.02(3) and that the public

safety and welfare and the safety and welfare of the patients of the registrant would not thereby be jeopardized.

(8) At the conclusion of the hearing the Board shall conduct its deliberations and render its decision outside the presence of the parties. The Board may have the advice and counsel of the hearing officer during its deliberations. The final order of the Board shall be rendered in conformity with §41-22-16 of the Administrative Procedure Act.

(9) Upon a finding by the Board that the registrant is guilty of any violation of the offenses and conditions as set forth in Code of Ala. 1975, §20-2-54(a), the Board may, within its sole discretion, impose one of the following penalties:

(a) Revoke the registration certificate.

(b) Revoke the registration certificate, suspend the revocation, and place the registrant on probation for a specific stated period and impose such conditions or restrictions on the registration certificate as it shall deem necessary.

(c) Suspend the registration certificate for a specific stated period, at the expiration of which time the registration certificate will automatically be reinstated with such authorized schedules as the registrant had prior to the action of the Board.

(d) Restrict the registration certificate by deletion of such authorized schedules for particular classes of controlled substances as deemed appropriate by the Board according to the facts of the case. Unless otherwise specified in the order of the Board, a restricted registration certificate shall continue to be restricted until the Board removes the restrictions, subject to the right of the registrant to apply for reinstatement or to apply for an unrestricted certificate at a later date.

Author: Wendell R. Morgan

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540-X-6-.05 Miscellaneous Provisions.

(1) Record. The record in a contested case shall consist of all of those items enumerated in Code of Ala. 1975, §41-22-12(f). A verbatim record of all proceedings before the Board shall be made either by stenographic notes or electronic recording or both. Any party requesting a transcription of the proceedings shall be required to reimburse the Board for the actual expense of the production of the transcript. The entire record of a contested case, including the record of oral proceedings, shall be maintained by the Board for a period of five (5) years from the date of the decision of the Board in accordance with the requirements of Code of Ala. 1975, §41-22-12(g).

(2) Discovery. The Board may provide by order in a contested case that each party provide to the other parties a list of all witnesses to be called at the hearing and copies of all documents to be entered into evidence at the hearing. The Board may authorize the parties to submit the testimony of witnesses by deposition upon oral examination in the manner prescribed in the Alabama Rules of Civil Procedure. The Board may provide by order for such other limited discovery by the parties as is deemed necessary and prudent by the Board or the hearing officer to ensure that the hearing is fairly conducted under the law; provided, however, that no party to a hearing shall be entitled to discover the contents of any investigative files and records, including any investigative reports, statements, summaries, or other materials compiled and accumulated by investigators, attorneys or staff of the Board pursuant to its ordinary and usual investigative function unless the document is to be offered into evidence at the hearing.

(3) Subpoenas.

(a) Either party to a contested case may request that the Board issue subpoenas compelling the attendance of witnesses residing within the jurisdiction of the Board or the production of documents at the hearing. The expense of the subpoena, including mileage and per diem as specified by law, shall be borne by the party requesting the subpoena. The Board or the hearing officer may prescribe reasonable time limitations for the filing of requests for the subpoena of witnesses and documents and may further require the payment of the expenses for such subpoenas in advance.

(b) Upon the filing of a timely motion by any party, the Board may direct the issuance of a subpoena to require the attendance of a witness at a deposition upon oral examination or to produce documents for inspection provided that the witness resides within the jurisdiction of the Board to issue

such subpoena and further provided that the party requesting the subpoena tender to the Board the required mileage and per diem rate. The party at whose request the deposition is held shall be responsible for all administrative costs of the deposition.

(c) In the exercise of the Board's power to subpoena witnesses and to compel the production of documents the Board will make a reasonably diligent effort to secure the attendance of any material witness and to produce any relevant documents which are necessary for the resolution of the issues raised in the contested case. The Board will not unreasonably extend or delay the proceedings in contested cases for discovery purposes. This section governing the issuance of subpoenas and production of documents shall not be interpreted to require that any member of the Board of Medical Examiners, or any investigator, attorney or employee of the Board of Medical Examiners, submit to a deposition upon oral examination or produce documents for inspection unless the individual is designated by the complainant to testify as a witness in the contested case. In all circumstances the deliberations of the Board of Medical Examiners, the contents of any investigative files and records of the Board, including any investigative reports, statements, summaries or other materials compiled and accumulated by its investigators, attorneys or staff of the Board pursuant to its ordinary and usual investigative function are confidential and privileged and are not subject to discovery proceedings under these rules.

(4) Emergency suspension or revocation. If the Board shall determine that there exists an immediate and clear danger to the public health or safety, the Board may immediately suspend any registration simultaneous with the institution of a revocation proceeding under the provision of Code of Ala. 1975, §20-2-55, and these rules, with a hearing to be set not less than thirty (30) days after the effective date of the emergency suspension.

(5) Rules of evidence.

(a) The rules of evidence in contested cases shall be in accordance with §41-22-13 of the Administrative Procedure Act. In arriving at a determination upon medical issues in contested cases the Board may consider the testimony of expert witnesses; however, the Board is authorized to exercise its independent medical judgment in the resolution of medical issues and is not required to receive expert testimony for the determination of medical issues. In any final order resulting from a contested case where the Board does not receive expert testimony, the Board shall set out as findings and conclusions the basis for the medical judgments and opinions relied upon by the Board in rendering the decision.

(b) Documentary evidence and testimony which is otherwise admissible in a contested case shall not be rendered inadmissible because of any claim of privilege between physician and patient. All testimony regarding the medical condition of individuals and all medical records produced during the course of the contested case shall be considered confidential and shall not be released to persons who are not parties or participants in the contested case.

(6) Informal disposition. Upon written consent of the parties, any contested case may be concluded and disposed of informally by stipulation, agreed settlement, consent order or as otherwise agreed. Informal disposition of contested cases is appropriate where there are no material issues of fact, there are no witnesses offering testimony other than general character and reputation testimony, and there are no contested documents that will be considered by the Board in arriving at its decision. In a revocation hearing the registrant or his attorney may consent to an informal disposition by executing a written consent and filing the same with the Board. In such event the registrant will be offered the opportunity, if he desires, to appear for an informal interview with the Board prior to the Board reaching a decision in the matter. The record of contested cases concluded by informal disposition will consist of the notice and/or complaint, stipulation and agreement, the consent of the registrant to informal disposition, the prior history of the registrant as reflected in the record of the Board, a transcript of any statement made by the registrant to the Board at the interview, and the final decision of the Board. A reinstatement hearing may be subject to informal deposition at the election of the Board, but, in all such cases the registrant shall be advised in the notice of hearing that a full hearing, with the appointment of a hearing officer, will be set by the Board if registrant requests such within 15 days of the service of the notice of hearing.

(7) Representation before the Board. A registrant in a contested case may represent himself or may be represented by an attorney. No other person, unless specifically permitted by statute or by these rules, will be permitted to represent a registrant as an advocate before a contested hearing conducted pursuant to these rules.

(8) Intervention. Intervention is permitted only to the extent provided by Code of Ala. 1975, §41-22-14. An application for intervention must be submitted at least ten (10) days before any scheduled hearing.

(9) Computation of time. Time is computed for these rules in the same manner as is provided in Code of Ala. 1975, §1-1-4.

(10) Application for rehearing. Applications for rehearing are not required but may be submitted in conformity with §41-22-17 of the Administrative Procedure Act. If the Board enters no order on the

application for rehearing within thirty (30) days from the date of filing, the application shall be deemed to have been denied as of the expiration of the thirty (30) day period.

(11) Appeals. Appeals from decisions of the Board of Medical Examiners in contested cases conducted pursuant to its authority as a certifying Board under the Uniform Controlled Substances Act are governed by §20-2-53, Code of Ala. 1975 (2006), except that judicial review shall be commenced by the filing of a petition for review with the Alabama Court of Civil Appeals, in accordance with §34-24-380, Code of Ala.1975, as amended by Act No. 2008-397.

Author: Wendell R. Morgan

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