

APA-2

ALABAMA MEDICAL LICENSURE COMMISSION

NOTICE OF INTENDED ACTION

AGENCY NAME: Alabama Medical Licensure Commission

RULE NO. & TITLE: 545-X-3 Hearings In Contested Cases

INTENDED ACTION: To amend multiple rules in Chapter three as part of a five year review required by Section 41-22-5.2

SUBSTANCE OF PROPOSED ACTION: Move Definitions to Chapter 1, remove outdated rule language, expand the duties of the Chairman, add additional language for clarification of current procedures used during contested hearings.

TIME, PLACE, MANNER OF PRESENTING VIEWS: All interested persons may submit data, views or arguments concerning the proposed new rule(s) and regulation(s) in writing to: Karen H. Silas, Executive Assistant, Alabama Medical Licensure Commission, Post Office Box 887, Montgomery, Alabama 36101-0887, by mail, email or in person between the hours of 8:30 a.m. and 4:30 p.m., Monday through Friday, until and including **Friday, November 2, 2018**. Persons wishing to obtain copies of the text of this rule and submit data, views or comments or arguments orally should contact Karen H. Silas, by telephone (334/242-4153) or email at ksilas@almlc.org during said period in order to set up an appointment for a hearing respecting such oral data, views, or arguments.

FINAL DATE FOR COMMENT AND COMPLETION OF NOTICE: **November 2, 2018**

CONTACT PERSON AT AGENCY: Karen H. Silas

James H. Walburn, M.D.

James H. Walburn, M.D., Chairman

Alabama Medical Licensure Commission

APA-2

ALABAMA MEDICAL LICENSURE COMMISSION

NOTICE OF INTENDED ACTION

AGENCY NAME: Alabama Medical Licensure Commission

RULE NO. & TITLE: 545-X-3 Hearings In Contested Cases

INTENDED ACTION: To amend multiple rules in Chapter three as part of a five year review required by Section 41-22-5.2

SUBSTANCE OF PROPOSED ACTION: Move Definitions to Chapter 1, remove outdated rule language, expand the duties of the Chairman, add additional language for clarification of current procedures used during contested hearings.

TIME, PLACE, MANNER OF PRESENTING VIEWS: All interested persons may submit data, views or arguments concerning the proposed new rule(s) and regulation(s) in writing to: Karen H. Silas, Executive Assistant, Alabama Medical Licensure Commission, Post Office Box 887, Montgomery, Alabama 36101-0887, by mail, email or in person between the hours of 8:30 a.m. and 4:30 p.m., Monday through Friday, until and including **Friday, November 2, 2018**. Persons wishing to obtain copies of the text of this rule and submit data, views or comments or arguments orally should contact Karen H. Silas, by telephone (334/242-4153) or email at ksilas@almlc.org during said period in order to set up an appointment for a hearing respecting such oral data, views, or arguments.

FINAL DATE FOR COMMENT AND COMPLETION OF NOTICE: **November 2, 2018**

CONTACT PERSON AT AGENCY: Karen H. Silas

James H. Walburn, M.D.

James H. Walburn, M.D., Chairman

Alabama Medical Licensure Commission

MEDICAL LICENSURE COMMISSION OF ALABAMA

ADMINISTRATIVE CODE

CHAPTER 545-X-3

HEARINGS IN CONTESTED CASES

TABLE OF CONTENTS

| | |
|--|---|
| 545-X-3-.01 | Definitions (Moved to 545-X-1-.11) |
| 545-X-3-.02 | Application <u>a</u> And Scope |
| 545-X-3-.03 | Initiation <u>O</u> f <u>a</u> A Contested Case, Notice <u>A</u> and Opportunity <u>f</u> For Hearing <u>I</u> n Contested Cases; Contents <u>O</u> f Notice; Procedure Upon Failure <u>O</u> f Notified Party <u>T</u> to Appear; Presentation <u>O</u> f Evidence <u>a</u> And Argument, Right to Counsel; Disposition <u>b</u> By Stipulation; Settlement; Contents <u>O</u> f Record; Public Attendance <u>A</u> at Oral Proceedings; Recordings <u>a</u> And Transcripts <u>O</u> f Oral Proceedings |
| 545-X-3-.04 | Discovery <u>I</u> n Contested Cases |
| 545-X-3-.05 | Witnesses/How Subpoenaed and Sworn; Failure <u>T</u> to Comply |
| 545-X-3-.06 | Intervention <u>I</u> n Contested Cases |
| 545-X-3-.07 | Disqualification <u>f</u> From Participation <u>I</u> n _____ |
| <hr/> | |
| Proposed Order <u>o</u> Or Final Decision Based Upon | |
| Conflict <u>O</u> f Interest <u>O</u> or Personal Bias | |
| 545-X-3-.08 | Conduct <u>O</u> f Hearings <u>I</u> n Contested Cases; <u>A</u> ppointment <u>A</u> and Authority <u>O</u> f Legal Counsel; Grounds For <u>S</u> suspension <u>O</u> or Revocation Of License |
| 545-X-3-.09 | Rules of Evidence <u>I</u> n Contested Cases |
| 545-X-3-.10 | Form <u>a</u> And Content Of Final Order; When Final Order <u>T</u> to <u>B</u> be Rendered; Service <u>O</u> f Notice <u>a</u> And Copies <u>o</u> f Final Order |
| 545-X-3-.11 | Filing <u>O</u> f Application <u>f</u> For Rehearing; Form <u>a</u> And Content; Effect <u>O</u> f Application <u>O</u> n Final Order; Grounds <u>F</u> or Rehearing; Service of Application <u>O</u> n Parties <u>O</u> f Record; Agency Decision <u>O</u> n Application |
| -545-X-3-.12 | <u>I</u> mmEDIATE Effect <u>O</u> f Commission Order; Judicial Review; Vacation <u>-</u> <u>O</u> f Order <u>B</u> by Court; Venue |
| -545-X-3-.13 | Emergency Suspension |

545-X-3-.14 Appointment Oof Hearing Panels545-X-3-.15 Application Ffor Reinstatement Oof
Licenses Aand Application Ffor Modification Oof Orders

545-X-3-.16 Probation Compliance Hearings

545-X-3-.01Definitions. (Moved to 545-X-1-.11)

~~(1) These rules incorporate by reference those definitions contained in Code of Ala. 1975, §§20-2-2, 41-22-3, unless the context clearly indicates otherwise. For the purposes of these rules, the following words and phrases shall have the respective meanings ascribed by this section:~~

~~Licensee shall mean a physician licensed to practice medicine or osteopathy in the State of Alabama.~~

~~Commission shall mean the Medical Licensure Commission of the State of Alabama.~~

~~Certificate shall mean a certificate of qualification duly issued by the Alabama State Board of Medical Examiners.~~

~~Board shall mean the Alabama State Board of Medical Examiners.~~

~~Complainant shall mean the party that is responsible for preparing and prosecuting complaints in contested cases before the Medical Licensure Commission.~~

~~Respondent shall mean the licensee whose license to practice medicine or osteopathy is the subject of the complaint filed before the Commission.~~

~~Legal Counsel shall mean an individual designated as a legal counsel by the Medical Licensure Commission of Alabama and appointed pursuant to these rules.~~

~~Parties shall mean the complainant, the respondent, and any person permitted to intervene in a contested case.~~

~~Legitimate medical purpose shall mean a therapeutic treatment regimen or program generally recognized and accepted in the field of medical science as being safe and effective in the diagnosis, treatment, correction or alleviation of a specific medical condition of the patient, under all relevant circumstances.~~

~~Practicing medicine in such a manner as to endanger the health of the patient of the practitioner shall mean to expose the health of the patient to unreasonable risks of harm which are not medically justified by the expected benefits to the patient, under all the circumstances evident in the diagnosis and treatment of the medical condition of the patient.~~

~~Performance of unnecessary diagnostic tests or medical or surgical services shall mean to administer medical tests or medical or surgical services which are not reasonably indicated or which are not reasonably required in order to ensure the well being of the patient of the practitioner, after considering all of the circumstances.~~

~~Malpractice as used in these rules shall mean negligence. Gross malpractice shall mean gross negligence. Negligence shall mean~~

~~the failure to do that which a reasonably prudent physician would have done under the same or similar circumstances, or the doing of that which a reasonably prudent physician would not have done under the same or similar circumstances. Gross negligence is the conscious doing of an act or the omission of some duty to act with a conscious disregard of known conditions of danger or with careless and reckless indifference to the consequences of such act or omission. For the purposes of this rule the existence of negligence or gross negligence may be established without proof of actual injury or harm to the patient, provided that the act or omission complained of created a substantial risk of harm to the health and well being of the patient which risk was known or should have been known to a reasonably prudent practitioner and which was not medically justified by the expected benefits to the patient from the act or omission.~~

~~In considering whether a fee for medical services is grossly excessive, as this term is used in these rules, the Commission may consider the following factors:~~

~~The difficulty and/or uniqueness of the service performed as well as the time, skill and/or experience required;~~

~~The fee customarily charged in the locality for similar physician services;~~

~~The amount of the charges involved;~~

~~The nature and length of the professional relationship with the patient;~~

~~The experience, reputation and ability of the physician in performing the kind of services involved;~~

~~The costs to the physician of devices or appliances or other special items (excessive of reasonable overhead expenses) furnished in connection with the service; and~~

~~The facts relating to the opportunity of the patient and physician to discuss the amount of fees in question prior to the initiation of the medical services.~~

~~Licensed practitioners specializing in the treatment of depression shall mean a psychiatrist licensed to practice medicine in the State of Alabama or a physician or osteopath licensed to practice medicine in the State of Alabama who devotes a substantial portion of his practice to the specialized treatment of mental or emotional illness.~~

~~Physician shall mean either a doctor of medicine or a doctor of osteopathy.~~

~~Licensed to practice medicine shall mean either the practice of medicine by a doctor of medicine or the practice of osteopathy by a doctor of osteopathy.~~

~~Doctor shall mean either a doctor of medicine or a doctor of osteopathy.~~

~~False or fraudulent claims for medical services shall mean any claim or claims requesting payment for any medical services which contain any misrepresentation of any material fact, or any suppression of any material fact, regarding any services for~~

~~which the claim or claims is made if such misrepresentation or suppression is made with knowledge that such fact is being misrepresented or suppressed or if such misrepresentation or suppression is made recklessly without knowledge.~~

~~Minimum standards for medical records shall mean medical records maintained as to each patient in each physician's office which shall be written legibly in the English language and which shall include, at a minimum, a record of:~~

~~the patient's complaint or complaints;~~

~~the history and physical examination;~~

~~the treatment given or recommended; and,~~

~~4. all follow up recommendations.~~

Author: Wayne P. Turner

Statutory Authority: Code of Ala. 1975, §§34-24-50.1, 34-24-311, 34-24-360; 41-22-1, et seq.

History: Filed May 6, 1983. ~~Repealed and new rule adopted in lieu thereof:~~ Filed May 1, 1984. ~~Amended:~~ Filed June 27, 1986.

~~Amended:~~ Filed March 4, 2003; effective April 8, 2003. ~~Amended:~~ Filed May 5, 2010; effective June 9, 2010.

545-X-3-.02 Application Aand Scope. These rules shall apply to all hearings conducted by the Medical Licensure Commission pursuant to its authority to issue, reinstate, revoke, suspend, restrict or otherwise discipline a license. ~~reinstate licenses and to conduct hearings on the possible suspension or revocation of a license to practice medicine in the State of Alabama.~~

Author: Unknown, Wallace D. Mills

Statutory Authority: Code of Ala. 1975, §§34-24-311, 34-24-360; 41-22-1, et seq.

History: Filed May 6, 1983. ~~Repealed and new rule adopted in lieu thereof:~~ Filed May 1, 1984. ~~Amended:~~ Filed ;effective

545-X-3-.03 Initiation oof aA Contested Case; Notice Aand Opportunity Ffor Hearing Iin Contested Cases; Contents oOf Notice; Procedure Upon Failure Oof Notified Party Tto Appear; Presentation Oof Evidence Aand Argument; Right Tto Counsel; Disposition Eby Stipulation; Settlement; Contents Oof Record; Public Attendance Aat Oral Proceedings; Recordings aAnd Transcripts Oof Oral Proceedings.

(1) A contested case before the Medical Licensure Commission shall be initiated by the filing of a written administrative complaint signed by any member of the Alabama Board of Medical Examiners, any duly licensed physician or osteopath, the executive officer of the Board or any other person and which alleges that the respondent may be guilty of one or more of the grounds for the suspension or revocation discipline of a license to practice medicine as provided in Code of Ala. 1975, §34-24-360, and these rules and regulations.

(1)

~~(2)~~ Any physician ~~or osteopath~~ holding a certificate of qualification to practice medicine ~~or osteopathy~~ in Alabama shall and is hereby required to, and any other person may, report to the Board or the Commission any information such physician, ~~osteopath~~ or other person may have which appears to show that any physician ~~or osteopath~~ holding a certificate of qualification to practice medicine ~~or osteopathy~~ in Alabama may be guilty of any of the acts, offenses or conditions set out in Code of Ala. 1975,

~~(3)~~ (2) §34-24-360; and any physician, ~~osteopath~~ or other person who in good faith, makes such a report to the Board or to the Commission shall not be liable to any person for any statement or opinion made in such report.

(3) In a contested case for the discipline of a license instituted by the filing of an administrative complaint, all parties shall be afforded

an opportunity for hearing after reasonable notice in writing. Such notice shall be delivered ~~delivered either to the physician against whom the administrative complaint is filed by personal service as in civil actions or by certified mail, return receipt requested~~ required by § 34-24-361(e). However, the Commission may provide by rule for the delivery of such notice by other means. Delivery of the notice referred to in this subsection shall constitute commencement of the contested case proceedings.

(4) The notice shall include:

(a) A statement of the time, place and nature of the hearing;

~~(a)~~

(b) A statement of the legal authority and jurisdiction under which the hearing is to be heard;

~~(b)~~

(c) A reference to the particular sections of the statutes and rules involved.

~~(c)~~

(5) In addition, the notice may include:

(a) A time deadline for the filing of an answer to the administrative complaint;

~~(a)~~

(b) A time deadline for the filing of all motions addressed to the sufficiency of the administrative complaint;

~~(b)~~

(c) A time deadline for the filing of all motions requesting prehearing relief;

~~(c)~~

(d) A time deadline for the complainant to furnish to the respondent a list of witnesses who are expected to offer testimony;

~~(d)~~

(e) A time deadline for the respondent to furnish to the complainant a list of witnesses who are expected to offer testimony;

~~(e)~~

(f) A time deadline for the complainant and the respondent to furnish to the Commission the name and full address of each witness residing in the State of Alabama who is requested to be subpoenaed for attendance at the hearing;

(g) A copy of the administrative complaint that has been filed before the Medical Licensure Commission in regard to the license of the physician and which contains a short and plain statement of the matters asserted. If the complainant is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished.

~~(g) A copy of the administrative complaint that has been filed before the Medical Licensure Commission in regard to the license of the physician or osteopath and which contains a short and plain statement of the matters asserted. If the complainant is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished.~~

~~+(6)~~ Upon receipt of the Notice of Hearing by the respondent, the respondent shall file an answer with the Commission which either admits or denies the allegations contained in the administrative complaint which was filed against the respondent before the Medical Licensure Commission. If the respondent fails to file an answer, a general denial shall be entered on behalf of the respondent and the allegations in the administrative complaint shall be deemed denied.

(a) If the respondent admits the allegations of the administrative complaint and those admissions indicate that the respondent is guilty of a violation of Code of Ala. 1975, §34-24-360, then the hearing scheduled by the Medical Licensure Commission shall proceed on the question of appropriate punishment for the violation. At this hearing, all parties shall be afforded the opportunity to present evidence which is germane to the issue of appropriate punishment.

~~(a)~~

(b) If the answer filed by the respondent denies the allegations of the administrative complaint filed with the Medical Licensure Commission, then the hearing scheduled by the Commission shall proceed on the factual matters which are alleged in the administrative complaint.

~~(b)~~

(7) If a party fails to appear, or absents himself, in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, proceed with the hearing and make a decision in the absence of the party.

(8) Opportunity shall be afforded all parties to respond and present evidence and argument on all material issues involved and to be represented by counsel at their own expense.

(9) Unless precluded by statute, informal dispositions may be made of any contested case by stipulation, agreed settlement, consent order or default or by another method agreed upon by the parties in writing, subject to approval of the Commission.

(10) The record in a contested case shall include:

(a) All pleadings, motions, and intermediate rulings;

~~(a)~~

(b) All evidence received or considered and all other submissions; provided, in the event that evidence in any proceeding may contain proprietary and confidential information, steps shall be taken to prevent public disclosure of that information;

~~(b)~~

(c) A statement of all matters officially noticed;

~~(c)~~

(d) All questions and offers of proof, objections and rulings thereon;

~~(d)~~

(e) All proposed findings and exceptions;

~~(e)~~

(f) Any ~~decision~~, opinion or report by the legal counsel at the hearing; and

~~(f)~~

(g) All staff memoranda or data submitted to the legal counsel or members of the agency in connection with their consideration of the case unless such memoranda or data is protected as confidential or ~~privileged~~ is recognized as privileged by laws of the state of Alabama; provided, if such memoranda or data contains information of a proprietary and confidential nature, it shall be protected by the Commission from public disclosure.

~~(g)~~

(h) Administrative complaints seeking to discipline the licenses to practice medicine of physicians ~~or~~ ~~osteopaths~~ and all orders of the Commission which are dispositive of the issues raised by such complaints shall be public record.

~~(h)~~

(11) Hearings on administrative complaints shall be closed. The record in such hearings, including witness testimony, exhibits and pleadings, shall be confidential and shall not be available for public inspection; provided, however, that all administrative complaints, and amendments thereto, and all orders of the Commission which are dispositive of the issues raised by such complaints, shall be public record.

~~(11)~~

(12) Oral proceedings shall be recorded either by mechanized means or by qualified shorthand reporters. Oral proceedings or any part thereof shall be transcribed at the request of any party with the expense of the transcription charged to the requesting party. The recording of stenographic notes of oral proceedings or the transcription thereof shall be filed with and maintained by the agency for at least five years from the date of decision and

shall be made available for inspection by the public, except in those cases where ~~private hearings are authorized by law~~ hearings are closed, or where the proceedings shall be

(12) ordered sealed by order of court, or are required to be sealed by statute.

~~(13)~~

(13) An administrative complaint may be amended without leave of the eCommission at any time more than 45 days before the first setting of the case for hearing. Thereafter, the eCommission may permit the administrative complaint to be amended, but no amendments shall be permitted that are not germane to the acts, offenses or conditions originally charged or that materially alters the nature of any act, offense or condition charges; provided, however, that amendments to conform to the evidence may be allowed in conformance with Rule 15(b), Alabama Rules of Civil Procedure.

~~(13)~~

(14) Findings of fact shall be based solely on the evidence in the record and on matter officially noticed in the record.

~~(14)~~

(15) The Commission shall not order the suspension or revocation of a license unless at least five members of the Commission are present and a majority of those present vote for such suspension or revocation.

Author: Wayne P. Turner, Wallace D. Mills

Statutory Authority: Code of Ala. 1975, §§34-24-361, 34-24-361.1, 34-24-366, 41-22-12.

History: Filed May 6, 1983. **Repealed and new rule adopted in lieu thereof:** Filed May 1, 1984. **Amended:** Filed March 4, 2003; effective April 8, 2003. **Amended:** Filed May 5, 2010; effective June 9, 2010. **Amended:** Filed ;effective

545-X-3-.04 Discovery In Contested Cases.

(1) The Commission 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 Commission 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 Commission may provide by order for such other limited discovery by the parties as is deemed necessary and prudent by the Commission to ensure that the hearing is fairly conducted under the law; provided, however, that the parties shall not be permitted to prolong or unnecessarily delay the proceedings in contested cases for discovery purposes. However, no party to a hearing shall be entitled to discover the contents of any

investigative files, records, including investigative reports,
statements, summaries,

or other materials compiled and accumulated by the investigators, attorneys or staff of the Commission, or the Board of Medical Examiners, pursuant to its ordinary and usual investigative function unless the document or statement in lieu of the actual witness is to be offered into evidence at the hearing.

(2) ~~The Commission, Board, or with the consent of the Commission, a~~Any party to any proceeding before the Commission, may cause depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for depositions in civil action in circuit courts, ~~such depositions to be taken on a commission to be issued by the executive officer of the Commission or by the executive director of the Board and made returnable to either the Commission or the Board.~~

Author: Unknown, Wallace D. Mills

Statutory Authority: Code of Ala. 1975, §34-24-365.

History: Filed May 6, 1983. **Repealed and new rule adopted in lieu thereof:** Filed May 1, 1984. **Amended:** Filed May 5, 2010; effective June 9, 2010. **Amended:** Filed ;effective

545-X-3-.05 Witnesses/How Subpoenaed And Sworn; Failure To Comply.

(1) To any such hearing, witnesses may be subpoenaed by the Commission on its own motion, or on the demand of either party by subpoena signed by the chairman of the Commission, or by the executive officer of the Commission, and such subpoenas may be served by any sheriff of Alabama, or by the executive officer of the Commission or by any person designated by the Executive Officer and, if served by anyone other than a sheriff, the return of service shall be sworn to by said person before some officer authorized to administer oaths. Witnesses may be sworn by the chairman or by the person discharging the duties of such chairman. Similar subpoenas may be issued directing the production of books, papers, or documents at said hearing.

(1)

(2) The Commission, by order of its chairman or executive director, may require any person to produce within this state, at such reasonable time and place as it may designate, any books, documents, records, or papers kept in any office or place without or within this state, or certified copies thereof, whenever the production thereof is reasonably required and pertinent to any matter under investigation before the Commission, in order that an examination thereof may be made by the Commission, or by any person employed by the Commission.

(2)

(3) In case of failure or refusal on the part of any person to comply with any subpoena, or on the refusal of any witness to testify or answer as to any matter regarding which he may lawfully be interrogated, any circuit court in that state, or any judge thereof, on application of the Commission or its executive director may issue an attachment for such person and compel him to comply with such order, or to attend before the Commission and produce such documents and give his testimony upon such matters as he may be lawfully required, and the court or judge shall have the power to punish for contempt as in cases of disobedience of a like order or subpoena issued by or from such court, or a refusal to testify therein.

~~(3)~~

(4) The expense of the subpoena including mileage and per diem as specified by law shall be borne by the party requesting the subpoena. The Commission may prescribe reasonable time limitations for the filing of requests for the subpoena of witnesses and documents and may further require payment of the expenses for such subpoenas in advance.

~~(4)~~

(5) Upon the filing of a timely motion by any party the Commission 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 Commission to issue such subpoena and further provided the party requesting the subpoena tender to the Commission 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.

~~(5)~~

(6) This section governing the issuance of subpoenas and production of documents shall not be interpreted to require that any members of the Medical Licensure Commission, or the Board of Medical Examiners, or any investigator, attorney or employee of the Medical Licensure Commission or 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 Medical Licensure Commission, the contents of any investigative files and records of the Board of Medical Examiners, including any investigative reports, statements, summaries or other materials compiled and accumulated by investigators, attorneys or staff of the Board of Medical Examiners pursuant to its ordinary and usual investigative function are confidential and privileged and are not subject to discovery proceedings under these rules.

~~(6)~~ Author:

Statutory Authority: Code of Ala. 1975, §§34-24-361, 34-24-

363, 34-24-364.

History: Filed May 6, 1983. **Repealed and new rule adopted in lieu thereof:** Filed May 1, 1984. **Amended:** Filed May 5, 2010; effective June 9, 2010.

545-X-3-.06 Intervention in Contested Cases. In contested cases, upon timely application, any person shall be permitted to intervene when a statute confers an unconditional right to intervene, or when the applicant has an individual interest in the outcome of the case as distinguished from a public interest and the representation of the interest of the applicant is inadequate. The mere fact that an applicant is, or has been, a patient of the licensee is not a sufficient interest to permit intervention. The individual interest contemplated by this rule is a business or financial interest which cannot adequately be represented by the Board of Medical Examiners.

Author:

Statutory Authority: Code of Ala. 1975, §41-22-14.

History: Filed May 6, 1983. **Repealed and new rule adopted in lieu thereof:** Filed May 1, 1984. **Amended:** Filed May 5, 2010; effective June 9, 2010.

545-X-3-.07 Disqualification from Participation in Proposed Order or Final Decision Based Upon Conflict of Interest or Personal Bias.

(1) No individual who participates in the making of any proposed order or final decision in a contested case shall have prosecuted or represented a party in connection with that case, the specific controversy underlying that case, or another pending factually related contested case, or pending factually related contested case, or pending factually related controversy that may culminate in a contested case involving the same parties. Nor shall any such individual be subject to the authority, direction or discretion of any person who has prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy, involving the same parties.

~~(1)~~

(2) A party to a contested case proceeding may file a timely and sufficient affidavit asserting disqualification according to the provisions of subsection (a) or asserting personal bias of an individual participating in the making of any proposed order or final decision in that case. The agency shall determine the matter as part of the record in the case. When the

Commission in these circumstances makes such a determination with respect to the Commission member, that determination shall be subject to de novo judicial review in any subsequent review proceeding of the case.

Author:

Statutory Authority: Code of Ala. 1975, §41-22-18.

History: Filed May 6, 1983. **Repealed and new rule adopted in lieu thereof:** Filed May 1, 1984.

**545-X-3-.08 Conduct Of Hearings In Contested Cases;
Appointment And Authority Of Legal Counsel; Grounds For
Suspension Or Revocation Of License.**

(1) Legal counsel is an individual appointed by the Commission to act in such capacities and with such authority as is specified herein. Legal counsel shall be an attorney licensed to practice law in the state of Alabama. The legal counsel shall be compensated at a rate to be prescribed by the Commission for services actually performed pursuant to a contractual agreement entered into between the Commission and the legal counsel. Subject to the restrictions concerning participation in prosecution and conflict of interest, a legal counsel may be an employee of the Commission.

~~(1)~~

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

~~(2)~~

(a) Advise the Commission regarding any motions contesting or challenging the legal sufficiency of a complaint, or other documents which is the basis of a contested case.

~~(a)~~

(b) Advise the Commission regarding all pre-hearing motions by all parties to a contested case.

~~(b)~~

(c) To assist the Chairman in making rulings regarding the attendance of parties and/or attorneys at hearings and conferences on matters related to the contested case.

~~(c)~~

(d) To assist the chairman on behalf of the Commission in setting 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.

(d)

(e) To assist the chairma~~an~~, when the Commission is not in session, on legal matters related to a pending contested case. The Chairman 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 Commission.

~~(e)~~

(f) To administer oaths and to certify the authenticity of documents when required in the discharge of his duties as legal counsel in a contested case.

~~(f)~~

(g) To assist the Chairman in directing that evidence relevant to the general character and reputation of the licensee 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 licensee.

~~(g)~~

(h) To render advice to the Chairman of the Commission on the conduct of all aspects of hearings on contested cases.

~~(h)~~

(i) The legal counsel is specifically authorized to represent the Commission in all matters involving the Commission in state and federal courts. The legal counsel is specifically authorized to represent the Commission in all appeals from its decisions and orders.

~~(i)~~

(3) The legal counsel shall advise the Commission on matters of evidence and law during its deliberations.

~~(3)~~

(4) When directed by the Commission, the legal counsel shall prepare the final order reflecting the decision of the Commission in each contested case. The final order shall be executed and authenticated in the manner prescribed by the Commission.

~~(4)~~

~~(5) When directed by the Commission, the legal counsel shall notify all parties to the hearing of the final order of the Commission and of all appellate remedies available to any party that is adversely affected by a decision of the Commission.~~

~~(6)~~ In addition, the legal counsel shall be authorized to perform such duties and functions in each specific case as may be prescribed by the Commission, it being the intent of this rule that the legal counsel shall be the chief legal advisor to the Commission in the conduct and disposition of all contested cases. However, the Commission shall retain the authority in all cases to hear all evidence and argument and be the sole judge of the facts. The Commission shall fix the penalty or

| restriction, if any, to be imposed at the conclusion of a
contested case. ~~The~~

~~(7) Commission shall appoint a legal counsel in each contested case unless the case is subject to informal disposition as otherwise provided in these rules.~~

~~(5) The person appointed by the Commission to act as legal counsel in the contested case~~Commission's legal counsel shall not have participated in the investigation or prosecution of the licensee in the matters pertaining to the contested case. The legal counsel shall not have a manifest conflict of interest with any party in a contested case.

~~(8)~~

~~(6)~~ The Chairman of the Commission shall preside during hearings with the assistance and advice of a legal counsel. All evidence and argument shall be presented before the Commission and no member of the Commission shall participate in the final decision unless he has been present during all of the hearing or unless he has considered the complete record of those proceedings which took place in his absence.

~~(9)~~

~~(7)~~ The Chairman shall be responsible for the conduct of the hearing and shall make all rulings on procedural and evidentiary issues with the assistance of the Commission's legal counsel. ~~A and all~~ rulings of the Chairman shall be final and shall be deemed to be the action of the Commission unless such rulings are challenged by a member of the Commission. All such challenges are to be considered and decided by the Commission outside the presence of the parties, attorneys and witnesses to the contested case, and only the decision of the Commission 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 Commission, and the imposition of reasonable sanctions and penalties for misconduct of parties and attorneys before the Commission. 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.

~~(10)~~

~~(8)~~ During the conduct of any contested case the members of the Commission may direct questions to witnesses offering testimony to the Commission but the Chairman shall insure that such questions are material and relevant to the issues under inquiry.

~~(11)~~

~~(12)~~ ~~(9)~~ The hearing shall be conducted in so far as is practicable in the same manner as a civil action at law. In a 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 facia violation of the offenses and conditions as stated in the

complaint. At the conclusion of the complainant's presentation, the respondent shall have the opportunity to call witnesses on his or her behalf and to rebut the allegations of the complainant and/or to present evidence in mitigation of the evidence presented by the complainant. At the completion of Respondent's case, Complainant shall be allowed to call witnesses or submit evidence to rebut facts or issues raised by Respondent.

(102) At the conclusion of the hearing, the Commission shall hold its deliberations in executive session in consultation with the legal counsel. If the Commission finds that a physician ~~or osteopath~~ is guilty of any of the acts, offenses or conditions enumerated in § 34-24-360, the Commission may take any of the following actions or any combination of the following action:

(a) Enter a judgment and impose a penalty, which penalty may include revoking, suspending, or restricting a license to practice medicine, issuing a reprimand, issuing a non-disciplinary citation, imposing a fine, or any combination thereof;

(b) Suspend imposition of judgment and penalty;

(c) Impose judgment and penalty, but suspend enforcement thereof by placing the physician ~~or osteopath~~ on probation, which probation shall be revocable if the Commission finds that the conditions of the probation order are not followed by the physician ~~or osteopath~~.

~~(i)~~

(i) As a condition of probation the Commission may require the physician ~~or osteopath~~ to submit to care, counseling, or treatment by a physician-healthcare professional designated by the Commission. The expense of such care, counseling or treatment shall be borne by the physician ~~or osteopath~~ on probation.

~~(ii)~~

(ii) The Commission may at any time modify the conditions of the probation and may include among them any reasonable condition for the purpose of the protection of the public or for the purpose of the rehabilitation of the probationer or both.

~~(iii)~~

(d) Impose an ~~administrative~~ fine on the respondent in

an amount not greater than ten thousand dollars (\$10,000.00) for each violation of '34-24-360 or any rule or regulation of the Commission which relates to '34-24-360.

(i) All administrative fines assessed by the Commission shall be due and payable to the Commission within thirty (30) days from the date the fine is assessed, unless otherwise provided for by order of the Commission. In the event that an appeal is filed subject to '34-24-357, Code of Ala. 1975, then the fine shall be required to be paid. However, the Commission shall refund the fine in the event the decision of the Commission is reversed by the final judgment of the reviewing court.

~~(i)~~

~~(ii)~~ The Commission shall not renew the annual certificate of registration as set forth in Section 34-24-337 of

(ii) ~~any~~ physician against whom an administrative fine has been assessed by the Board of Medical Examiners or the Commission until such fine is paid in full. However, if an order of the Medical Licensure Commission or the Board of Medical Examiners allows for the payment of the fine or costs in installments and if the licensee is current with the installment payment, then the physician shall be permitted to renew his or her certificate of registration. In the event that the fine is paid more than thirty-one (301) days after registration is due, the licensee shall be required to pay the reinstatement fee and complete all forms as provided by these rules.

(iii) All administrative fines received by the Commission shall be deposited in an escrow account and held until all proceedings seeking review of the Commission's order have concluded. At the conclusion of these proceedings or after the statutory period for filing an appeal has lapsed, all fines paid to the Commission shall be deposited with the Board of Medical Examiners for use as provided by statute and by the rules and regulations of the Alabama State Board of Medical Examiners.

3. ~~_____ All administrative fines received by the Commission shall be deposited in an escrow account and held until all proceedings seeking review of the Commission's order have concluded. At the conclusion of these proceedings or after the statutory period for filing an appeal has lapsed, all fines paid to the Commission shall be deposited with the Board of Medical Examiners for use as provided by statute and by the rules and regulations of the Alabama State Board of Medical Examiners.~~

(11) (e) Administrative Costs:

in addition to the administrative fine authorized in subsection (d), the Commission, upon application by the Board of Medical Examiners, may require a physician found to be in violation of Section 34-24-360 to pay the costs, fees, and expenses of the Board incurred in connection with any proceedings before the Commission. Such costs include, but are not limited to the following;

~~(a) 1. In addition to the administrative fine authorized~~

~~(b) in subsection (d), the Commission, upon application by the Board of Medical Examiners, may require a physician or osteopath found to be in violation of Section 34-24-360 to pay the costs, fees, and expenses of the Board incurred in connection with any proceedings before the Commission. Such costs include, but are not limited to the~~

following:

(a) The actual cost of independent medical review and expert testimony.

~~(e)~~

(b) Fees and expenses of board counsel.

~~(d)~~

(c) Deposition costs.

~~(e)~~

(d) Travel expenses for board staff.

~~(f)~~

(e) Charges incurred for obtaining documentary evidence, and such other categories of expenses as may be prescribed in regulation published by the Board and Commission.

(12) Payment of any costs, fees, or expenses ordered by the Commission shall be made and enforced in the same manner as an administrative fine, as set forth in the preceding section. The following procedures shall be followed with the regard to requests for costs, fees and expenses:

~~(a) 2. Payment of any costs, fees, or expenses ordered by~~

~~(b) the Commission shall be made and enforced in the same manner as an administrative fine, as set forth in the preceding section.~~

~~(c) 3. The following procedures shall be followed with~~

~~(d) the regard to requests for costs, fees and expenses:~~

(a) If the Board intends to seek the imposition of costs, fees and expenses, it shall give notice of such intent prior to the commencement of the final hearing. Such notice may be included in the Administrative Complaint, or it may be given by separate pleading filed with the Commission, a copy of which shall be served on the licensee or his/her attorney.

~~(e)~~

(b) Unless otherwise ordered by the Commission, ~~The~~ Board ~~shall~~ may submit to the Commission, within ~~ten~~ thirty days after the conclusion of the final hearing, a complete bill of costs, fees and expenses. Such bill of costs, fees and expenses shall include a verification by the provider(s) of the services for which reimbursement is requested that such costs General Counsel of the Alabama Board of Medical Examiners, that the costs, fees, and expenses were necessary for the prosecution of the case. A copy of such bill of costs, fees and expenses shall be served upon the licensee or his/her attorney.

~~(f)~~

(c) The licensee may file written objections to the bill of costs, fees and expenses within ten days of ~~its~~ receipt service thereof. Such objection shall be set forth in detail the basis for such objection. If no objection is filed, the Commission may assume that the costs, fees and expenses requested are necessary and reasonable.

~~(g)~~

(d) In determining whether or not to award cost, fees and expenses, the Commission shall determine whether or not such cost, fees and expenses are reasonable and necessary for the prosecution of the case. Attorney fees shall be awarded at a rate not to exceed \$150.00 per hour for the Board's in-house counsel. Attorney fees for outside counsel shall be awarded at a rate not to exceed the contract rate set out in the contract between the Board and said counsel.

~~(h)~~

(e) The Commission may include its ruling on the request for costs, fees and expenses in its final order. In the alternative, the Commission may enter a final order and reserve for a later time the issue of costs, fees and expenses. The fact that the issue of costs, fees and expenses is reserved for a later ruling shall not effect the finality of the order.

~~(i)~~

(~~§13~~) If a license to practice medicine ~~or osteopathy~~ in Alabama is suspended or revoked, the holder of that license shall not practice in Alabama during the term of the suspension or revocation.

(14) If the Commission finds that the physician is not guilty of any of the acts, offenses or conditions enumerated in § 34-24-360, it shall issue a judgment setting out such findings and dismiss the administrative complaint.

(135) When the issue is whether or not a doctor is competent or

physically or mentally capable of practicing medicine ~~or~~ osteopathy with reasonable skill and safety to patients, then, upon a showing of probable cause to the Commission that the doctor is not competent or capable of practicing medicine ~~or~~ osteopathy with reasonable skill and safety to patients, the Commission may order and direct the doctor in question to submit to either a physical, mental, ~~or~~ laboratory, or diagnostic examination or testing or any combination of such ~~a~~

examinations or testing to be performed by a physician or other healthcare professional ~~or osteopath~~ designated by the Commission. The expense of such examination shall be borne by the physician ~~or osteopath~~ who is so examined.

(16) Every physician licensed to practice medicine ~~or osteopathy~~ in Alabama who accepts the privilege of practicing medicine ~~or osteopathy~~ in Alabama by actually practicing or by the making and filing of an annual registration to practice medicine shall be deemed to have given his consent to submit to a mental, physical or laboratory examination or to any combination of such examination and to waive all objections to the admissibility of the examining ~~physician's~~ health care professional's testimony or examination reports on the ground that they constitute privileged doctor-patient communications.

~~(16)~~

(17) The Commission shall have the power and duty to suspend, revoke or restrict any license to practice medicine ~~or osteopathy~~ in the State of Alabama or place on probation or fine any licensee, whenever the licensee shall be found guilty on the basis of substantial evidence of any of the following acts or offenses:

~~(17)~~

(a) Fraud in applying for or procuring a certificate of qualification to practice medicine ~~or osteopathy~~ or a license to practice medicine ~~or osteopathy~~ in this State;

~~(a)~~

(b) Unprofessional conduct as defined by statute or by these rules and regulations promulgated by the Commission;

~~(b)~~

(c) Practicing medicine ~~or osteopathy~~ in such a manner as to endanger the health of the patients of the practitioner;

~~(c)~~

(d) Conviction of a felony; a copy of the record of conviction, certified to by the clerk of the court entering the conviction, shall be conclusive evidence;

~~(d)~~

(e) Conviction of any crime or offense which reflects the inability of the practitioner to practice medicine ~~or osteopathy~~ with due regard for the health or safety of his patients; a copy of the record of conviction, certified to by the clerk of the court entering the conviction, shall be conclusive evidence;

~~(e)~~

(f) Conviction for any violation of a federal or state law relating to controlled substances; a copy of the record of conviction, certified to by the clerk of the court entering the conviction, shall be conclusive evidence;

~~(f)~~

(g) Use of any untruthful or deceptive or improbable statement concerning the licensee's qualifications or effects or results of his proposed treatment;

~~(g)~~

(h) Distribution by prescribing, dispensing, furnishing, or supplying of controlled substances to any person or patient for any reason other than a legitimate medical purpose;

~~(h)~~

(i) Gross malpractice or repeated malpractice or gross negligence in the practice of medicine ~~or osteopathy~~;

~~(i)~~

(j) Division of fees or agreement to split or divide the fees received for professional services with any person for bringing or referring a patient;

~~(j)~~

(k) Performance of unnecessary diagnostic tests or medical or surgical services;

~~(k)~~

(l) Charging fees determined by the Commission to be grossly excessive or intentionally filing or causing to be filed false or fraudulent claims, as defined by the Commission, for medical or surgical services to any private or government third party payor having a legal or contractual obligation to pay such claims on behalf of a patient;

~~(l)~~

(m) Aiding or abetting the practice of medicine by any person not licensed by the Commission;

~~(m)~~

(n) Conviction of fraud in filing ~~m~~Medicare or Medicaid claims or conviction of fraud in filing claims to any third party payor; a copy of the record of conviction, certified to by the clerk of the court entering the conviction, shall be conclusive evidence;

~~(n)~~

(o) Any disciplinary action taken by another state against a license to practice medicine ~~or osteopathy~~, based upon acts by the licensee similar to acts described in this section; a certified copy of the record of the disciplinary action of the state making such an action is conclusive evidence thereof;

~~(o)~~

(p) Refusal to appear before the Board of Medical Examiners after having been formally requested to do so in writing by the Executive Director of the Board;

~~(p)~~

(q) Making any fraudulent or untrue statement to the Commission or to the Board of Medical Examiners;

(q)

~~(*)~~ The termination, revocation, probation,
restriction, denial, failure to renew, suspension, reduction
or +

(r) resignation of staff privileges of a licensee by a hospital in this or any other state when such action is related to negligence or incompetence in the practice of medicine, moral turpitude, sexual misconduct, abusive or disruptive behavior, or drug or alcohol abuse;

~~(s)~~

(s)1.

Being unable to practice medicine ~~or osteopathy~~ with reasonable skill and safety to patients by reason of illness, inebriation, excessive use of drugs, narcotics, alcohol, chemicals or any other substance, or as a result of any mental or physical condition.

(i) When the issue is whether or not a doctor is competent or physically or mentally capable of practicing medicine ~~or osteopathy~~ with reasonable skill and safety to patients, then, upon a showing of probable cause to the Commission that the doctor is not competent or capable of practicing medicine ~~or osteopathy~~ with reasonable skill and safety to patients, the Commission may order and direct the doctor in question to submit to ~~either a~~ physical, mental, or laboratory, or diagnostic examination or testing, or any combination of such examinations or testing, to be performed by a physician or other healthcare professional ~~or osteopath~~ designated by the Commission or by the Board of Medical Examiners. The expense of such examination shall be borne by the physician ~~or osteopath~~ who is so examined.

~~(i)~~

(ii) Every physician licensed to practice medicine ~~or osteopathy~~ in the State of Alabama who accepts the privilege of practicing medicine ~~or osteopathy~~ in Alabama by actually practicing or by the making and filing of an annual registration to practice medicine shall be deemed to have given his or her consent to submit to a mental, physical, ~~or laboratory, or diagnostic examination or testing~~, or to any combination of such examinations or testing, and to waive all objections to the admissibility of the examining physician's or healthcare professional's testimony, ~~or examination reports, or diagnostic reports~~ on the ground that they constitute privileged doctor-patient communications.

~~(ii)~~

~~(iii)~~ Upon certification by the Board of Medical Examiners that a physician ~~or osteopath~~ has failed to comply with an order of the Board of Medical Examiners issued pursuant to Code of Ala. 1975, Section 34-24-360(19)(d) the Commission shall summarily suspend such physician's ~~or osteopath's~~ license. Such suspension shall

continue in effect until such time as the physician or
~~osteopath~~ complies with the order of the Board or the
order is withdrawn by the Board or the order is terminated
by the Commission after a hearing.

(iii)

~~(iv)~~ All reports, records, and documents obtained by
the Board pursuant to an order authorized by section 34-
24-360(19)(d) and introduced as evidence in any hearing
conducted by the Commission are privileged and
confidential and

(iv) shall not be public records nor available for court subpoena or for discovery proceedings.

~~(v)~~ A physician whose license to practice medicine has been suspended by the Commission under the authority of subparagraph (iii) above may obtain judicial review in accordance with the provisions of Sections 41-22-20 and 34-24-367.

~~(v)~~

~~6. A physician or osteopath whose license to practice medicine has been suspended by the Commission under the authority of subparagraph 4. above may obtain judicial review in accordance with the provisions of Sections 41-22-20 and 34-24-367.~~

(t) ~~1.~~ Being unable to practice medicine ~~or osteopathy~~ with reasonable skill and safety to patients by reason of a demonstrated lack of basic medical knowledge or clinical competency.

(i) Upon certification by the Board of Medical Examiners that a physician ~~or osteopath~~ has failed to comply with an order of the Board of Medical Examiners issued pursuant to Code of Ala. 1975, Section 34-24-360(20)(a) the Commission shall summarily suspend such physician's ~~or osteopath's~~ license. Such suspension shall continue in effect until such time as such physician ~~or osteopath~~ complies with the order of the Board or the order is withdrawn by the Board or the order is terminated by the Commission after a hearing.

~~(i)~~

(ii) A physician ~~or osteopath~~ whose license to practice medicine has been summarily suspended under the authority of subparagraph 2. above may obtain judicial review in accordance with the provisions of Sections 41-22-20 and 34-24-367.

~~(ii)~~

~~(iii)~~ Any physician ~~or osteopath~~ whose certificate of qualification and license to practice medicine has been restricted by the Board of Medical Examiners under the authority of Code of Ala. 1975, Section 34-24-360(20)(e) may request a hearing before the Commission. At such hearing it shall be the burden of the Board to demonstrate to the reasonable satisfaction of the Commission that the restriction or restrictions are consistent with the findings of the examination or evaluation ordered by the Board pursuant to Code of Ala. 1975, Section 34-24-360(20)(b). All such hearings shall be conducted on an expedited basis and any restrictions ordered by the Board

shall not be stayed by the Commission during the pendency of the hearing. The Commission may consider, in any hearing resulting from a decision of the Board to impose a restriction or restrictions on the certificate of qualification and license to practice medicine of the physician ~~or osteopath~~ in question, the results of all examinations or evaluations of basic knowledge or clinical competency upon which the Board relied and such other evidence as the Commission deems relevant to the issues presented. In rendering a decision the Commission is authorized to affirm the restriction or restrictions, to modify the

(iii) restriction or restrictions, or to order the removal of the restriction or restrictions.

(iv) A physician ~~or osteopath~~ adversely affected by a decision of the Commission resulting from a hearing under the preceding subparagraph ~~(4,iii)~~ may obtain judicial review in accordance with the provisions of Sections 41-22-20 and 34-24-367.

~~(i)~~

(v) The Commission may, within its discretion, revoke or suspend the license to practice medicine of a physician ~~or osteopath~~ who fails to abide by or who violates a restriction or restrictions imposed by the Board, or as modified by the Commission, on the certificate of qualification and license to practice medicine of the physician ~~or osteopath~~ in question, or it may impose administrative fines or other penalties as authorized by Sections 34-24-361 and 34-24-381.

~~(ii)~~

(u) Excessive prescribing, dispensing, furnishing or supplying of a schedule II controlled substance. A physician ~~or osteopath~~ violates this section if he or she prescribes, orders, dispenses, administers, supplies or otherwise distributes any Schedule II amphetamine or Schedule II amphetamine like anorectic drug or Schedule II sympathomimetic amine drug or compound thereof, or any salt, compound, isomer, derivative or preparation of the foregoing which are chemically equivalent thereto, or other nonnarcotic Schedule II stimulant drug, which drugs or compounds are classified under schedule II of the Alabama Uniform Controlled Substances Act, Section 20-2-24, to any person except for the therapeutic treatment of:

(i) Narcolepsy.

~~(i)~~

(ii) Hyperkinesis.

~~(ii)~~

(iii) Brain dysfunction of sufficiently specific diagnosis or etiology which clearly indicates the need for these substances in treatment or control.

~~(iii)~~

(iv) Epilepsy.

~~(iv)~~

(v) Differential psychiatric evaluation of clinically significant depression; provided, however, that such treatment shall not extend beyond a period of 30 days unless the patient is referred to a licensed practitioner specializing in the treatment of depression.

~~(v)~~ Clinically significant depression shown to be refractory to other therapeutic modalities; provided, however, that such treatment shall not extend beyond a period of 30 days unless the patient is referred to a licensed practitioner specializing in the treatment of depression; or for the clinical investigation of the effects of such drugs or compounds, in which case an investigative protocol must be submitted to and reviewed and approved by the State Board of Medical Examiners before the investigation has begun.

(vi)

~~6.(I) Clinically significant depression shown to be refractory to other therapeutic modalities; provided, however, that such treatment shall not extend beyond a period of 30 days~~

~~unless the patient is referred to a licensed practitioner specializing in the treatment of depression; or for the clinical investigation of the effects of such drugs or compounds, in which case an investigative protocol must be submitted to and reviewed and approved by the State Board of Medical Examiners before the investigation has begun.~~

~~(ii) A~~

(v) A physician prescribing, ordering or otherwise distributing the controlled substances listed above in the manner permitted by subsection (u) above ~~this section~~ shall maintain a complete record which must include documentation of the diagnosis and reason for prescribing, the name, dose, strength, and quantity of the drug, and the date prescribed or distributed. The records required under this subsection shall be made available for inspection by the certifying board or its representative upon request. Those Schedule II stimulant drugs enumerated above shall not be dispensed or prescribed for the treatment or control of exogenous obesity.

(w) Failure to maintain for a patient a medical record which meets the minimum standards stated in the rules and regulations promulgated by the Commission.

~~(w)~~

(x) The violation of '34-24-57, Code of Ala. 1975, in that the licensee, who, during the preceding three (3) year period has had two or more final judgments or settlements, or has had a total of three or more final judgments or settlements, or both, resulting from a claim or action for damages for personal injuries caused by an error, omission or negligence in the performance of medical professional services, or in the performance of medical professional services without consent.

~~(x)~~

(y) Practicing medicine ~~or osteopathy~~ in violation of the provisions of the Infected Health Care Worker Management Act, Act 93-846.

~~(y)~~

(z) Failure to comply with any rule of the Board of Medical Examiners or Medical Licensure Commission.

~~(z)~~ **Author:** Alabama Board of Medical Examiners, Wallace D. Mills

Statutory Authority: Code of Ala. 1975, §§34-24-57, 34-24-360, 34-24-381, 34-24-382.

History: Filed May 6, 1983. **Repealed and new rule adopted in lieu thereof:** Filed May 1, 1984. **Amended:** Filed September 25, 1986. **Amended:** Filed January 26, 1994;

effective March 3, 1994. **Amended:** Filed March 4, 2003;
effective

April 8, 2003. **Amended:** Filed April 29, 2005; effective June
3, 2005. **Amended:** Filed April 28, 2006; effective June 2,
2006. **Amended:** Filed November 30, 2007; effective January 4,
2008. **Amended:** Filed May 5, 2010; effective

June 9, 2010. **Amended:** Filed April 5, 2011; effective May 10, 2011. **Amended:** Filed November 26, 2014; effective December 31, 2014. **Amended:** Filed _____; effective.

Ed. Note: Amendment of _____ removed 3-.08(5) and (7) and renumbered as follows:

subsection (12)(c)(1-2) renumbered to (10)(c)(i-ii);
subsection (12)(d)(1-3) renumbered to (10)(d)(i-iii)
subsection (12)(e) renumbered to (11)
subsection (12)(e)(2) renumbered to (12)
subsection (12)(f) renumbered to (13)
subsection (13) renumbered to (15) et. seq.
subsection (15)(s)(1-6) renumbered to (17)(s)(i-v)
subsection (15)(t)(1-6) renumbered to (17)(t)(i-v)
subsection (15)(u)(1-6) renumbered to (17)(u)(i-vi)
subsection (15)(u)(ii) renumbered to (17)(v)

545-X-3-.09 Rules Of Evidence In Contested Cases.

(1) In contested cases, the rules of evidence as applied in nonjury civil cases in the circuit courts of the state shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. Objections to evidentiary offers may be made and shall be noted in the record. Whenever any evidence is excluded as inadmissible, all such evidence existing in written form shall remain a part of the record as an offer of proof. The party seeking the admission of oral testimony may make an offer of proof by means of a brief statement on the record describing the testimony excluded. All rulings on the admissibility of evidence shall be final and shall appear in the record. Subject to these requirements, when a hearing will be expedited and the interest of the parties will not be prejudiced substantially, any part of the evidence may be received or may be required to be submitted in verified form, provided the adverse party shall not be denied the right of cross-examination of the witness. The testimony of parties and witnesses shall be made under oath.

~~(1)~~

(2) Documentary evidence otherwise admissible may be received in the form of copies or excerpts, or by incorporation by reference to material already on file with the Commission. Upon request, parties shall be given an opportunity to compare the copy with the original.

(3) A party may conduct cross-examination required for a full and true disclosure of the facts, except as may otherwise be limited by law.

~~(2)~~

~~(3) A party may conduct cross-examination required for a full and true disclosure of the facts, except as may otherwise be limited by law.~~

(4) Official notice may be taken of all facts of which judicial notice may be taken and of other scientific and technical facts within the specialized knowledge of the Commission. Parties shall be notified at the earliest practicable time, either before or during the hearing, or by reference in preliminary reports, preliminary decisions or otherwise, of the facts proposed to be noticed and their course, including any staff memoranda or data, and the parties shall be afforded an opportunity to contest such facts before the decision is announced unless the agency determines as part of the record or decision that fairness to the parties does not require an opportunity to contest such facts.

~~(5) Official notice may be taken of all facts of which judicial notice may be taken and of other scientific and technical facts within the specialized knowledge of the Commission. Parties shall be notified at the earliest practicable time, either before or during the hearing, or by reference in preliminary reports, preliminary decisions or otherwise, of the facts proposed to be noticed and their course, including any staff memoranda or data, and the parties shall be afforded an opportunity to contest such facts before the decision~~

~~(6) is announced unless the agency determines as part of the record or decision that fairness to the parties does not require an opportunity to contest such facts.~~

(5) The experience, technical competence, and specialized knowledge of the Commission may be utilized in the evaluation of the evidence.

~~(7)~~

(6) A copy of records that are certified by the custodian of those records shall be admissible in evidence in a contested hearing before the Commission or Board. The certificate of the custodian of records provided for in this paragraph shall be in substantially the form as follows:

~~(8)~~

I, _____, hereby certify and affirm in writing that I am _____ of _____—and that I am custodian of the records that are attached hereto. The copies of the records are exact, full, true and correct copies of records pertaining to the case of _____.

All of which I hereby certify and affirm, under oath, this _____ day of _____, 20__.

Custodian of Records

Author: Alabama Medical Licensure Commission

Statutory Authority: Code of Ala. 1975, §41-22-13.

History: Filed May 6, 1983. **Repealed and new rule adopted in lieu thereof:** Filed May 1, 1984. **Amended:** Filed November 25, 2003; effective December 30, 2003. **Amended:** Filed September 30, 2016; effective November 14, 2016.

545-X-3-.10 Form Aand Content oOf Final Order; When Final Order tTo bBe Rendered; Service oOf Notice aAnd Copies Oof Final Order.

(1) The final order in a proceeding which affects substantial interests shall be in writing and made a part of the record and include findings of fact and conclusions of law separately stated, and it shall be rendered within thirty days:

(a) After the hearing is concluded, if conducted by the Commission;

~~(a)~~

(b) After a recommended order, or findings, and conclusions are submitted to the Commission and mailed to all parties;

~~(b)~~

(c) After the Commission has approved or modified a proposed order submitted by a hearing panel pursuant to Code of Ala. 1975, Section 34-24-366 and Rule 545-X-3-.14; or

~~(e)~~

(d) After the Commission has received the written and oral material it has authorized to be submitted, if there has been no hearing.

~~(d)~~

(2) The thirty-day period may be waived or extended with the consent of the parties.

~~(2)~~

(3) Findings of fact, if set forth in a manner which is no more than mere tracking of the statutory language, shall be accompanied by a concise and explicit statement of the underlying facts of record which support the findings. The Commission, in its discretion, may require the submission of proposed findings of fact from the parties. If the Commission requests such proposed findings of fact, the order shall include a ruling upon each proposed finding and a brief statement of the grounds for denying the application or request.

~~(3)~~

(4) If no expert testimony is heard during the course of a hearing, the Commission may include in the final order the expert medical findings made by the Commission.

~~(4)~~

(5) Parties shall be notified either personally or by certified mail, return request requested, of any order and, unless waived, a copy of the final order shall be so delivered or mailed to each party or to his attorney of record.

~~(5)~~

Author: Wayne P. Turner

Statutory Authority: Code of Ala. 1975, §§34-24-366, 41-22-16.

History: Filed May 6, 1983. **Repealed and new rule adopted in lieu thereof:** Filed May 1, 1984. **Amended:** Filed March 4, 2003; effective April 8, 2003. **Amended:** Filed May 5, 2010; effective June 9, 2010.

545-X-3-.11 Filing Of Application For Rehearing; Form Aand Content; Effect Of Application On Final Order Grounds For Rehearing; Service Of Application On Parties Of Record; Agency Decision On Application.

(1) Any party to a contested case who deems himself aggrieved by a final order and who desires to have the same modified or set aside may, within fifteen days after entry of said order, file an application for rehearing or a motion to alter, amend, or vacate the order, which shall specify in detail the grounds for relief sought therein and authorities in support

| thereof.

(2) The filing of such an application for rehearing or motion to alter, amend, or vacate

shall not extend, modify, suspend or delay the effective date of the order, and said order shall take effect on the date fixed by the agency and shall continue in effect unless and until said application shall be granted or until said order shall be suspended, modified, or set aside in a manner provided by law.

(3) Such application for rehearing or motion to alter, amend, or vacate will be considered

only if the final order is:

(a) in violation of constitutional or statutory provisions;

~~(a)~~

(b) in excess of the statutory authority of the agency;

~~(b)~~

(c) in violation of a Commission rule;

~~(c)~~

(d) made upon unlawful procedure;

~~(d)~~

(e) affected by other error of law;

~~(e)~~

(f) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

~~(f)~~

(g) unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

~~(g)~~

(4) Copies of such application for rehearing shall be served on all parties of record, who may file replies thereto.

(5) Within thirty days from the filing of an application the Commission may in its discretion enter an order:

(a) setting a hearing on the application for a rehearing which shall be heard as soon as practicable; or

~~(a)~~

(b) with reference to the application without a hearing; or

~~(b)~~

(c) granting or denying the application.

~~(c)~~

(d) If the Commission enters no order whatsoever regarding the application within the thirty-day period, the application shall be deemed to have been denied as of the expiration of the thirty-day period.

Author:

Statutory Authority: Code of Ala. 1975, §41-22-17.

History: Filed May 6, 1983. **Repealed and new rule adopted in lieu thereof:** Filed May 1, 1984. **Amended:** Filed ;effective

545-X-3-.12 **Immediate Effect Of Commission Order; Judicial Review; Vacation Of Order Bby Court; Venue.** Any order of the Commission suspending or revoking a license to practice medicine ~~or osteopathy~~ shall have immediate effect and shall not be stayed or held in abeyance by any court. If it is subsequently determined by a court of competent jurisdiction that the Commission acted arbitrarily or capriciously or that the Commission grossly abused its discretion, then, upon issuance of a preemptory writ of mandamus, the order of the Commission shall be vacated. The reviewing court, however, shall not itself hear or accept any further evidence with respect to issues of fact determined by the Commission. Notwithstanding any other provision of law to the contrary, any action commenced for the purpose of seeking judicial review of the administrative decisions of the Commission, including writ of mandamus, or judicial review pursuant to Chapter 22, Title 41, Code of Ala. 1975, must be filed, commenced, and maintained in the Alabama Court of Civil Appeals, pursuant to Code of Ala. 1975, Section 34-24-367 as amended by Act 2008-397.

Author: Unknown, Wallace D. Mills

Statutory Authority: Code of Ala. 1975, §34-24-367.

History: Filed May 6, 1983. **Repealed and new rule adopted in lieu thereof:** Filed May 1, 1984. **Amended:** Filed October 29, 2008; effective December 3, 2008. **Amended:** Filed ;effective

545-X-3-.13 **Emergency Suspension.**

(1) The Commission shall temporarily suspend the license of a physician ~~or osteopath~~ without a hearing:

(a) simultaneously with the institution of proceedings for a hearing provided under this section on the request of the Board if the Board finds that evidence in its possession indicates that the physician's ~~or osteopath's~~ continuation in practice may constitute an immediate danger to his patients or to the public; or,

~~(a)~~

(b) upon certification by the Board of Medical Examiners that the physician ~~or osteopath~~ has failed to comply with an order of the Board issued pursuant to Code of Ala. 1975, Section 34-24-360(19) or Section 34-24-360(20).

(2) If the Board of Medical Examiners finds that a physician's ~~or osteopath's~~ continuation in practice may constitute a danger to his patients or to the public and if the Medical Licensure Commission finds that danger to the public health, safety or welfare requires emergency suspension of a license and states in writing its reasons for that finding, the Commission may proceed without hearing to suspend the license of that physician ~~or osteopath~~. The suspension shall become effective immediately unless otherwise stated. The suspension may be effective for a period of not longer than 120 days and shall not be renewable; provided, however, that a summary suspension for failure to comply with an order of the Board issued pursuant to Section 34-24-360(19) or (20) shall continue in effect until such time as the physician ~~or osteopath~~ complies with the order of the Board or the order is withdrawn by the Board or the order is terminated by the Commission after a hearing. The Commission shall not suspend the same license for the same or substantially similar emergency within one calendar year from its first suspension unless the Commission clearly establishes that it could not reasonably be foreseen during the initial 120-day period that such emergency would continue or would likely reoccur during the next 9-month period. When such suspension is ordered, a formal suspension or revocation proceeding under subsection c of this shall also be promptly be instituted and acted upon.

~~(2)~~

(3) The Commission may meet by telephone conference call to act upon any request by the Board for the summary suspension of the license of a physician ~~or osteopath~~.

(4) Immediately upon acting to temporarily suspend the license of a physician, except in the case of a suspension for failure to comply with an order issue pursuant to Section 34-24-360(19) or (20), the Commission shall schedule a hearing to be held consistent with these rules and regulations and shall notify the respondent according to notice requirements outlined heretofore.

~~(3) Immediately upon acting to temporarily suspend the license of a physician or osteopath, except in the case of a suspension for failure to comply with an order issue pursuant to Section 34-24-360(19) or (20), the Commission shall schedule a hearing to be held consistent with these rules and regulations and shall notify the respondent according to notice requirements outlined heretofore.~~

Author: Wayne P. Turner, Wallace D. Mills

Statutory Authority: Code of Ala. 1975, §§34-24-360, 34-24-361. **History:** Filed May 6, 1983. **Repealed and new rule adopted in lieu thereof:** Filed May 1, 1984. **Amended:** Filed March 4, 2003; effective April 8, 2003.

545-X-3-.14 Appointment Of Hearing Panels.

(1) The chairman of the Commission may appoint members of the Commission to sit as a hearing panel to hear the evidence in a contested case whenever the chairman deems such appointment of a panel reasonably required and necessary to accomplish a timely hearing.

~~(1)~~

(2) A hearing panel shall consist of no fewer than three (3) Commission members. The public member of the Commission may be, but shall not be required to be, a member of each such hearing panel.

~~(2)~~

(3) Such hearing panels are authorized to conduct hearings in contested cases in the same manner as the full Commission is authorized to conduct hearings. At the conclusion of each hearing conducted by a hearing panel, such hearing panel shall prepare an order which shall be presented to the full Commission for ratification and, if ratified by the Commission, such order shall be the order of the Commission. It shall not be necessary for the members of the Commission not on the hearing panel to review the record of the hearing.

~~(3)~~

(4) When a hearing panel is appointed and the chairman of the Commission does not participate in the panel, the chairman of the Commission shall designate one (1) panel member to serve as acting chairman for the panel.

~~(4)~~

(5) All contested cases heard by a hearing panel shall be conducted in accordance with Rules 545-X-3-.03 through 545-X-3-.09.

~~(5)~~

(6) Before the Commission shall render a decision based on a hearing panel's recommendation, at least five (5) members of the Commission must be present and a majority of those present vote in favor of such decision.

Author: Wayne P. Turner

Statutory Authority: Code of Ala. 1975, §34-24-311, 34-24-366. **History:** Filed January 28, 1988. **Amended:** Filed March 4, 2003; effective April 8, 2003.

545-X-3-.15 Applications For Reinstatement Of Licenses And Applications For Modification Of Orders. Applications for reinstatement of a license to practice medicine ~~or osteopathy~~ which has been revoked or suspended by the Commission and applications for modification or termination of probation or removal or modification of restrictions concerning a license to practice medicine ~~or osteopathy~~ filed with the Commission within 24 months from the effective date of the Commission's order may,

within the discretion of the Commission, be dismissed by the commission as prematurely filed, subject to the right of the applicant to refile the application at a later date. An application as described above which is filed with the Commission more than 24 months following the effective date of the Commission's order may be granted, or may be set for a hearing before the Commission, and such hearing shall be conducted as a contested case under the Alabama Administrative Procedure Act. The commission shall be without jurisdiction to reinstate the license to practice medicine ~~or osteopathy~~ of a physician ~~or osteopath~~ whose license was revoked or indefinitely suspended by the Commission or voluntarily surrendered while under investigation or during the pendency of an administrative hearing if the application for reinstatement is received more than five years after the effective date of the revocation or surrender of the license. No application for reinstatement of a license to practice medicine ~~or osteopathy~~ which has been revoked or suspended by the Commission shall be considered unless a criminal background check shall have been obtained, pursuant to Code of Ala. 1975, Section 34-24-337 as amended by Act 2008-397.

Author: Wayne P. Turner, Wallace D. Mills

Statutory Authority: Code of Ala. 1975, §34-24-361.

History: New Rule: Filed March 4, 2003; effective

April 8, 2003. **Amended:** Filed October 29, 2008; effective

December 3, 2008. **Amended:** Filed May 5, 2010; effective June 9, 2010. **Amended:** Filed ;effective

545-X-3-.16

Probation Compliance Hearings.

(1) If a final order of the Commission in a contested case suspends the implementation of the penalty, or any portion thereof, and the physician's license is placed on probationary status, the Commission may, from time to time, hold a probation compliance hearing for the limited purpose of determining whether any restrictions or terms of the probation have been violated.

~~(1)~~

(2) In a probation compliance hearing, the probationer shall be afforded an opportunity to be heard after reasonable notice in writing. Notice shall be served on the probationer in the same manner as provided for in §34-24-361(e) of the Code of Ala. 1975, at least 20 days prior to the date set for the hearing and shall include:

~~(2)~~

(a) A statement of the time, place and nature of the hearing;

~~(b)~~

(b) citation to the restriction or term of probation in the final order which the probationer is accused of violating;

~~(c)~~

(c) a statement of the legal authority under which the hearing is to be held.

~~(d)~~

(3) The notice may contain any and all of the items listed in Rule 545-X-3-.03(5) above as well as copies of any and all reports, data, test results, or communications which tend to show that the probationer may have violated the restrictions or terms of probation.

~~(3)~~

~~(4)~~—A copy of the notice shall be served on the Alabama Board of Medical Examiners concurrently with service on the probationer. The Board shall have the right to intervene as a complainant at any time prior to the hearing date. If the Board elects to intervene, the Board shall notify the probationer and the Commission by filing a petition to intervene as complainant with the Commission, which shall serve a copy of the petition on the probationer. Upon filing such a petition, the Board shall have the right to appear through counsel, call witnesses, present evidence and argument, cross examine any witnesses giving testimony before the Commission, and make recommendations to the Commission.

(4) The Board shall be limited to the subject matter identified in the notice unless it alleges additional violations of the Commission's probation order in the petition to intervene. In no instance shall the Board be permitted to prosecute additional violations of the probation order unless notice has been provided to the probationer at least ten (10) days prior to the date set for the hearing. Nothing in this rule shall be construed to prohibit, preclude, or limit the Board's authority to file an administrative complaint with the Commission under applicable law and regulations.

~~(5)~~—(5) In a probation compliance hearing, a

~~(6)~~—probationer shall be afforded the opportunity to be heard by the Commission, to call witnesses, present evidence and argument, and to cross examine any witness giving testimony before the Commission, all as allowed for the Alabama Administrative Procedures Act, §41-22-1, et. seq. of the Code of Ala. 1975. A probationer may be represented by counsel at said probation compliance hearing.

(6) Witnesses may be subpoenaed to testify at or supply evidence for a probation compliance hearing by either

the Commission or the probationer in the same manner prescribed in Rule 545-X-3-.05 above.

(7) The rules of evidence in a probation compliance hearing shall be as set out in §41-22-13 of the Code of Ala. 1975, and Section 545-X-3-.09 above.

(8) If the Commission finds that the probationer has violated a restriction or term of probation, the Commission may enter an order, which shall be public record, either:

(a) Revoking Probationer's probation and implementing the penalties provided for in the final order; or

~~(a)~~

(b) Amending the final order to change the restrictions or terms of the probation, which terms may include suspending the probationers license during the pendency of the probationary period, or any other discipline provided for in Section 34-24-360 of the Code of Ala. 1975; or

~~(b)~~

(c) Tabling action until the occurrence of a future event, which event shall be reflected in the record and communicated to the probationer; or

~~(c)~~

(d) Taking no action.

~~(d)~~

(9) An order of the Commission entered pursuant to §545-X-3-.16 (8)(a) or (b) immediately above shall be in writing and made part of the record. The order shall state:

(a) The term or restriction of probation which the Commission has found the probationer to have violated; and

~~(a)~~

(b) The facts upon which the Commission bases its finding.

~~(b)~~

(10) Record. All data, staff memoranda, evidence, ~~evidence,~~ ~~argument~~, and testimony accepted or relied upon by the Commission relative to a probation compliance hearing shall be made a part of the record and shall be maintained by the Commission for at least five (5) years. Nothing in this section shall be construed to limit or alter the confidentiality requirements of §34-24-361.1.

(11) Appeal. ~~3.~~ A physician ~~or osteopath~~ whose probation has been revoked under the authority of this section may obtain judicial review of such revocation in

accordance with the provisions of Sections 41-22-20 and 34-24-367
of the Code of Alabama 1975. #

~~accordance with the provisions of Sections 41-22-20 and 34-24-367 of the Code of Ala. 1975.~~

Authors: Wallace D. Mills, E. Wilson Hunter

Statutory Authority: Code of Ala. 1975, §§34-24-360, 34-24-360.1, 34-24-361.

History: New Rule: Filed September 12, 2017; effective October 27, 2017.