

**RULES
OF
THE TENNESSEE BOARD OF MEDICAL EXAMINERS
DIVISION OF HEALTH RELATED BOARDS**

**CHAPTER 0880-1
RULES OF PROCEDURE FOR HEARING CONTESTED CASES**

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0880-1-.01 SUBPOENAS.

- (1) Purpose - Although this rule applies to persons and entities other than physicians, it is the Board's intent as to physicians that they be free to comprehensively treat and document treatment of their patients without fear that the treatment or its documentation will be unduly subjected to scrutiny outside the profession. Consequently, balancing that intent against the interest of the public and patients to be protected against substandard care and activities requires that persons seeking to subpoena such information and/or materials must comply with the substance and procedures of these rules. It is the intent of the Board that the subpoena power outlined herein shall be strictly proscribed. Such power shall not be used by the division or board investigators to seek other incriminating evidence against physicians when the division or board does not have a complaint or basis to pursue such an investigation. Thus, unless the division or its investigators have previously considered, discovered, or otherwise received a complaint from either the public or a governmental entity, then no subpoena as contemplated herein shall issue.
- (2) Definitions - As used in this chapter of rules the following words shall have the meanings ascribed to them:
 - (a) Probable Cause
 1. For Investigative Subpoenas - shall mean that probable cause, as defined by case law at the time of request for subpoena issuance is made, exists that a violation of the Medical Practice Act or rules promulgated pursuant thereto has occurred or is occurring and that it is more probable than not that the person(s), or items to be subpoenaed possess or contain evidence which is more probable than not relevant to the conduct constituting the violation.
 2. The utilization of the probable cause evidentiary burden in proceedings pursuant to this rule shall not in any way, nor should it be construed in any way to establish a more restrictive burden of proof than the existing preponderance of the evidence in any civil disciplinary action which may involve the person(s) or items that are the subject of the subpoena.
 - (b) Presiding Officer - For investigative subpoenas shall mean any elected officer of the board, or any duly appointed or elected chairperson of any panel of the board, or any screening panel, and any hearing officer, arbitrator or mediator.
- (3) Procedures
 - (a) Investigative Subpoenas

(Rule 0880-1-.01, continued)

1. Investigative Subpoenas are available only for issuance to the authorized representatives of the Tennessee Department of Health, its investigators and its legal staff.
2. An applicant for such a subpoena must either orally or in writing notify the Board Administrator of the intention to seek issuance of a subpoena. That notification must include the following:
 - (i) The time frame in which issuance is required so the matter can be timely scheduled; and
 - (ii) A particular description of the material or documents sought, which must relate directly to an ongoing investigation or contested case, and shall, in the instance of documentary materials, be limited to the records of the patient or patients whose complaint, complaints, or records are being considered by the division or board.
 - (I) In no event shall such subpoena be broadly drafted to provide investigative access to medical records of other patients who are not referenced in a complaint received from an individual or governmental entity, or who have not otherwise sought relief, review, or board consideration of a physician's conduct, act, or omission.
 - (II) If the subpoena relates to the prescribing practices of a licensee, then it shall be directed solely to the records of the patient(s) who received the pharmaceutical agents and whom the board of pharmacy or issuing pharmacy(ies) has so identified as recipients; and
 - (iii) Whether the proceedings for the issuance is to be conducted by physical appearance or electronic means; and
 - (iv) The name and address of the person for whom the subpoena is being sought or who has possession of the, items being subpoenaed.
3. The Administrator shall do the following:
 - (i) In as timely a manner as possible arrange for either an elected officer of the board, or any duly appointed or elected chairperson of any panel of the board, or any screening panel, or any hearing officer, arbitrator or mediator to preside and determine if the subpoena should be issued; and
 - (ii) Establish a date, time and place for the proceedings to be conducted and notify the presiding officer, the applicant and the court reporter; and
 - (iii) Maintain a complete record of the proceedings including an audio tape in such a manner as to:
 - (I) Preserve a verbatim record of the proceeding ; and
 - (II) Prevent the person presiding over the proceedings and/or signing the subpoena from being allowed to participate in any manner in any disciplinary action of any kind formal or informal which may result which involves either the person or the documents or records for which the subpoena was issued.

(Rule 0880-1-.01, continued)

4. The Proceedings

- (i) The applicant shall do the following:
 - (I) Provide for the attendance of all persons whose testimony is to be relied upon to establish probable cause; and
 - (II) Produce and make part of the record copies of all documents to be utilized to establish probable cause; and
 - (III) Obtain, complete and provide to the presiding officer a subpoena which specifies the following:
 - I. The name and address of the person for whom the subpoena is being sought or who has possession of the items being subpoenaed; and
 - II. The location of the materials, documents or reports for which production pursuant to the subpoena is sought if that location is known; and
 - III. A brief, particular description of any materials, documents or items to be produced pursuant to the subpoena; and
 - IV. The date, time and place for compliance with the subpoena.
 - (IV) Provide the presiding officer testimony and/or documentary evidence which in good faith the applicant believes is sufficient to establish that probable cause exists for issuance of the subpoena as well as sufficient proof that all other reasonably available alternative means of securing the materials, documents or items have been unsuccessful.
- (ii) The Presiding Officer shall do the following:
 - (I) Have been selected only after assuring the Board Administrator that he or she has no prior knowledge of or any direct or indirect interest in or relationship with the person(s) being subpoenaed and/or the licensee who is the subject of the investigation; and
 - (II) Commence the proceedings and swear all necessary witnesses; and
 - (III) Hear and maintain the confidentiality, if any, of the evidence presented at the proceedings; and
 - (IV) Control the manner and extent of inquiry during the proceedings and be allowed to question any witness who testifies; and
 - (V) Determine based solely on the evidence presented in the proceedings whether probable cause exists and if so, issue the subpoena for the person(s) or items specifically found to be relevant to the inquiry.; and
 - (VI) Sign the subpoena as ordered to be issued; and

(Rule 0880-1-.01, continued)

- (VII) Not participate in any way in any other proceeding whether formal or informal which involves the matters, items or person(s) which are the subject of the subpoena. This does not preclude the presiding officer from presiding at further proceedings for issuance of subpoenas in the matter.
- (b) Post-Notice of Charges Subpoenas - If the subpoena is sought for a contested case being heard with an Administrative Law Judge from the Secretary of State's office presiding, this definition shall not apply and all such post-notice of charges subpoenas should be obtained from the office of the Administrative Procedures Division of the Office of the Secretary of State pursuant to the Uniform Administrative Procedures Act and rules promulgated pursuant thereto..
- (4) Subpoena Forms
 - (a) All subpoenas shall be issued on forms approved by the Board.
 - (b) The subpoena forms may be obtained by contacting the Board's Administrative Office.
- (5) Subpoena Service - Any method of service of subpoenas authorized by the Tennessee Rules of Civil Procedure or the rules of the Tennessee Department of State, Administrative Procedures Division may be utilized to serve subpoenas pursuant to this rule.

Authority: T.C.A. §§4-5-202, 4-5-204, 63-6-101, and 63-6-214. **Administrative History:** Original chapter filed November 22, 1978; effective January 8, 1979. Repeal and new rule filed September 9, 1999; effective November 22, 1999.

0880-1-.02 RULES FOR CONTESTED CASE BEFORE THE BOARD OF MEDICAL EXAMINERS.

- (1) All contested cases before the Board of Medical Examiners shall be conducted pursuant to the Rules of Procedure for Contested Cases of the Rules of the Secretary of State as compiled at Chapter 1360-4-1.

Authority: T.C.A. §§4-5-202, 4-5-204, 63-6-101, and 63-6-214. **Administrative History:** Original chapter filed November 22, 1978; effective January 8, 1979. Repeal and new rule filed September 9, 1999; effective November 22, 1999.