

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI**

UNITED STATES OF AMERICA,)	
<i>Plaintiff,</i>)	
)	
v.)	No. 08-00026-04-CR-W-FJG
)	
CHRISTOPHER L. ELDER,)	
<i>Defendant.</i>)	

**NON-PARTY TEXAS MEDICAL BOARD’S
MOTION TO QUASH RULE 17(c) SUBPOENA AND IN THE
ALTERNATIVE, MOTION FOR PROTECTION
WITH SUGGESTIONS IN SUPPORT**

**TO THE HONORABLE SARAH W. HAYS, UNITED STATES MAGISTRATE
JUDGE:**

COMES NOW, the Texas Medical Board (the “Board”), a non-party to the above styled and numbered cause, by and through Greg Abbott, Attorney General of Texas, and the undersigned Assistant Attorney General, appearing *pro hac vice*, and files this Motion to Quash rule 17(c) Subpoena, and in the alternative, Motion for Protection, and would respectfully show the Court as follows:

1. Request for Telephone Hearing. Should the Court determine that a hearing on this motion is necessary, the Board requests that its counsel be allowed to appear by telephone.

2. Background. In accordance with Federal Rule of Criminal Procedure 17(c)(2) and federal common law, the Board, a non-party to the above-styled and numbered cause, asks the Court to quash the trial subpoena duces tecum served upon it by the defendant,

Christopher L. Elder, through his counsel, John R. Osgood.

2.1. On October 16, 2008, the Board was served with the subject subpoena, ordering the appearance of the Board's custodian of records, along with the production of the following documents and things:

That portion of the non-public investigative file (sic) maintained in the custody and care of the Texas Medical Board dealing with Dr. Peter Okose, Texas license number J2704, concerning an investigation of Dr. Okose which resulted in disciplinary actions against him by the TMB in July and August of 2006. Documents requested are any and all written submissions by Okose to the Board by him or on his behalf by any representative dealing with the aforesaid investigation; any recorded statements or transcripts of statements of Okose in the Board's possession dealing with the aforesaid investigation; any summaries or reports prepared by any investigator or Board member that reflects admissions, statements, or explanations offered by Okose to the Board in response to the aforesaid investigation; and, any other items or information in whatever medium, that reflect or are considered by the TMB as admissions or statements of Dr. Okose dealing with the aforesaid investigation.

The subpoena further advised that the witness custodian of records was to appear at courtroom #7-C on January 5, 2008 at 9 a.m. A true and correct copy of the subpoena is attached as State's Exhibit "A." By agreement, the witness's appearance was not required pending resolution of this motion. The trial date was subsequently rescheduled for April, 2009. The subpoena falls under rule 17(c) in that it seeks production of documents, rather than the mere appearance of a witness for testimony.

2.2 Because certain portions of the investigative and disciplinary files maintained by the Board regarding Dr. Okose are confidential by state statute, the

undersigned for the Board held a telephone conference with Mr. John R. Osgood, the defendant's counsel, to inform him of this fact and subsequently provided the statutory basis for such confidentiality. The Board will provided all non-confidential documents¹, but informed Mr. Osgood that it would withhold those documents that are confidential pursuant to Texas law. If necessary, the Board will submit the confidential documents to the Court for *in camera* review.

3. Texas Confidentiality Statutes. The Texas Medical Board is an agency of the State of Texas and is mandated by the Texas Constitution and the Texas Legislature to license and regulate the practice of medicine. *Texas Constitution Article XVI Section 31; Medical Practice Act, Texas Occupations Code Sections 151.003 and 152.001.* Pursuant to its duties to license and regulate physicians, the Board evaluates applications for licensure and investigates complaints against physicians. To assist the Board in its licensing and regulatory duties, the Texas Medical Practice Act, Texas Occupations Code section 155.007(g) provides for confidentiality and states in part that, "Each report received or gathered by the board on a license applicant is confidential and is not subject to disclosure under Chapter 552, Government Code."²

Documents gathered by the Board as part of any investigation of any licensee are likewise confidential by statute. Texas Occupations Code, section 164.007(c) provides in

¹Agreed Order of Temporary Suspension dated July 13, 2006; Agreed Order Dated August 25, 2006; Modification of Agreed Order dated August 24, 2007; Agreed Order Modifying Prior Order dated June 27, 2008; and Dr. Okose's public profile.

² Texas Public Information Act, commonly referred to as the "Open Records Act."

part:

Each complaint, adverse report, investigation file, other investigation report, and other investigative information in the possession of or received or gathered by the board or its employees or agents relating to a license holder, an application for a license, or a criminal investigation or proceeding *is privileged and confidential and is not subject to discovery, subpoena, or other means of legal compulsion for release* to anyone other than the board or its employees or agents involved in discipline of a license holder. (Emphasis added).

A subpoena issued pursuant to rule 17 may be quashed if it seeks irrelevant or privileged matters. *United States v. McGrady*, 508 F.2d 13, (8th Cir. 1974). Here, the material sought has been designated by the Texas Legislature as privileged, confidential, and not subject to subpoena under Texas law. For the convenience of the Court, copies of sections 155.007 and 164.007 are attached as State's Exhibits "B" and "C," respectively.

4. The Trial Subpoena Is "Unreasonable or Oppressive" under Rule 17.

4.1 Although the trial subpoena is limited to certain categories of documents, it is not limited to any particular disciplinary or investigative document held by the Board regarding Dr. Okose. Rather, Elder has simply described what documents he hopes to find in the privileged investigative files of the Board. A party seeking to subpoena a document must establish: (1) the subpoenaed document is relevant; (2) it is admissible; and (3) it has been requested with adequate specificity. *United States v. Hang*, 75 F.3d 1275, 1283 (8th Cir. 1996); *U.S. v. Butler*, 429 F.3d 140, 149 (5th Cir. 2005). The trial subpoena is unreasonable and should be quashed in accordance with FRCP 17(c)(2), because it is not limited in scope, nor has Elder established that the subpoenaed categories of material are relevant to the prosecution against him or any defense to that prosecution. There must be

such a showing, particularly in light of the privileged and confidential nature of the documents. The specificity and relevancy requirements “require more than the title of a document and conjecture as to its contents.” *Hang*, at 1283 (citing *United States v. Arditti*, 955 F.2d 331, 345 (5th Cir.)). Therefore, the subpoena should be quashed.

4.2 Similarly, the trial subpoena is a “fishing expedition” that is not related to the charges against the defendant in this case. Using a subpoena as “a fishing expedition to see what may turn up,” was condemned in *Bowman Dairy Co. v. United States*, 341 U.S. 214, 221, 71 S.Ct. 657, 679, 95 L.Ed. 879 (1951). The fact that Dr. Elder has limited the request to all portions of the file that relate to a specific investigation of a specific licensee does not make it any less of an effort at discovery, which is not the intent for the use of a subpoena under rule 17. *Bowman*, at 679. A trial subpoena is a “compulsory process for securing specific, identifiable evidence for trial.” *U.S. v. Jackson*, 155 F.R.D. 664, 667 (D. Kan. 1994). The subpoena is unreasonable or oppressive and should be quashed in accordance with rule 17(c)(2) because it is a “fishing expedition.”

5. Use of subpoena to obtain impeachment materials is inappropriate. Conversations with counsel for Dr. Elder indicated that the initial reason for issuing the subpoena to the Board was so that counsel could obtain material to aid him in impeaching Dr. Okose, who he expected to be called by the prosecution at trial. The use of a rule 17(c) subpoena to obtain documents to be used for impeachment purposes is generally not a valid justification for the issuance of the subpoena. *United States v. Fields*, (in the matter of Wells Fargo Bank, non-party witness), 663 F.2d 880 (9th Cir. 1981). Even if procurement of such

evidence were to be an appropriate goal for the subpoena, such evidence could not become relevant unless and until the witness for whom the impeachment is expected actually testifies. *United States v. Cuthbertson*, 651 F.2d 189 (3rd Cir. 1981) Therefore, even assuming the subpoena otherwise complies with rule 17, Elder has failed to show that the information sought is relevant and admissible at the time of the issuance of the subpoena.

After conversations with Mr. Rhodes, counsel for the prosecution, it is clear that Dr. Okose does not even appear on the prosecution's witness list, and the prosecution has no intention of calling Dr. Okose as a witness. Therefore, the previous stated reason for seeking impeachment material, in addition to being an insufficient reason, now no longer exists.

In response, counsel for Elder indicates that he has now added Okose as a "hostile defense witness" who he may call in his case. This is even further removed in terms of relevancy and admissibility. The undersigned has learned that the Magistrate Judge has previously denied a Motion for Rule 17(c) subpoena to the Medical Board, on the grounds that it was overbroad. The Board asserts that this trial subpoena is likewise overbroad, is a fishing expedition, and seeks information that at best might be relevant, depending on the testimony of Dr. Okose, *if he even testifies*. This is too far removed to overcome the clear public interest in keeping these documents privileged, confidential, and not subject to subpoena. Accordingly, the subpoena should be quashed. In the alternative, the Board would respectfully request that the subpoenaed material be reviewed *in camera* by the court to determine whether it is properly subject to disclosure, given the confidential nature of the material. *Id.*

6. Public Policy. There is sound public policy in protecting reports and information received by the Board from third parties in the licensure process and the complaint investigation process. In the licensure process, confidentiality enables the Board to encourage frank and candid reporting from the applicant's references. Assurances of confidentiality ultimately serves the public interest by protecting public health and safety, because without it, an applicant's references would be reluctant to report an adverse matter to the Board. It is an absolute necessity that the Board receive straightforward and uncolored responses in its credentialing efforts. There is also a sound public policy in protecting the Board's investigative files from production. Confidentiality is essential to the investigatory process. Much of the information obtained in an investigation is from licensees who are under investigation, and the guarantee of confidentiality furthers a more candid and complete exchange of information from the licensee to the Board. Additionally, witnesses are less hesitant to come forward if they are guaranteed confidentiality. An investigation may be compromised if the Board's methods, progress, and sources of information are not protected from disclosure. Finally, the risk of wide dissemination of the confidential investigative and licensure materials via electronic means is real. The fact that this trial will occur in Missouri, outside the state of Texas, means little in terms of the risk of disclosure. For reasons of public policy, Elder's rule 17(c) subpoena should be quashed.

Conclusion. The Board requests that the Court issue a protective order and quash defendant Elder's trial subpoena for production of confidential records for the reasons stated above.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I hereby certify that multiple telephonic conferences have been held in November and December, 2008, with Mr. John R. Osgood, in a good faith attempt to resolve the merits of this discovery dispute, but an agreement could not be reached. It is therefore necessary to present this matter to the Court for resolution.

/s/ John S. Langley
John S. Langley

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on February 18, 2009, to the CM-ECF system of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

/s/ **John S. Langley**

John S. Langley