

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: North Carolina Behavior Analyst Licensure Board

RULE CITATION: All Submission for Permanent Rule Forms

DEADLINE FOR RECEIPT: Thursday, November 10, 2022.

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:

In each form, regardless of whether the Rule deals with a fee or not, you've checked "Yes" in Box 7 indicating that the Rule establishes or increases a fee. Please amend your forms so that "Yes" is checked only in the Rules that actually require the payment of a fee.

In Box 9A, under "Reason for Action" you've checked both "Agency" and "Legislation enacted by the General Assembly". However, instead of citing to a session law, you cite to a range of statutes in Chapter 90. If there is a session law amending these statutes, please cite to the session law, rather than the codified statutes.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Brian Liebman
Commission Counsel
Date submitted to agency: November 1, 2022

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: North Carolina Behavior Analyst Licensure Board

RULE CITATION: All Rules

DEADLINE FOR RECEIPT: Thursday, November 10, 2022.

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In reviewing this Rule, the staff recommends the following changes be made:

In many of these Rules, rather than citing to specific statutes in Chapter 90, you cite to a range – i.e. “G.S. 90-731-737.” While it’s fine to cite to more than one statute, in some rules, many of the statutes within that range were not applicable, and missed statutes outside the range that were applicable. Additionally, if you are going to cite to multiple statutes, you need to cite them individually—i.e. “G.S. 90-731, 90-732, 90-733” and so on.

Please review all such instances, ensure that the statutes you’re citing to are relevant to the subject matter of the Rule, and cite each statute independently.

Throughout these Rules, I noticed inconsistencies in the capitalization of “Ethics Committee.” Please choose capitalization or lower case and be consistent throughout.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Brian Liebman
Commission Counsel

Date submitted to agency: November 1, 2022

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: North Carolina Behavior Analyst Licensure Board

RULE CITATION: 21 NCAC 05 .0201

DEADLINE FOR RECEIPT: Thursday, November 10, 2022.

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:

In (a)(1), line 8, what are the contents of the completed application? Are they stated in these Rules?

In (a)(3), lines 11-12, is the Ethics Code incorporated by reference anywhere else in these Rules?

In your History Note, please cite to each statute individually.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

1 21 NCAC 05 .0201 is adopted with changes as published in 37:03 NCR 231-235 as follows:
2

3 **SECTION .0200 – APPLICATIONS**
4

5 **21 NCAC 05 .0201 APPLICATION FOR LICENSURE OF LICENSED BEHAVIOR ANALYST AND**
6 **LICENSED ASSISTANT BEHAVIOR ANALYST**

7 (a) The Behavior Analyst License applicant shall submit the following to the Board:

- 8 (1) Completed application developed and provided by the Board;
- 9 ~~(2) Official documentation of the education degree required for license;~~
- 10 ~~(3)~~ (2) Documentation of all previous professional human services licenses held by the applicant;
- 11 ~~(4)~~ (3) Attestation that the applicant has read and agrees to adhere to the current version of the Ethics Code
12 for Behavior Analysts published by the certifying entity;
- 13 ~~(5)~~ (4) Documentation of all work experience in the field of behavior analysis, including internships,
14 practicum, and other field experience completed as part of an educational course of study;
- 15 ~~(6)~~ (5) Documentation of all certifications of behavior analysis currently or previously granted by national
16 or other state certification bodies;
- 17 ~~(7)~~ (6) Payment of all required fees; and
- 18 ~~(8)~~ (7) Signed consent form provided by the State Bureau of Investigation or NC Department of Justice
19 authorizing the completion of a certified criminal records check based on the applicant's fingerprints
20 provided to a local law enforcement office.

21 (b) The Assistant Behavior Analyst License applicant shall submit the following to the Board:

- 22 (1) Completed application developed and provided by the Board;
- 23 ~~(2) Official documentation of the education degree required for license;~~
- 24 ~~(3)~~ (2) Documentation of all previous professional human services licenses held by the applicant;
- 25 ~~(4)~~ (3) Attestation that the applicant has read and agrees to adhere to the current version of the Ethics Code
26 for Behavior Analysts published by the certifying entity;
- 27 ~~(5)~~ (4) Documentation of all work experience in the field of behavior analysis, including internships,
28 practicum, and other field experience completed as part of an educational course of study;
- 29 ~~(6)~~ (5) Documentation of all certifications of behavioral analysis currently or previously granted by
30 national or other state certification bodies;
- 31 ~~(7)~~ (6) Payment of all required fees; and
- 32 ~~(8)~~ (7) Signed consent form provided by the State Bureau of Investigation or NC Department of Justice
33 authorizing the completion of a certified criminal records check based on the applicant's fingerprints
34 provided to a local law enforcement office.

35
36 *History Note: Authority G.S. 90-736-738;*
37 *Eff. December 1, 2022.*

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: North Carolina Behavior Analyst Licensure Board

RULE CITATION: 21 NCAC 05 .0202

DEADLINE FOR RECEIPT: Thursday, November 10, 2022.

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In reviewing this Rule, the staff recommends the following changes be made:

Why is this not part of Rule .0201, or at least mentioned in Rule .0201 as part of the requirements for licensure?

Please put the first word of each item in the list from (1)-(4) in lower case.

Is (b) necessary? You've already said in (a) that letters shall be submitted via the software portal.

In your History Note, you cite to G.S. 90-737.2 and 737.3, which do not appear in the General Statutes. I looked for a Session Law adding them to the G.S. but could not find one. Please explain and correct your citations accordingly.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Brian Liebman
Commission Counsel
Date submitted to agency: November 1, 2022

1 21 NCAC 05 .0202 is adopted as published in 37:03 NCR 231-235:
2

3 **21 NCAC 05 .0202 REFERENCES**

4 (a) The application for Behavior Analyst License and Assistant Behavior Analyst shall include two letters of
5 reference, to be submitted to the Board using a portal in the application software. The two letters of references shall
6 include:

7 (1) Name of reference and applicant;

8 (2) Period of time the reference has known the applicant;

9 (3) Nature of professional relationship; and

10 (4) Knowledge of the applicant's training, experience, professional skills, and adherence to legal and
11 ethical standards.

12 (b) Letters of reference shall be submitted electronically to the Board.

13

14 *History Note:* Authority G.S. 90-737.2; 90-737.3;

15 Eff. December 1, 2022.

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: North Carolina Behavior Analyst Licensure Board

RULE CITATION: 21 NCAC 05 .0203

DEADLINE FOR RECEIPT: Thursday, November 10, 2022.

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In reviewing this Rule, the staff recommends the following changes be made:

Why is this not part of Rule .0201, or at least mentioned in Rule .0201 as part of the requirements for licensure?

Is (b) not just repetition of (a)? Please clarify.

What does (c) mean? If the applicant must submit the official copy to the Board, why is the Board accepting it "on behalf the applicant [sic]"?

In (c), line 8, add an "of" between "behalf" and "the".

In your History Note, you cite to G.S. 90-737.2 and 737.3, which do not appear in the General Statutes. I looked for a Session Law adding them to the G.S. but could not find one. Please explain and correct your citations accordingly.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Brian Liebman
Commission Counsel
Date submitted to agency: November 1, 2022

1 21 NCAC 05 .0203 is adopted as published in 37:03 NCR 231-235:
2

3 **21 NCAC 05 .0203 CERTIFICATION**

4 (a) The applicant for Behavior Analyst License and Assistant Behavior Analyst shall submit an official copy of the
5 applicant's Behavior Analyst certification to the Board.

6 (b) The applicant for Assistant Behavior Analyst shall submit an official copy of the applicant's Behavior Analyst
7 certification to the Board.

8 (c) The Board shall accept the Behavior Analyst certification electronically submitted to the Board on behalf the
9 applicant.

10

11 *History Note: Authority G.S. 90-737.2; 90-737.3;*

12 *Eff. December 1, 2022.*

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: North Carolina Behavior Analyst Licensure Board

RULE CITATION: 21 NCAC 05 .0401

DEADLINE FOR RECEIPT: Thursday, November 10, 2022.

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The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:

In (a), where is your statutory authority to require a signed agreement? G.S. 90-738 refers to an “ongoing arrangement for supervision” that is “in a manner consistent with the certifying entity’s requirements for supervision...” Is this in the certifying entity’s requirements? If so please incorporate by reference pursuant to G.S. 150B-21.6.

In (a), line 6, to whom shall the applicant “provide” the agreement?

In (b), line 9, what is “supervisory documentation”? Please specify what documents or document types you’re requiring.

In (b), line 9, is it correct that the applicant for licensure as an assistant AND the supervisor should both maintain the supervisory documentation? If the supervisor must maintain the documentation and the agreement for 7 years, is the applicant also bound by this limit?

In (b), line 10, please delete “at least”, as rules already set a minimum.

In (c), line 12, who may make the delegation? Because the sentence is written in the passive tense, it is unclear who is authorized to delegate.

In (c), line 13, please define or delete “properly”, “safely”, and “appropriately.”

In (c), line 13, please define “other person.” Are you saying the licensed behavior analyst may delegate a task or a procedure to anyone?

Where is your statutory authority for delegation? G.S. 90-738 speaks only to licensure of an assistant behavior analyst.

In (d), line 15, the term “include” connotes an open-ended requirement. What other activities fall within “supervision activities?”

Brian Liebman
Commission Counsel
Date submitted to agency: November 1, 2022

In (d)(1), line 17, delete “and/or” and replace with “and” or “or” as appropriate.

In (d)(4), are these “informal interactions” part of the “supervisory documentation”?

In (e), are these requirements set out someplace? Please incorporate by reference, pursuant to G.S. 150B-21.6.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Brian Liebman
Commission Counsel

Date submitted to agency: November 1, 2022

1 21 NCAC 05 .0401 is adopted as published in 37:03 NCR 231-235:
2

3 **SECTION .0400 – SUPERVISION AND TELEHEALTH**
4

5 **21 NCAC 05 .0401 SUPERVISION OF ASSISTANT BEHAVIOR ANALYST**

6 (a) Applicants for licensure as an assistant behavior analyst shall provide a supervisory agreement signed by the
7 licensed behavior analyst and the licensed assistant behavior analyst.

8 (b) Applicants for licensure as an assistant behavior analyst shall maintain a copy of the signed supervisory agreement
9 and any supervisory documentation. The supervisor of the licensed assistant behavior analyst shall maintain a copy of
10 the signed supervisor agreement and supervisory documentation for at least seven years following the termination of
11 the supervisory relationship. This documentation shall be made available to the Board upon request.

12 (c) Delegation shall be made if, in the judgment of the licensed behavior analyst, the task or procedures can be
13 properly and safely performed by an appropriately trained assistant behavior analyst or other person, and the delegation
14 does not jeopardize the health or safety of the client.

15 (d) Supervision activities by the licensed behavior analyst include:

16 (1) Direct observation of the supervisee implementing behavior analytic assessment and intervention
17 procedures with clients in natural environments and/or training others to implement them, with
18 feedback from the supervisor. The observation may be done in-person, on-site, or using
19 asynchronous or synchronous formats.

20 (2) One-to-one, live, person-to-person, or synchronous virtual interactions between supervisor and
21 supervisee to review and discuss assessment and treatment plans and procedures, client assessment
22 and progress data and reports, published research, ethical and professional standards and guidelines,
23 professional development needs and opportunities, and relevant laws, regulations, and policies.

24 (3) Live, person-to-person, or synchronous virtual interactions between a supervisor and a group of
25 supervisees to review and discuss assessment and treatment plans and procedures, client assessment
26 and progress data and reports, published research, ethical and professional standards and guidelines,
27 professional development needs and opportunities, and relevant laws, regulations, and policies.

28 (4) Informal interactions between supervisors and supervisees via telephone, electronic mail, and other
29 written communication are encouraged but shall not be considered formal supervision for the
30 purposes of this Chapter.

31 (e) The frequency and nature of supervision interactions shall be consistent with the supervisory requirements set
32 forth by the certifying entity, as defined in G.S. 90-732.

33
34 History Note: Authority G.S. 90-738;

35 Eff. December 1, 2022.

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: North Carolina Behavior Analyst Licensure Board

RULE CITATION: 21 NCAC 05 .0402

DEADLINE FOR RECEIPT: Thursday, November 10, 2022.

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In reviewing this Rule, the staff recommends the following changes be made:

In (c), line 9, delete “and/or” and replace with “and” or “or” as appropriate.

In (c), line 11, why are “analyst’s” in the possessive? Please delete the ‘s in both instances.

In (d), line 14, please define or delete “sufficient.”

In (d), line 15, please delete “but is not limited to.”

In (d), line 15, the term “include” connotes an open-ended requirement. Are there other documents that you are requiring the licensed behavior analyst or licensed assistant to maintain?

In (e)(1), line 20, please delete “but is not limited to.”

In (e)(1), line 20, the term “include” connotes an open-ended requirement. Are there other tasks that are specifically non-client related?

In (e)(2), line 22, please delete or define “certain” and “routine.”

In (e)(2), line 24, is the “practice of behavior analysis” defined? How would one know whether the task does or does not constitute the practice of behavior analysis?

In (e)(3), line 26, please delete “such”.

In (e)(3), line 26-27, is this responsibility the same as defined in (b)?

Brian Liebman
Commission Counsel

Date submitted to agency: November 1, 2022

In (f), line 28, what training are you requiring? The rule speaks to supervision, but does not specify what level of training is necessary to avoid disciplinary action.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

1 21 NCAC 05 .0402 is adopted with changes as published in 37:03 NCR 231-235 as follows:
2

3 **21 NCAC 05 .0402 SUPERVISION OF BEHAVIOR TECHNICIANS**

4 (a) Behavior technicians shall be supervised by a licensed behavior analyst or a licensed assistant behavior analyst.

5 (b) Any licensed behavior analyst or licensed assistant behavior analyst employing or supervising behavior
6 technicians who are implementing applied behavior analysis interventions designed by the licensed behavior analyst
7 or licensed assistant behavior analyst shall maintain professional responsibility for the quality of the interventions
8 rendered and for the effects of the interventions upon the client, patient, or other individuals.

9 (c) The behavior analyst shall have face-to-face contact, including in-person and/or synchronous virtual interactions,
10 during the course of services with all patients, clients, or other recipients of services delivered by behavior technicians
11 as part of the interventions designed by the licensed behavior analyst's or licensed assistant behavior analyst's.

12 (d) Any licensed behavior analyst or licensed assistant behavior analyst employing or supervising behavior
13 technicians who are implementing applied behavior analysis interventions designed by the licensed behavior analyst
14 or licensed assistant behavior analyst shall maintain sufficient documentation to demonstrate their adherence to this
15 Rule. Such documentation may include but is not limited to supervision contracts, supervision logs, supervision notes,
16 meeting notes. The licensed behavior analyst or licensed assistant behavior analyst shall maintain documentation of
17 the employee's or supervisee's training for at least seven years following the termination of applied behavior analysis
18 services by the behavior technician.

19 (e) Behavior technicians shall be utilized to perform only:

20 (1) Non-client-related tasks, including but not limited to clerical and maintenance activities and the
21 preparation of the work area and equipment;

22 (2) Certain routine client-related tasks that, in the opinion of and under the supervision of a licensed
23 behavior analyst or a licensed assistant behavior analyst, have no potential to adversely impact the
24 client or the client's treatment plan and do not constitute the practice of behavior analysis; and

25 (3) The behavior technician shall not design assessment or intervention plans or ~~procedures~~, procedures
26 but may deliver such services as assigned by a supervisor who is responsible for the behavior
27 technician's work.

28 (f) Failure of any licensed behavior analyst or licensed assistant behavior analyst to train and supervise behavior
29 technicians shall subject that licensed behavior analyst or licensed assistant behavior analyst to disciplinary action
30 pursuant to 21 NCAC 05 .0603.

31
32 *History Note: Authority G.S. 90-745;*

33 *Eff. December 1, 2022.*

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: North Carolina Behavior Analyst Licensure Board

RULE CITATION: 21 NCAC 05 .0403

DEADLINE FOR RECEIPT: Thursday, November 10, 2022.

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In reviewing this Rule, the staff recommends the following changes be made:

Where is your statutory authority for authorizing telehealth? G.S. 90-738 deals with licensure of assistants, and is silent on telehealth.

Throughout, please make sure the first word of each item in the lists under (a)(1), (a)(2), and (a)(2)(E), are in lowercase.

Throughout, please capitalize "state" if referring only to the State of North Carolina.

In (a)(1)(A), line 7, delete or define "adequately".

In (C), line 11, delete or define "appropriate."

In (C), line 12, delete or define "readily."

In (a)(2)(A), please define "reasonable attempts" or delete "reasonable."

In (B), line 21, and (C), line 22, when you say "other than electronically," does this include the phone? Does this mean in person or regular mail?

In (D), lines 23-24, what does this mean? Does this mean technological literacy, or something else?

In (E), is the licensee to inform the client in writing and get informed written consent during, before, or after the telehealth encounter?

In (b)(1) and (2), p.2, line 5 and 7, capitalized "board."

In (b)(2), lines 7-8, what are you requiring with the language "...and may be subject... received by the client"? Are you saying the licensee must get licensed in the other state if licensure is available? Otherwise, when would the licensee not be subject to licensure requirements in the other state?

Brian Liebman
Commission Counsel

Date submitted to agency: November 1, 2022

In (c)(1), line 10, is “false, misleading, or deceptive” defined?

In (c)(1), line 11, please replace “their” with “his or her”, as the licensee is a singular person.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Brian Liebman
Commission Counsel

Date submitted to agency: November 1, 2022

1 21 NCAC 05 .0403 is adopted with changes as published in 37:03 NCR 231-235 as follows:
2

3 **21 NCAC 05 .0403 TELEHEALTH AND TELEPRACTICE**

4 (a) Requirements for Licensees Providing Applied Behavior Analytic Services via Telehealth

- 5 (1) A licensee who provides applied behavior analytic services via telehealth shall:
- 6 (A) Maintain competence with the technologies utilized, including understanding and
7 adequately addressing the actual and potential impact of those technologies on clients,
8 supervisees, or other professionals;
 - 9 (B) Maintain compliance with the NC Behavior Analyst Practice Act and the certifying body's
10 ethics code, and all other applicable federal, state, and local laws;
 - 11 (C) At the onset of the delivery of care via telehealth, identify appropriate emergency response
12 contacts local to the client so that those contacts shall be readily accessible in the event of
13 an emergency;
 - 14 (D) Protect and maintain the confidentiality of data and information in accordance with all
15 applicable federal, state, and local laws; and
 - 16 (E) Dispose of data and information only in accordance with federal, state, and local law and
17 in a manner that protects the data and information from unauthorized access.
- 18 (2) If applied behavior analysis services commence via telehealth, the licensee shall, at the initial
19 meeting with the client:
- 20 (A) Make reasonable attempts to verify the identity of the client;
 - 21 (B) Obtain alternative means of contacting the client other than electronically;
 - 22 (C) Provide to the client alternative means of contacting the licensee other than electronically;
 - 23 (D) Document if the client has the necessary knowledge and skills to benefit from the type of
24 telehealth to be provided by the licensee; and
 - 25 (E) Inform the client in writing about and obtain the client's informed written consent
26 regarding:
 - 27 (i) The limitations of using technology in the provision of applied behavior analytic
28 services;
 - 29 (ii) Potential risks to confidentiality of information due to technology in the provision
30 of applied behavior analytic services;
 - 31 (iii) Potential risks of disruption in the use of telehealth technology;
 - 32 (iv) When and how the licensee will respond to routine electronic messages;
 - 33 (v) In what circumstances the licensee will use alternative communications for
34 emergency purposes;
 - 35 (vi) Who else may have access to client communications with the licensee;
 - 36 (vii) How communications can be directed to a specific licensee;
 - 37 (viii) How the licensee stores electronic communications from the client; and

1 (ix) That the licensee or client may elect to discontinue the provision of services
2 through telehealth at any time.

3 (b) Jurisdictional Considerations

4 (1) A person providing applied behavior analytic services via telehealth to a person physically located
5 in North Carolina while services are provided shall be licensed by the board.

6 (2) A person providing applied behavior analytic services via telehealth from a physical location in
7 North Carolina shall be licensed by the board and may be subject to licensure requirements in other
8 states where the services are received by the client.

9 (c) Representation of Services and Code of Conduct - A licensee using telehealth to deliver services shall not:

10 (1) Engage in false, misleading, or deceptive advertising; nor

11 (2) ~~Split fees. Divide or share their fee with another licensee.~~

12

13 *History Note: Authority G.S. 90-738;*

14 *Eff. December 1, 2022.*

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: North Carolina Behavior Analyst Licensure Board

RULE CITATION: 21 NCAC 05 .0501

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In reviewing this Rule, the staff recommends the following changes be made:

Are the "policies, publications, guidelines, and casebooks" referenced here in existence, or are they pending development? If they exist, please incorporate them by reference pursuant to G.S. 150B-21.6.

On line 8, when "may" these "publications, guidelines, policies, and statements" be used to interpret the Ethics Code, and when may they be dispensed with?

In your History Note, is the reference to G.S. 90-743 correct? I believe it should be 90-742.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Brian Liebman
Commission Counsel

Date submitted to agency: November 1, 2022

1 21 NCAC 05 .0501 is adopted as published in 37:03 NCR 231-235:
2

3 **SECTION .0500 - ETHICS**
4

5 **21 NCAC 05 .0501 ETHICS**

6 The Board shall use those policies, publications, guidelines, and casebooks developed by the certifying entity in
7 determining whether violations of the Ethics Code for Behavior Analysts have occurred. In addition, publications,
8 guidelines, policies, and statements provided by the certifying entity and bodies may be used in interpreting the Ethics
9 Code for Behavior Analysts.
10

11 *History Note: Authority G.S. 90-731; 90-734; 90-743;*

12 *Eff. December 1, 2022.*

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: North Carolina Behavior Analyst Licensure Board

RULE CITATION: 21 NCAC 05 .0601

DEADLINE FOR RECEIPT: Thursday, November 10, 2022.

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In reviewing this Rule, the staff recommends the following changes be made:

Throughout, you refer to the “rules of the Board.” Does this refer to this subchapter, or does the term include other rules? If the former, please refer instead to the “rules of this Subchapter.”

In (a), line 6, when you say “person” do you mean that the Board has jurisdiction over those who are not licensed? Does this conflict with the reference to a “behavior analyst professional” on line 7? Depending on your answer here, please also see (b)(3), line 13.

In (a), line 7, what is a “behavior analyst professional”? Does it include technicians, or just licensees and licensed assistants?

In (a), line 8, please replace “through” with “using.”

In (a), line 8, are the contents of the Form described in a Rule or statute? If not, the Form itself is subject to rulemaking. See G.S. 150B-2(8a).

In (b), line 9, does “written” mean “handwritten”?

In (b), line 10, in what form do you want the attestation? Are you asking for a signature, or an affidavit, or a notarization? Please specify.

In (b)(3), line 13, please make “describes” singular.

In (d), lines 15-176, you say that the ethics committee “shall” try to reach a settlement, but in R. 602(c), this is one of 6 options available to the committee. Please settle this inconsistency.

In (e), line 18, you use the term “respondent” for the first time. Does this refer to “the person against whom the complaint is made”? If so, please include a parenthetical indicating that hereinafter this person is to be referred to as the respondent. I.e. “... person against whom the complaint is made (“respondent”).”

Brian Liebman
Commission Counsel

Date submitted to agency: November 1, 2022

In (e)(1), line 20, delete “state.”

In (e)(1), line 20, delete “(s)” and just make it “sections.”

In (e)(2), line 22, to whom is the reply to be directed? The Board? The complainant? Both?

In (e)(3), line 25, I believe you need an article before “credential.” Also, what is a credential? Do you mean the license?

In (f), please rephrase in the active tense. I know (e) says the committee chairperson is to give notice, but (f) itself is silent as to whom is required to give the notice, or who deems the notice given on a particular date.

In (g), line 29, please define “official correspondence.” Does this include notice and the response thereto?

In (g), line 29, what does it mean to “further the investigation”?

In (g), line 31, please insert “the” before “Private Protective Services Board.”

In (h), line 33, is there a reason that regular postage mail has been omitted? Also, if “official correspondence” includes the notice and response, should “e-mail” be included here?

In (h), is the second sentence largely duplicative of the first? If not, please articulate the difference.

In (h), line 35, is “personal delivery” different than “personal service”?

Can (h) be broken up into smaller paragraphs?

In (h), line 36, is “publishing a notice by publication” not redundant?

In (h), line 37-38, is the “party to be served” not the “respondent”?

In (h), p.2, line 1, insert “the” before “respondent’s”.

Also on line 1, delete “respondent’s” as it is redundant.

In (h), line 2, the sentence beginning with “There shall be mailed....” is passive. Please rephrase in the active tense. Who shall mail the copy of the notice?

Also on line 2, what does “... a copy of the notice to respond by publication to the respondent’s last known address” mean?

In (h), line 3, the sentence beginning with “Upon completion of service...” is passive. Please rephrase in the active tense. Who shall file the affidavit?

Brian Liebman
Commission Counsel

Date submitted to agency: November 1, 2022

In (h), line 8, could the second instance of “respondent” be replaced with “he or she”?

In (h), lines 9-10, the sentence beginning “Response shall be made....” is passive. Please rephrase in the active tense. Who shall respond?

In (h), line 11, is “whereby” necessary?

In (h), line 11, is “specific” supposed to be “specified”?

In (i), line 15, when “may” the failure to reply not be considered an admission?

In your History Note, beyond fixing the range of statutes, should you have a reference to 90-742?

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

1 21 NCAC 05 .0601 is adopted as published in 37:03 NCR 231-235:
2

3 **SECTION .0600 – DISCIPLINARY INVESTIGATION**
4

5 **21 NCAC 05 .0601 COMPLAINT PROCEDURES**

6 (a) Initiation. Any individual with personal knowledge that any person has violated the Code of Conduct, any other
7 rules of the Board, or G.S. 90, Article 43 may file a complaint against the behavior analyst professional by submitting
8 a complaint through the Ethics Complaint Form found on the Board's website.

9 (b) Form. The complaint shall be in written or typed format stating the nature of the alleged offense and signed or
10 attested to be true by the complainant. The complaint shall include:

- 11 (1) the name, address, and telephone number of the complainant;
12 (2) the name and address of the person against whom the complaint is made; and
13 (3) a statement of the facts that describes the allegations against the person.

14 (c) The complaint shall be investigated as set out in Rule .0602 of this Chapter.

15 (d) Following an investigation of the complaint, the ethics committee shall try to reach a settlement through informal
16 procedures pursuant to G.S. 150B-22.

17 (e) Once the ethics committee concludes there is a basis to schedule a disciplinary hearing before the Board, the
18 committee chairperson shall notify the person against whom the complaint is made. The notice to the respondent shall
19 include the following:

- 20 (1) state the section(s) of the Code of Conduct, other rules of the Board, or G.S. 90, Article 43 which
21 the complaint alleges has been violated;
22 (2) direct that the respondent reply in writing and by certified mail within 15 days of receipt of this
23 notice; and
24 (3) inform the respondent that failure to respond in writing within 15 days may result in revocation of
25 credential.

26 (f) Notice shall be given by regular postage mail, certified mail, or personal service at the last known address of the
27 respondent. If given by certified mail, notice shall be deemed to have been given on the delivery date appearing on
28 the return receipt.

29 (g) The Board may receive official correspondence in an ethics case through e-mail in order to further the investigation
30 or when the subject of an investigation is unable to use or has been unresponsive to certified mail or other methods of
31 delivery. The Board may use local law enforcement or a private investigator licensed by Private Protective Services
32 Board to personally serve a respondent.

33 (h) If notice cannot be given either by personal service or by certified mail, a notice that a complaint has been brought
34 against the respondent shall then be given by publication. A party that cannot with due diligence be served by personal
35 delivery or certified mail may be given notice to respond to a complaint by publication. Service of notice by publication
36 shall consist of publishing a notice by publication once a week for three successive weeks in a newspaper that is
37 qualified for legal advertising in accordance with G.S. 1-597 and G.S. 1-598 and circulated in the area where the party
38 to be served is believed by the serving party to be located, or if there is no reliable information concerning the location

1 of the party then in a newspaper circulated in the county of respondent's last address provided to the Board by the
2 respondent. There shall be mailed to the party at or prior to the first publication a copy of the notice to respond by
3 publication to the respondent's last known address. Upon completion of service there shall be filed with the Board by
4 the ethics committee chairperson an affidavit showing the publication and mailing substantially in accordance with
5 the requirement of G.S. 1-75.10(2), the circumstances warranting the use of service by publication, and information,
6 if any, regarding the location of the party served. The notice shall include a statement by the Board that a complaint
7 has been made against the respondent that is scheduled to be heard by the Board within 90 days. The notice shall
8 inform respondent that respondent shall be given 30 days from the date of the last date of publication in which to
9 respond to the service by publication for the purpose of notifying the Board of respondent's whereabouts. Response
10 shall be made in writing to the Board at the address provided by the Board in its notice. If respondent provides the
11 Board with information whereby respondent can be served by the deadline specific in the notice, the Board shall
12 provide notice either personally or by certified mail as provided in Paragraph (g) of this Rule. Failure of respondent
13 notified by publication of a complaint brought by the Board shall be treated as a failure of respondent to reply to the
14 charges.

15 (i) Failure of the respondent to reply to the charges, including each specific allegation, may be considered an
16 admission of the facts contained in the allegation(s).

17
18 *History Note: Authority G.S. 90-731-737;*

19 *Eff. December 1, 2022.*

20

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: North Carolina Behavior Analyst Licensure Board

RULE CITATION: 21 NCAC 05 .0602

DEADLINE FOR RECEIPT: Thursday, November 10, 2022.

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:

Generally to the Rule, the term “investigating entity” is used without definition. Please define.

Where is your statutory authority to delegate disciplinary action to the Ethics Committee? G.S. 90-742 states that the Board shall implement disciplinary action.

In (a), line 4, please add a comma following “designee.”

Also on lines 4-5, is the “legal counsel” the counsel to the chair or to the administrative director (“AD”) or their designee?

*In (a) generally, the first sentence says that the chairperson, the AD or designee, and legal counsel **shall** investigate the allegations. In the second sentence, it says that the chair **may** appoint someone else or name a subcommittee to serve as the investigating entity. I don't think it can be both.*

In (a), line 5, please delete (s) and make it “persons.”

In (a), line 5, please clarify “any person”. Can the chair appoint the respondent to investigate the complaint?

In (c), is not the chair part of the investigating entity? See (a).

In (c)(1), lines 10-11, please consider rephrasing the sentence: “The chairperson shall notify both parties that the complaint is dismissed; and”

Also, in (c)(1), lines 10-11, the Rule assumes that if the complaint is without merit, it is dismissed. I think you should be explicit and state who makes the decision to dismiss, as it is not clear whether the Committee makes that call, or if it is up to the chair and the investigating entity.

Brian Liebman
Commission Counsel

Date submitted to agency: November 1, 2022

In (c)(2), line 12, I believe for sentence structure you may need to add “the complaint has merit.”

In (c)(2)(A), please note the inconsistency with R. 601 noted therein.

In (c)(2)(C), line 16, where does the reference to the hearing panel come from? Who appoints the hearing panel? Who decides whether to refer to the committee or to the panel? Is it one of the “subcommittees” referenced in (d), line 20?

In (c)(2)(E), line 18-19, who is agreeing on the term of relinquishment? Is this a consent order as referenced in G.S. 90-742(c)?

Also, in (c)(2)(E), line 19 does “relinquish” mean “suspend” or “revoke”, which are the terms used in G.S. 90-742?

Again, in (c)(2)(E), line 19, what is a “credential”?

In (d)(2), line 23, delete or define “sufficient.”

In (d)(3), line 25, please define “informal resolution.”

In (d)(4), please define “informal procedures.” What is a “settlement” in this context?

In your History Note, please cite to G.S. 90-742.

In your History Note, please cite to the relevant portions of G.S. 150B.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

1 21 NCAC 05 .0602 is adopted as published in 37:03 NCR 231-235:
2

3 **21 NCAC 05 .0602 INVESTIGATION OF COMPLAINT**

4 (a) The Ethics Committee chairperson, in consultation with the administrative director or their designee and legal
5 counsel, shall investigate the allegations in the complaint. The chairperson may appoint any person(s) or name a
6 subcommittee to serve as the investigating entity to prepare an investigative report.

7 (b) The investigating entity may contact the complainant and person against whom the complaint is made.

8 (c) Upon completion of the investigation, the ethics committee chairperson in consultation with the investigating
9 entity may determine that:

10 (1) the complaint is without merit. The chairperson shall notify the complainant that the complaint is
11 dismissed and shall notify the respondent of the dismissal; and

12 (2) upon completion of an investigation wherein the complaint is not dismissed, the Ethics Committee
13 chairperson may:

14 (A) offer an informal resolution pursuant to G.S. 150B-22;

15 (B) schedule a meeting with the respondent;

16 (C) refer the report to the ethics committee or its hearing panel;

17 (D) schedule a hearing before the Board; or

18 (E) the chairperson may take a voluntary dismissal of the case where the respondent
19 relinquishes their credential for an agreed upon period of time.

20 (d) The Ethics Committee members or its subcommittees shall review a report referred by the Ethics Committee
21 chairperson and may take any of the following actions:

22 (1) dismiss the complaint;

23 (2) remand the matter to the investigating entity in order to obtain additional evidence sufficient upon
24 which to base a decision;

25 (3) make a written offer of informal resolution;

26 (4) schedule a meeting with the respondent whereby the dispute may be settled through informal
27 procedures; or

28 (5) schedule a disciplinary hearing, in accordance with G.S. 150B, Article 3A, before the Board.

29
30 *History Note: Authority G.S. 90-731-737;*

31 *Eff. December 1, 2022.*
32