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**VIA E-MAIL AND U.S. MAIL TO RRC COUNSEL**

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North Carolina Rules Review Commission

1711 New Hope Church Road

Raleigh, NC 27609

*Re: Comments on Rules submitted by the North Carolina Board of Massage and Bodywork Therapy for establishment licensing (21 NCAC 30.0302, .0401, .0405, .0701, .0702, .0703, .0905, and .1001 through 1013.)*

To the North Carolina Rules Review Commission:

On behalf of my client, Massage Envy, pursuant to 26 NCAC 05.0103(a), I am writing in opposition to the Rules submitted by the North Carolina Board of Massage and Bodywork Therapy ("Massage Board"). These Rules are primarily related to the mandatory licensure of all massage therapy establishments, which is a new layer of regulation of great concern. The Massage Board voted to adopt these rules at its meeting on June 21, 2018, and they will be considered at the September 20, 2018 meeting of the Rules Review Commission. **I also respectfully request to speak in opposition to these rules** at the RRC's September 20 meeting pursuant to 26 NCAC 05.0105.

As explained below, we submit that the Rules submitted to the RRC by the Massage Board do not qualify for approval under N.C. Gen. Stat. § 150B-21.9, for multiple reasons. First, the entire set of rules must be rejected because the Board did not hold a valid public hearing under Part 2 of North Carolina Administrative Procedure Act, Chapter 150B. Second, a number of the rules are outside the authority delegated to the Board by the General Assembly, and therefore must be rejected. Finally, even where authorized by statute, a number of the rules are not clear and unambiguous and should be rejected on that ground.

**Massage Envy**

Massage Envy is a nationwide leader in providing massage and spa services, with over 1,000 locations in 49 states. Our firm represents the franchise owners in North Carolina, where Massage Envy has over 40 clinics, each of which operates at the highest standards of professionalism. Massage Envy employs over 1,500 team members in North Carolina, including over 1,000 licensed massage therapists. Due to Massage Envy's national footprint, it has

experience with licensing issues through the country, and believes it has relevant input it can provide to the benefit of the entire profession.

Before the Massage Board, Massage Envy provided comments on both the Board's authority to adopt these rules, and on the wisdom and efficacy of the rules. There is no doubt that the Board's rules impose a burdensome new level of regulation on the massage profession. The current rules may not be perfect in all respects, but the new rules are not a good solution. However, before the RRC, the arguments below are limited to the statutory bases which the RRC must apply in determining whether to approve a rule.

### **Background**

Since the adoption of the North Carolina Massage and Bodywork Therapy Act ("Practice Act" or "Act") in 1998, massage therapists in North Carolina have been required to obtain an individual license to practice their profession. The original Act did not require that massage establishments, *i.e.*, the physical locations where massage and bodywork therapy is performed, obtain establishment licenses. Over recent years, however, the Massage Board has come to believe that they should also be able to require establishments to obtain separate licenses.

In 2015, the Massage Board first attempted to adopt rules which would require individual massage establishments to obtain licenses. However, because the Practice Act did not provide for any statutory authority to adopt such rules, the RRC objected to the rules. Massage Envy opposed the rules as well, as both unnecessary and without statutory authority. The Massage Board abandoned that rule-making effort after the RRC rejected the rules.

In 2017, the General Assembly adopted amendments to the Practice Act which now provide for the licensure of massage and bodywork therapy establishments ("establishments"). While the amendments expanded the Board's authority, they of course do not give the Massage Board unfettered discretion to adopt any rules they wish. A copy of the statutory amendments, Session Law 2017-151, is attached as **Exhibit A**.

### **The Public Hearing Was Invalid**

After the 2017 Practice Act amendments were enacted, the Massage Board proceeded to promulgate new rules to implement establishment licensing. On March 7, 2018, the Board posted notice that they intended to adopt new rules. The rules were posted, and the notice indicated that the Board would hold a public hearing at 1pm on April 19, 2018. Under §150B-21.2(e), of course, an "agency" cannot adopt a permanent rule without holding a public hearing. And, under Chapter 150B, a state board is an "agency" required to follow this public hearing rule. N.C. Gen. Stat. § 150B-2(1a) (definition of "agency"). A copy of the Board's public notice is attached as **Exhibit B**.)

The proposed rules here received a lot of attention and generated a great deal of commentary. For example, the initial proposed rules included a requirement that all massage treatment rooms be at least 10 feet by 12 feet in size. (The original language can be seen in a struck out portion of what is now Rule .1004). The Practice Act amendments, however, say nothing about giving the Board the authority to regulate the size of treatment rooms. This rule alone would have caused many (if not most) massage establishments in North Carolina to go out of business. *See Facing Possible Shutdown, NC massage therapists push back against new state rules*, WTVD (Abc11.com) (March 23, 2018) (copy attached as **Exhibit C**). Though this provision was later removed from the proposed rule, it is just one example of portions of the proposed rules that generated significant public concern.

The Massage Board has seven members, all of which convened for the Board's meeting scheduled for April 19, 2018. However, because the Board had disciplinary hearings scheduled on their agenda which were not settled, the Board meeting ending up lasting the whole day, until 5:30pm. *See April 19, 2018 Board meeting minutes*, attached as **Exhibit D**. At 1pm, therefore, three of the seven Board members left the Board meeting, and attended the planned "public hearing" of the Board on the new Rules.<sup>1</sup> The four-member quorum of the Board held disciplinary hearings during the afternoon of April 19, 2018, and there were only three Board members at the public hearing.

The Massage Board's Practice Act (similar to all occupational licensing board laws in North Carolina), provides that "[a] majority of the Board shall constitute a quorum." N.C. Gen. Stat. § 90-625(d). In other words, the Massage Board does not have the ability to conduct its business without a quorum. As there was no quorum at the public hearing on April 19, the public hearing was invalid.

The UNC School of Government has looked at this exact issue in terms of public hearings and local government boards. As Professor Bluestein wrote in a 2014 article on the subject:

When a statute requires a local government to hold or conduct a public hearing, the purpose is to provide public input into a decision to be made by a local government unit or body. **So it should be understood that the public hearing must occur at a legally convened meeting of the public body.**

Thus, as Professor Bluestein concluded, "a public hearing must take place at a properly noticed hearing *with a quorum present*." *See Bluestein, Frayda. Is a Quorum Necessary for a Public Hearing*, Coates' Canons: NC Local Government Law (April 25, 2014) (emphasis added) (attached as **Exhibit E**).

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<sup>1</sup> Undersigned counsel was present at the public hearing, and can confirm that only three Board members were present at the hearing.

Professor Bluestein notes in her article that there is no North Carolina specific case law on this issue. This does not seem surprising, however, because the issue should be a fundamental one. She does cite a Georgia case directly on point, and was unable to find any contrary case law. Just like a local government board, a state occupational licensing board can only conduct its official business when a quorum is present. The public hearing requirement is a fundamental part of the rule adoption process under the North Carolina APA. It is a guaranteed right of due process.

It is not clear whether the Rules Review Commission has had to review this issue before as to an occupational licensing board.<sup>2</sup> However, if an occupational licensing Board was *not* required to have a quorum to hold a public hearing on proposed rules, what rules then apply? Can a single board member attend a “public hearing” and that be sufficient? Or could the role simply be delegated to the most junior staff member employed by a board? If either of those scenarios was the case, the risk is significant that the public will be denied a meaningful right to comment and participate in the rule making process. For example, if it never reached the ears of the entire Board, maybe the ill-advised rule to require 10x12 feet treatment room would have been adopted. We have found no authority suggesting that an occupational licensing board, which can only conduct business with a quorum, can hold a “public hearing” on proposed rules simply by sending a single Board member or staffer to the event. That cannot be what the APA requires.

None of this is to say that we believe the Massage Board did not diligently attempt to let the public be heard on its proposed rules. If the Board did not have to conduct disciplinary hearings on the afternoon of April 19, it seems certain that a quorum of the Board would have conducted the public hearing. But the Board cannot be in two places at once. Instead of conducting the public hearing on the rules, it chose to conduct a disciplinary hearing.

Therefore, because we submit that occupational licensing boards such as the Massage Board cannot hold a public hearing without a quorum, the entire set of proposed rules must be rejected by the RRC.

### **Objections to Specific Rules**

Having addressed the above global objection to the Board’s rules, we now turn to individual objections to specific rules as exceeding the Board’s statutory authority and not being clear and unambiguous.

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<sup>2</sup> Although we believe that occupational licensing boards cannot hold a public hearing on proposed rules without a quorum present, we do not take any position on what is required for public hearings held by regular agencies in the executive branch, which are created and operated under different statutory authority.

After the purported public hearing on April 19, 2018, the Board considered the rules and voted to adopt them on at their June 21 meeting. Some significant changes were made to the proposed rules, which is generally reflected in the blacklines submitted to the RRC. RRC staff have reviewed the text of the rules closely, and submitted many questions and clarifications back to the Board. Since the Board's response to those questions is not due until September 13, this letter cannot address that response. However, the sheer volume of staff comments is itself some evidence of the unclear and ambiguous nature of many of the rules.

### **1. Rule .1003's Requirements for Licensure Exceed the Board's Statutory Authority**

The main purpose of the 2017 Practice Act amendments was to give the Board authority to license massage establishments. Under new statute N.C. Gen. Stat. §90-632.10, a person may not operate a massage establishment in North Carolina without a license from the Massage Board. Thus, N.C. Gen. Stat. § 90-632.11 specifies the "[r]equirements for massage and bodywork therapy establishment licensure." That statute specifies in detail the exact information that must be submitted to obtain an establishment license. The lengthy list includes: (1) the application fee, (2) certain proof of insurance, (3) prior licensure and disciplinary history, (4) a fingerprint card, (5) certain ownership information, (6) proof of good moral character "as determined by the Board", (7) signatures of all owners or representatives, (8) a self-evaluation inspection report, and (9) proof that all its employees are licensed.

Nowhere does N.C. Gen. Stat. § 90-632.11 provide that the Massage Board has the authority to add *additional* application requirements for obtaining an establishment license. Similarly, N.C. Gen. Stat. § 90-632.13 authorizes the Board to adopt rules for licensure of establishments, but it does not authorize the Board to adopt rules which add additional requirements for obtaining a license under § 90-632.11.

Although N.C. Gen. Stat. § 90-632.11 does not provide that the Massage Board has the authority to add *additional* application requirements for an establishment license, that is exactly what Rule .1003 seeks to do. That rule provides that not only must an establishment seeking licensure submit an application that contains all the information required by N.C. Gen. Stat. § 90-632.11, but it must also submit "*the following additional information.*" The rule then sets forth a list of additional information that must be provided, such as any city or county business license, and a copy of the lease for the premises (or other information about the landlord).

The blackline version of Rule .1003 first submitted to the RRC shows that this rule was significant amended after the Board's public hearing. The original rule was even worse, requiring even more voluminous information, including, for example, a facility plan for each location "including floor plans with dimensions and fixtures, uses of each room, specifications on lighting, ventilation and temperature control, location of lavatories for handwashing and toilet facilities." It also would have required the submission of an "equipment list, including furniture, office equipment, and equipment for massage and bodywork therapy treatment."

These parts of Rule .1003 were removed because parties objected to the burdensome nature of the requirements. As Massage Envy noted to the Massage Board at that stage, facility plan requirements are issues within the purview of local building codes and building inspectors, *not* massage and bodywork therapy. Indeed, the requirements would have even exceeded the requirements for obtaining restaurant liquor licenses, which is a very highly regulated area of the law.

Unless Rule .1003 is rejected as beyond the statutory authority of N.C. Gen. Stat. § 90-632.11, the Massage Board will consider itself free to add additional requirements to obtain an establishment license in the future, without any limit. This result is not tenable, because § 90-632.11 adopted a distinct and specific list of items that must be provided for an establishment to obtain a license. It did not confer upon the Massage Board the authority to expand that list to make the licensure process even more onerous. To the extent the Board needs any rule like Rule .1003, it cannot impose licensure requirements beyond those required by statute.

Therefore, we submit that Rule .1003 must be rejected by the RRC.

**2. Rule .1004 (“Establishment Operations”) Is Beyond the Board’s Statutory Authority**

Rule 21 NCAC 30.1004 is titled “establishment operations.” It originally included the 10x12 foot treatment room requirement which has deleted. However, that was not the only deficiency in this rule. N.C. Gen. Stat. § 90-632.13 authorizes the Board to “establish rules for the licensure of massage and bodywork establishments,” but it does not permit the Board to adopt any rule it wishes. Instead, that statute identifies six areas that the rules must address, including that the Board may adopt rules to require *compliance* with local building code requirements, State fire safety codes, and State health inspection codes as “necessary to ensure the safe and effective practice of massage and bodywork therapy.” N.C. Gen. Stat § 90-632.13(2). The statute does not authorize the Board to enact rules which *exceed or vary from* such code requirements. However, in this regard, subsections (1) and (2) of Rule .1004 are plainly beyond the Board’s statutory authority.

Rule .1004(1)(a) starts off by requiring that establishments “comply with State and local building codes, State fire safety codes, and State health inspection codes.” The rule seems unnecessary, because local enforcement authorities are already tasked with enforcing these codes. But at least subsection (1)(a) does not vary from or exceed such code requirements. The rule continues, however, to provide for very detailed requirements for restroom facilities in subsection (1)(b), including what specific items must be in a restroom. Furthermore, the subsection also seems to anticipate that is a crossing a line into the field of building codes by providing that “establishments located in buildings housing multiple businesses under one roof, such as shopping malls, terminals, or hotels, may substitute centralized toilet facilities.”

In practice, these facility requirements raise great concern. For example, if the Massage Board inspects a restroom and finds it to be not properly “lighted” or “ventilated”, even it has passed local building inspections, that “violation” would allow the Board to seek to suspend the establishment’s license. Or if the Board found that a “centralized toilet facility” in a shopping mall was beneath their standards, it is completely unclear what the establishment owner could do about it. A tenant in a shopping mall does not have direct control over a mall’s toilet facilities. It would have no authority to conduct restroom repairs by itself, yet would face a license suspension if the Board found the facilities to be not be sufficient.

The problems with Rule .1004 continue in subsection (2) of the rule. Subsection (2) provides for additional requirements, such as that a facility shall “provide for safe and unobstructed human passage in the public areas of the premises.” This presumably gives the Massage Board the authority to determine that a passage is not “safe and unobstructed” even when its condition meets local building codes. Similarly, the rule provides that the establishment must “provide for safe storage or removal of flammable materials.” The Massage Board is not, however, the arm of the State responsible for formulating fire codes. That is not even remotely its area of expertise. Yet, under this rule, if the Massage Board believes a certain process should be adopted for storage of flammable materials (even one at variance with the state fire code), this rule would allow the Massage Board to seek to suspend the license of an allegedly offending establishment.

Therefore, Rule .1004 is plainly beyond the Board’s statutory authority. The Board has authority to adopt a rule which requires compliance with local building codes, but does not have the authority to vary from or exceed those requirements. It seems extremely unlikely that the General Assembly would have intended such a result.

Lastly, Rule .1004 also contains additional provisions other than the “facility” and “safety” provisions discussed above. Specifically, subsection (4)(b) require establishment owners to notify the Board within 30 days of all changes in LMBT staff. Although N.C. Gen. Stat. § 90-632.13 is the cited statutory authority for Rule .1004, that statute does not authorize such a requirement. N.C. Gen. Stat. § 90-632.10 only authorizes the Board to maintain a list of licensed establishments, but it does not owners to submit and constantly update their employee and contractor lists. This requirement would be very burdensome for any active establishment. Individual licensees are already required to notify the Board of their place of practice under 21 NCAC 30.040.

Therefore, we request that this Rule .1004 be rejected as outside the Board’s statutory authority.

### **3. Rule .1009 Wrongfully Forbids Establishment License Transfers.**

N.C. Gen. Stat. § 90-632.13(6) provides that the Board shall adopt rules setting forth “[r]equirements for transfer of a massage and bodywork therapy establishment license.”

However, instead of formulating such a rule, Rule .1009 *forbids* license transfers. The rule states that upon an ownership change (such as in a sale of a business), an establishment license “shall not be transferrable,” but that the new owner “shall submit a new application for licensure.” The rule anticipates a procedure for granting “temporary operating approval” to new owners, but that is a process for getting new licenses, not the transfer of existing licenses.

This is not an insignificant issue. When selling a business which requires a license to operate, maintaining that license is a paramount concern. The Legislature could have provided that establishment licenses are not transferrable (like in the case ABC permits), but instead they did the opposite: they directed the Board to adopt rules to govern how licenses can be transferred. A buyer of a massage establishment must make sure he is a qualified person to receive the transfer of a license, and follow the rules for doing so, but here the Board has failed to provide any process for doing so. Having to obtain a new license, even a “temporary” approval, creates more risk and bureaucratic burdens for the new owner.

Therefore, because Rule .1009 is beyond the Board’s statutory authority, it should be rejected. The Board should instead develop a rule, as directed by statute, to govern a process for how licenses can be transferred to new owners.

**4. Rule .1010 (“Informing Board of Violations”) and Rule .1011 Are Beyond The Board’s Authority and Not Clear and Unambiguous.**

Rule .1010 imposes an obligation on establishment owners with “knowledge of alleged violations of the rules of this Chapter or the Practice Act” to report such to the Board within five business days. Although the rule cites eight statutes as providing authority for this reporting requirement, none of these statutes impose a reporting requirement on establishment licensees or provide for the adoption of such a rule.<sup>3</sup> This issue was also not a subject included in the 2017 amendments to the Practice Act. It is beyond the Board’s current statutory authority.

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<sup>3</sup> The statutes cited by the Board as authority for this rule are as follows:

- (1) 90-626(9). Relates to general authority of Board to adopt rules, no reference to reporting obligations.
- (2) 90-626(9)b.2. No such section exists, this is likely a typo.
- (3) 90-632.10. New statute allowing establishments to be licensed.
- (4) 90-632.15(5). New statute, subsection authorizes Board to discipline establishment that engages in conduct that could harm public.
- (5) 90-633(6). Authority to discipline individual licensees.
- (6) 90-632.17. New statutory prohibition on sexual activity.
- (7) 90-632.18. New statutory right to obtain injunctive relief against establishments.
- (8) 90-634(b3). New statutory provision making it unlawful to employ unlicensed persons, among other things.

Massage Envy agrees that reporting of the type of violations listed in subsections (a)(1)-(3) of Rule .1010 should be encouraged – sexual activity has no place in the massage field, or any licensed profession. However, Rule .1010 is not limited to the violations set forth in subsections (a)(1)-(3), but includes any violations of *any rule* or *any part* of the Practice Act. In fact, the reporting requirement is not even limited to an establishment owner’s own facility – the duty imposed would require establishment owners to report any knowledge of “alleged” violations by anyone, anywhere in the State. This goes far beyond the voluntary reporting of seriously concerning behavior.

The far potential reach of this rule should not be underestimated. For example, under Rule 21 NCAC 30.0302 (as amended), a licensee must have his physical license in his possession (the original or a “wallet card”) when performing massage outside a primary business location. Consider this scenario: A client comes into an establishment and reports that he recently had a massage from someone else who did not have his license with him that day. Under Rule .1010, the establishment owner has no choice: he must report that “alleged violation” to the Board within five business days. Not doing so would be a violation of Rule .1010. And, under N.C. Gen. Stat. § 90-632.15(a)(2), the Board may suspend the establishment’s license for failing to report this alleged violation. The same predicament would result from the failure to report any “alleged violation” of the Board’s rules of which an establishment owner becomes aware, no matter how minor or how old the alleged violation may be.

The rule also requires the mandatory reporting of allegations regarding any licensee “who has engaged in behavior where there is a potential for malpractice as defined in Rule .0102(6).” (Rule .1010(a)(2).) Rule .0102(6), in turn, is the Board’s definition of malpractice: “Conduct in variance with the Standards of Practice set forth in Section .0500 that results in harm to a client or that endangers the health or safety of a client.” Section .0500 of the Board’s rules are a set of 16 different rules titled “Standards of Professional Conduct.” Thus, this mandatory reporting requirement in Rule .1010 is quite onerous, and far from clear. The rule seems to contemplate that any allegations that constitute a “potential for malpractice” require mandatory reporting. And again, the penalty for a failure to report could include the suspension of an establishment license.

Turning briefly to Rule .1011, this rule imposes reporting requirements as to certain crimes or charges of alleged crimes committed by licenses. While this rule is much less open-ended than Rule .1010, it cites the same statutory authority as Rule .1010, which does not authorize the Board to impose these mandatory reporting requirements.

Therefore, because we submit that Rule .1010 and Rule .1010 is not authorized by the Practice Act or the 2017 amendments, and because Rule .1010 is not clear and unambiguous, these rules must be rejected.<sup>4</sup>

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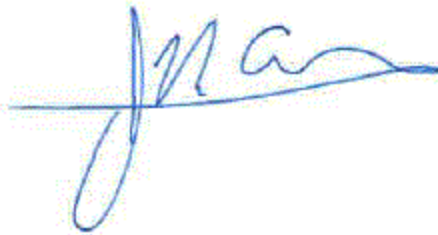
<sup>4</sup> To be clear, no one is opposed to encouraging voluntary reporting of violations. Reporting suspected serious concerns to the Board is beneficial to the profession, and Section

**Conclusion**

On behalf of Massage Envy, we respectfully request that the RRC reject the Massage Board's rules as set forth above. We appreciate the RRC's attention to this matter.

Sincerely,

SMITH, ANDERSON, BLOUNT,  
DORSETT, MITCHELL & JERNIGAN, LLP



By: J. Mitchell Armbruster

Enclosures (Exhibits)

cc: Charles Wilkins, Esq. (cwilkins@bws-law.com)  
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.0900 of the Board's rules already provide procedures for reporting such violations. In fact, Massage Envy has not objected specifically to amended Rule .0902, which made the process for voluntary reporting easier. Under the old version of the rule, a violation reported by e-mail or fax could not be accepted by the Board, forcing complainants to either resort to U.S. mail or coming to the Board's office in Raleigh in person to deliver a complaint.

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2017

SESSION LAW 2017-151  
SENATE BILL 548

AN ACT STRENGTHENING HUMAN TRAFFICKING LAWS, AUTHORIZING THE NORTH CAROLINA BOARD OF MASSAGE AND BODYWORK THERAPY TO REGULATE MASSAGE AND BODYWORK THERAPY ESTABLISHMENTS, REQUIRING MASSAGE AND BODYWORK THERAPISTS TO OBTAIN A STATEWIDE PRIVILEGE LICENSE, AND AUTHORIZING THE DEPARTMENT OF HEALTH AND HUMAN SERVICES TO STUDY WAYS TO IDENTIFY AND PROTECT VICTIMS OF HUMAN TRAFFICKING.

The General Assembly of North Carolina enacts:

**SECTION 1.** G.S. 14-43.11 reads as rewritten:

"§ 14-43.11. **Human trafficking.**

...

(b) A person who violates this section is guilty of a Class ~~F-C~~ felony if the victim of the offense is an adult. A person who violates this section is guilty of a Class ~~E-B2~~ felony if the victim of the offense is a minor.

...."

**SECTION 2.(a)** G.S. 14-202.10(2) reads as rewritten:

"(2) "Adult establishment" means an adult bookstore, adult motion picture theatre, adult mini motion picture theatre, or adult live entertainment business, ~~or massage-business~~ as defined in this section."

**SECTION 2.(b)** G.S. 14-202.10(7) and G.S. 14-202.10(8) are repealed.

**SECTION 2.(c)** G.S. 14-202.11 is amended by adding a new subsection to read as

follows:

"(a1) No person shall permit the practice of massage and bodywork therapy, as defined in Article 36 of Chapter 90 of the General Statutes, in an adult establishment."

**SECTION 3.(a)** G.S. 90-621 reads as rewritten:

"§ 90-621. **Declaration of purpose.**

The purpose of this Article is to ensure the protection of the health, safety, and welfare of the citizens of this State receiving massage and bodywork therapy services. This purpose is achieved ~~by establishing~~by:

(1) Establishing education and testing standards that ensure competency in the practice of massage and bodywork therapy. Mandatory licensure of those engaged in the practice of massage and bodywork therapy assures the public that each individual has satisfactorily met the standards of the profession and continues to meet both the ethical and competency goals of the profession.

(2) Establishing standards for establishments that provide massage and bodywork therapy services. Mandatory licensure of those who own or operate massage and bodywork therapy establishments assures the public that these establishments provide legal, professional services and employ licensed massage and bodywork therapists who have satisfactorily met the



standards of the profession and continue to meet both the ethical and competency goals of the profession."

**SECTION 3.(b)** G.S. 90-622 reads as rewritten:

**"§ 90-622. Definitions.**

The following definitions apply in this Article:

- (1) Accreditation. – Status granted to a postsecondary institution of higher learning that has met standards set by an accrediting agency recognized by the Secretary of the United States Department of Education. The accreditation for massage and bodywork schools may be institutional or programmatic in nature.
- (1a) Board. – The North Carolina Board of Massage and Bodywork Therapy.
- (2) Board-approved school. – Any massage and bodywork therapy school or training program in this State or another state that is not otherwise exempt from Board approval, that has met the standards set forth in this Article, and been granted approval by the Board.
- (2a) Business name. – The name under which the owner applies for the establishment license to provide massage therapy, if different from the name of the owner.
- ~~(2a)~~(2b) Criminal history record check. – A report resulting from a request made by the Board to the North Carolina Department of Public Safety for a history of conviction of a crime, whether a misdemeanor or felony, that bears on an applicant's fitness for licensure to practice massage and bodywork therapy.
- (3) Massage and bodywork therapy. – Systems of activity applied to the soft tissues of the human body for therapeutic, educational, or relaxation purposes. The application may include:
  - a. Pressure, friction, stroking, rocking, kneading, percussion, or passive or active stretching within the normal anatomical range of movement.
  - b. Complementary methods, including the external application of water, heat, cold, lubricants, and other topical preparations.
  - c. The use of mechanical devices that mimic or enhance actions that may possibly be done by the hands.
- (3a) Massage and bodywork therapy establishment. – Any duly licensed site or premises in which massage and bodywork therapy is practiced. This term does not include any of the following:
  - a. On-site massage performed at the location of the customer.
  - b. Stand-alone devices, such as chairs, that are operated by the customer.
  - c. Establishments located within the confines of a hospital, nursing home, or other similar establishment or facility licensed or otherwise regulated by the Department of Health and Human Services.
  - d. Massage and bodywork therapy provided by a sole practitioner.
  - e. A student clinic operated by a Board-approved school or a massage and bodywork therapy program offered by community colleges in North Carolina that are accredited by the Southern Association of Colleges and Schools or massage and bodywork therapy programs offered by a degree or diploma granting college or university accredited by any accrediting agency that is recognized by the United States Department of Education and licensed by the North Carolina Community College System or The University of North Carolina

Board of Governors or exempt from such licensure pursuant to G.S. 116-15(c).

f. Chiropractic physician offices that provide massage and bodywork therapy only by massage and bodywork therapists currently licensed in North Carolina.

~~(3a)~~(3b) Massage and bodywork therapy school. – Any educational institution that conducts a training program or curriculum for a tuition charge, which is intended to teach adults the knowledge, skills, and abilities necessary for the safe, effective, and ethical practice of massage and bodywork therapy.

(4) Massage and bodywork therapist. – A person licensed under this Article.

(4a) Owner. – The person, sole proprietor, partnership, limited partnership, or corporation that operates the massage and bodywork therapy establishment.

(5) Practice of massage and bodywork therapy. – The application of massage and bodywork therapy to any person for a fee or other consideration.

(6) Sole practitioner. – A single licensed massage and bodywork therapist offering massage or bodywork therapy services from a space the licensed massage and bodywork therapist controls and from which only the licensed massage and bodywork therapist offers and provides the services."

**SECTION 3.(c)** The catch line of G.S. 90-623 reads as rewritten:

**"§ 90-623. License to practice required."**

**SECTION 3.(d)** The catch line of G.S. 90-624 reads as rewritten:

**"§ 90-624. Exemptions. ~~Activities not requiring a license to practice.~~"**

**SECTION 3.(e)** Subdivision (9) of G.S. 90-626 reads as rewritten:

"(9) Adopt, amend, or repeal any ~~rules of the following rules:~~

a. Rules necessary to carry out the purposes of this ~~Article and~~Article.

b. Rules necessary to carry out the duties and responsibilities of the Board, including ~~rules the following:~~

1. Rules related to the approval of massage and bodywork therapy schools, continuing education providers, examinations for licensure, and the practice of advanced techniques or specialties, and ~~massage and bodywork therapy establishments.~~ specialties. Any rules adopted or amended shall take into account the educational standards of national bodywork and massage therapy associations and professional organizations.

2. Rules related to massage and bodywork therapy establishments."

**SECTION 3.(f)** G.S. 90-628(b) reads as rewritten:

"(b) The Board may impose the following fees up to the amounts listed ~~below:~~below for a license to practice massage and bodywork therapy:

- |  |         |
|--|---------|
| (1) Application for license .....  | \$20.00 |
| (2) Initial license fee .....  | 150.00  |
| (3) License renewal .....  | 100.00  |
| (4) Late renewal penalty .....   | 75.00   |
| (5) Repealed by Session Laws 2008-224, s. 8, effective August 17, 2008.  |         |
| (6) Duplicate license .....  | 25.00   |
| (7) Repealed by Session Laws 2008-224, s. 8, effective August 17, 2008." |         |

**SECTION 3.(g)** G.S. 90-629 reads as rewritten:

**"§ 90-629. Requirements for ~~licensure.~~licensure to practice."**

Upon application to the Board and the payment of the required fees, an applicant may be licensed as a massage and bodywork therapist if the applicant meets all of the following qualifications:

- (1) Has obtained a high school diploma or equivalent.
- (2) Is 18 years of age or older.
- (3) Is of good moral character as determined by the Board.
- (4) Has successfully completed a training program consisting of a minimum of 500 in-class hours of supervised instruction at a Board-approved school.
- (5) Has passed a competency assessment examination that meets generally accepted psychometric principles and standards and is approved by the Board.
- (6) Has submitted fingerprint cards in a form acceptable to the Board at the time the license application is filed and consented to a criminal history record check by the North Carolina Department of Public Safety.
- (7) Demonstrates satisfactory proof of proficiency in the English language."

**SECTION 3.(h)** G.S. 90-629.1 reads as rewritten:

**"§ 90-629.1. Criminal history record checks of applicants for ~~licensure~~licensure to practice and for ownership or operation of an establishment.**

(a) All applicants for licensure to practice massage and bodywork therapy or to operate a massage and bodywork therapy establishment shall consent to a criminal history record check. Refusal to consent to a criminal history record check may constitute grounds for the Board to deny licensure to an applicant. The Board shall ensure that the State and national criminal history of an applicant is checked. The Board shall be responsible for providing to the North Carolina Department of Public Safety the fingerprints of the applicant to be checked, a form signed by the applicant consenting to the criminal record check and the use of fingerprints and other identifying information required by the State or National Repositories, and any additional information required by the Department of Public Safety. The Board shall keep all information obtained pursuant to this section confidential.

...."

**SECTION 3.(i)** The catch line of G.S. 90-630.1 reads as rewritten:

**"§ 90-630.1. Licensure to practice by endorsement."**

**SECTION 3.(j)** G.S. 90-632 is recodified as G.S. 90-630.5 and reads as rewritten:

**"§ 90-630.5. ~~License renewal and~~Renewal of license to practice and license to operate massage and bodywork therapy establishment; continuing education.**

(a) The license to practice and the license to operate a massage and bodywork therapy establishment under this Article shall be renewed every two years.

(b) The continuing education requirement for the renewal of an initial license ~~renewal to practice~~ is as follows:

- (1) If the licensure period is two years or more, each licensee shall submit to the Board evidence of the successful completion of at least 24 hours of study, as approved by the Board, since the initial licensure application date in the practice of massage and bodywork therapy.
- (2) If the licensure period is less than two years, but more than one year, each licensee shall submit to the Board evidence of the successful completion of at least 12 hours of study, as approved by the Board, since the initial licensure application date in the practice of massage and bodywork therapy.

(c) For subsequent renewals of a license ~~renewals to practice~~, each licensee shall submit to the Board evidence of the successful completion of at least 24 hours of study, as approved by the Board, since the previous licensure renewal submission date in the practice of massage and bodywork therapy."

**SECTION 3.(k)** Article 36 of Chapter 90 of the General Statutes is amended by adding new sections to read:

**"§ 90-632.10. Massage and bodywork therapy establishment license required.**

The Board shall license massage and bodywork therapy establishments in this State for the purpose of protecting the health, safety, and welfare of the public. Unless otherwise exempt from the Board licensure process, no individual, association, partnership, corporation, or other entity shall open, operate, or advertise a massage and bodywork therapy establishment in this State unless it has first been licensed by the Board. The Board shall maintain a list of licensed massage and bodywork therapy establishments operating pursuant to this Article.

**"§ 90-632.11. Requirements for massage and bodywork therapy establishment licensure.**

(a) Any person who wishes to operate a massage and bodywork therapy establishment shall obtain a license from the Board by submitting a massage and bodywork therapy establishment licensure application accompanied by all of the following:

- (1) The applicable fee set forth in G.S. 90-632.14.
- (2) Proof of property damage and bodily injury liability insurance coverage in the name of the owner or, if the establishment is operated under a business name, in the name of both the owner and the business.
- (3) Prior licensure and disciplinary history, including verifications from all North Carolina licensing boards from which the owner holds or has held any health related professional license.
- (4) Fingerprint cards submitted in accordance with G.S. 90-629.1 at the time the license application is filed and consented to a criminal history record check by the Department of Public Safety.
- (5) Ownership information, including at least all of the following:
  - a. Type of ownership.
  - b. Name of owner.
  - c. Name of authorized representative.
  - d. Address of establishment.
  - e. Social Security number or federal tax identification number.
  - f. E-mail address.
  - g. Current phone number.
  - h. Hours of operation.
- (6) Proof of good moral character as determined by the Board.
- (7) Signature of all owners or authorized corporate representatives or both.
- (8) A successfully completed self-evaluation inspection report demonstrating compliance with this section and any rules adopted pursuant to G.S. 90-632.13.
- (9) Proof that the establishment employs, hires, or plans to employ or hire one or more massage and bodywork therapists who hold a current license from the Board.

(b) The application for licensure shall be submitted in the name of the owner or owners of the establishment. If the owner is a corporation, the application shall be submitted in the name of the corporation and shall be signed by a corporate representative.

**"§ 90-632.12. Operation of a massage and bodywork therapy establishment under a name different than the owner; advertisement.**

(a) An owner may operate a licensed massage and bodywork therapy establishment under a name other than the name of the owner, provided such name is submitted to the Board on the application for licensure.

(b) Any advertisement by the massage and bodywork therapy establishment shall include the establishment's business name and shall comply with 21 NCAC 30 .0404.

**"§ 90-632.13. Rules for massage and bodywork therapy establishment license.**

The Board shall establish rules for the licensure of massage and bodywork therapy establishments. These rules shall include at least all of the following:

- (1) Requirements for adequate, safe, and sanitary facilities.
- (2) Requirements for compliance with local building code requirements, State fire safety codes, and State health inspection codes necessary to ensure the safe and effective practice of massage and bodywork therapy.
- (3) Requirements for retention of client and ownership records.
- (4) A description of the process used by the Board to approve massage and bodywork therapy establishment licenses.
- (5) Requirements for initial and periodic inspections of massage and bodywork therapy establishments.
- (6) Requirements for transfer of a massage and bodywork therapy establishment license.

**"§ 90-632.14. Fees for massage and bodywork therapy establishment license.**

(a) The Board may impose the following fees up to the amounts listed below for massage and bodywork therapy establishment licensure:

- |  |                |
|--|----------------|
| <u>(1) Application for license .....</u>     | <u>\$20.00</u> |
| <u>(2) Initial license fee .....</u>         | <u>150.00</u>  |
| <u>(3) License renewal .....</u>             | <u>100.00</u>  |
| <u>(4) Late renewal penalty .....</u>        | <u>75.00</u>   |
| <u>(5) Duplicate license .....</u>           | <u>25.00</u>   |
| <u>(6) Inspection of establishment .....</u> | <u>150.00</u>  |

(b) All fees listed in subsection (a) of this section shall be paid in the form of a cashier's check, certified check, or money order made payable to the North Carolina Board of Massage and Bodywork Therapy and shall be nonrefundable.

**"§ 90-632.15. Grounds for suspension, revocation, or refusal of a massage and bodywork therapy establishment license; notice and hearing; judicial review.**

(a) The Board may deny, suspend, revoke, discipline, or refuse to approve a massage and bodywork therapy establishment for any of the following reasons:

- (1) The employment of fraud, deceit, or misrepresentation in obtaining or attempting to obtain a massage and bodywork therapy establishment license.
- (2) Engaging in any act or practice in violation of any of the provisions of this Article or of any of the rules adopted by the Board or aiding, abetting, or assisting any other person in the violation of the provisions of this Article or rules adopted by the Board.
- (3) Failure to require that its employees or independent contractors be currently licensed by the Board.
- (4) Operating a massage and bodywork therapy establishment without a license from this Board.
- (5) Engaging in conduct that could result in harm or injury to the public.
- (6) The employment of fraud, deceit, or misrepresentation when communicating with the general public, health care professionals, or other business professionals.
- (7) Falsely holding out a massage and bodywork therapy establishment as licensed by this Board.
- (8) Failure to allow authorized representatives of the Board to conduct inspections of the massage and bodywork therapy establishment or refusing to make available to the Board, following written notice to the massage and bodywork therapy establishment, the requested information pertaining to the requirements for approval set forth in this Article.

- (9) Failure to notify the Board in writing within 30 days of any notification it receives from any state, local, or federal court or agency of a show cause action, probation action, or denial of licensure or approval.
- (10) The applicant for or holder of a massage and bodywork therapy establishment license has pleaded guilty, entered a plea of nolo contendere, or has been found guilty of a crime involving moral turpitude by a judge or jury in any state or federal court.

(b) A refusal to issue, refusal to renew, or suspension or revocation of a massage and bodywork therapy establishment license under this section shall be made in accordance with Chapter 150B of the General Statutes.

**"§ 90-632.16. Unlicensed massage and bodywork therapy prohibited at massage and bodywork therapy establishments.**

A massage and bodywork therapy establishment shall not employ or contract with any person in this State to provide massage and bodywork therapy unless that person holds a current license to practice massage and bodywork therapy issued pursuant to this Article.

**"§ 90-632.17. Sexual activity prohibited.**

(a) Sexual activity or solicitation of sexual activity by any person or persons in any massage and bodywork therapy establishment is unlawful and prohibited.

(b) No owner shall engage in or permit any person or persons to engage in sexual activity in the owner's massage and bodywork therapy establishment. No owner shall engage in or permit any person or persons to use the owner's massage and bodywork therapy establishment to make arrangements to engage in sexual activity in any other place.

**"§ 90-632.18. Enforcement; injunctive relief against massage and bodywork therapy establishments.**

The Board may utilize the enforcement and injunctive relief set forth in G.S. 90-634 and assess civil penalties and disciplinary costs as provided in G.S. 90-634.1 to address violations of G.S. 90-632.10 through G.S. 90-632.17, any rules adopted pursuant to G.S. 90-632.13, or any other laws or rules applicable to the operation of a massage and bodywork therapy establishment.

**"§ 90-632.19. Human trafficking public awareness sign.**

The Board may require that a massage and bodywork therapy establishment prominently display on the premises in a place that is clearly conspicuous and visible to employees and the public a public awareness sign created and provided by the North Carolina Human Trafficking Commission that contains the National Human Trafficking Resource hotline information."

**SECTION 3.(I) G.S. 90-634 reads as rewritten:**

**"§ 90-634. Enforcement; injunctive relief.**

(a) It is unlawful for a person not licensed or exempted under this Article to engage in any of the following:

- (1) Practice of massage and bodywork therapy.
- (2) Advertise, represent, or hold out himself or herself to others to be a massage and bodywork therapist.
- (3) Use any title descriptive of any branch of massage and bodywork therapy, as provided in G.S. 90-623, to describe his or her practice.

(b) A person who violates subsection (a) of this section shall be guilty of a Class 1 misdemeanor.

(b1) Unless exempt from the approval process, it is unlawful for an individual, association, partnership, corporation, or other entity to open, operate, or advertise a massage and bodywork therapy school without first having obtained the approval required by G.S. 90-631.1.

(b2) An individual, association, partnership, corporation, or other entity that violates subsection (b1) of this section shall be guilty of a Class 3 misdemeanor.

(b3) It is unlawful for a person, individual, association, partnership, corporation, or other entity to do any of the following:

- (1) Employ, hire, engage, or otherwise contract with a person who is not licensed or exempted under this Article to provide massage and bodywork therapy services to the public.
- (2) Aid and abet any person not licensed or exempted under this Article in the practice of massage and bodywork therapy.
- (3) Advertise, represent, or hold out any person not licensed or exempted under this Article to others as a massage and bodywork therapist.
- (4) Describe the practice of any person not licensed or exempted under this Article or use any title descriptive of any branch of massage and bodywork therapy to reference any such person in violation of G.S. 90-623.

(b4) A person who violates subsection (b3) of this section shall be guilty of a Class 1 misdemeanor.

(c) The Board may make application to superior court for an order enjoining a violation of this Article. Upon a showing by the Board that a person, association, partnership, corporation, or other entity has violated or is about to violate this Article, the court may grant an injunction, restraining order, or take other appropriate action."

**SECTION 4.** G.S. 105-41(a) reads as rewritten:

**"§ 105-41. Attorneys-at-law and other professionals.**

(a) Every individual in this State who practices a profession or engages in a business and is included in the list below must obtain from the Secretary a statewide license for the privilege of practicing the profession or engaging in the business. A license required by this section is not transferable to another person. The tax for each license is fifty dollars (\$50.00).

- ...
- (2) A physician, a veterinarian, a surgeon, an osteopath, a chiropractor, a chiropodist, a dentist, an ophthalmologist, an optician, an optometrist, a massage and bodywork therapist, or another person who practices a professional art of healing.

...."

**SECTION 5.** In consultation with the North Carolina Human Trafficking Commission, the Department of Health and Human Services shall study the feasibility of training health care providers, emergency medical providers, and relevant first responders in human trafficking identification and response and preventative tools and methods. The Department shall report its findings and recommendations to the Joint Legislative Oversight Committee on Justice and Public Safety, the Joint Legislative Oversight Committee on Health and Human Services, the Human Trafficking Commission, and the Governor no later than February 1, 2018.

**SECTION 6.** Section 1 and Section 3(l) of this act become effective December 1, 2017, and apply to offenses committed on or after that date. Sections 2(a) through 2(c) and 3(a) through 3(k) of this act become effective October 1, 2017. Section 4 of this act is effective when it becomes law and applies to taxable years beginning on or after July 1, 2018. The remainder of this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 30<sup>th</sup> day of June, 2017.

s/ Philip E. Berger  
President Pro Tempore of the Senate

s/ Tim Moore  
Speaker of the House of Representatives

s/ Roy Cooper  
Governor

Approved 4:19 p.m. this 20<sup>th</sup> day of July, 2017

**Notice** is hereby given in accordance with G.S. 150B-21.2 that the Board of Massage and Bodywork Therapy intends to adopt new rules as indicated below.

**DATE: March 7, 2018**

**TITLE 21 OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS**

**CHAPTER 30 BOARD OF MASSAGE AND BODYWORK THERAPY**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Board of Massage and Bodywork Therapy intends to adopt the rules cited as 21 NCAC 30 .0405, .0703, .1001-.1014 and amend the rules cited as 21 NCAC 30 .0302, .0401, .0701, .0702, .0902, and .0905.*

**Link to agency website pursuant to G.S. 150B-19.1(c):** <http://bmbt.org/pages/news.html>

**Proposed Effective Date:** September 1, 2018

**Public Hearing:**

**Date:** April 19, 2018

**Time:** 1:00 p.m.

**Location:** Wells Fargo Capitol Center, 13<sup>th</sup> Floor Conference Room, 150 Fayetteville Street, Raleigh, NC 27601

**Reason for Proposed Action:** *The amendment to Rule .0302 is being submitted to clarify what is required in order to display the license. The amendment to Rule .0401 is being submitted to clarify the term "practice" instead of "business" and to clarify the information the Board is requesting to be on file. The adoption of Rule .0405 is being submitted to define the term "practice". The amendments to Rule .0701 and .0702 and adoption of Rule .0703 are being submitted to clarify continuing competence and continuing education requirements. The amendments to Rule .0902 and .0905 are being submitted to clarify the complaint and disciplinary sanction process. The adoptions of Rule .1001-.1014 are being submitted to clarify requirements for massage and bodywork therapy establishments.*

**Comments may be submitted to:** Charles P. Wilkins, PO Box 2539, Raleigh, NC 27602; phone (919) 546-0050; email [cwilkins@bws-law.com](mailto:cwilkins@bws-law.com)

**Comment period ends:** May 14, 2018

**Procedure for Subjecting a Proposed Rule to Legislative Review:** If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

**Fiscal impact (check all that apply).**

- State funds affected
- Environmental permitting of DOT affected Analysis submitted to Board of Transportation
- Local funds affected
- Substantial economic impact ( $\geq$ \$1,000,000)
- Approved by OSBM
- No fiscal note required by G.S. 150B-21.4
- NO FISCAL NOTE REQUIRED BY G.S. 150B-21.4**

WATCH

EXHIBIT C

Download the ABC11 app for the latest Hurricane Florence information

BUSINESS

# Facing possible 'shutdown,' NC massage therapists push back against new state rules

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Legitimate massage therapists feel they could be pushed out of business by tightened state laws.

By Joel Brown

Friday, March 23, 2018

CARY, NC (WTVD) -- [Hands on Health](#) in Cary is one of the hundreds of independent massage therapy businesses around the state. They boast a clientele as young as 10 months old and as old as 80.

But as the state tries to crack down on a growing problem, these massage therapy pros are concerned they'll be caught in the crossfire.

"We're a small business," said Laura Ford, one of the 15 licensed massage therapists here specializing in medical massage, orthopedic, or injury-repair touch therapy.

"It needs to be a place where a person can feel comfortable letting go and feel safe," Ford explained from one of the company's six treatment rooms.

It's a serious business of stress and pain relief - but don't call it a massage parlor.

"Parlor is not a word to use with a massage-therapy practice," Ford said. "You will not find a legitimate massage therapy practice that uses

that word."

It's those unscrupulous parlors - many of them operating in the shadows of rural North Carolina - that the state is cracking down on.

In 2017, there were 258 cases of human trafficking; it's a form of slavery where victims are forced to work or perform sex acts - some of it done under the guise of a massage business.

Last summer, state lawmakers passed a [new law](#) imposing tougher penalties for human traffickers as well as new regulations for massage therapy businesses to keep them from being used by human traffickers.



**Joel Brown**  
@JoelBrownABC11

MASSAGE BATTLE: "People are shutting down. "They'll have to shut down!" - Local massage therapists are fighting back against new state regulations.

9:53 PM - Mar 20, 2018 · Raleigh, NC

2 See Joel Brown's other Tweets

Regulators want to mandate the size of treatment rooms to 10 feet by 12 feet. It's one of the many new rules drawing the ire of legitimate therapists like Ford

"I cannot do massage and bodywork therapy in this room," Ford says in one of her 9 feet by 11 feet treatment rooms.

And renovating the room to meet those new requirements would not be a cheap fix.

About "\$100,000," Ford estimated. "And weeks of shutdown."

The N.C. Board of Massage and Bodywork is the panel of state regulators finalizing the new rules and regulations. Charles Wilkins is the board's legal counsel. He told ABC11 the rules are not yet written in stone.

The board is taking public comment on the proposals until mid-May.

"And we hope if there are any unintended consequences from these rules that we will be notified of them," Wilkins said. "(The board) will consider all those comments and then have the opportunity to amend those rules and change them to make them more user-friendly."

Laura Ford said she and her network of therapists plan to test that pledge by speaking out loudly.

"The public needs to know what's going to happen to this industry if (the rules go in effect as is)," she said. "People are shutting down. They'll have to shut down. They will have to."

### Report a Typo

#### Related Topics:

- business
- small business
- state politics
- north carolina news
- Cary
- NC
- Wake County



## **NORTH CAROLINA BOARD of MASSAGE AND BODYWORK THERAPY**

Mailing Address: PO Box 2539, Raleigh, NC 27602 Phone: 919.546.0050  
Location Address: 150 Fayetteville Street Mall, Suite 1910, Raleigh, NC 27601

EXHIBIT D

### **OPEN SESSION MINUTES**

*April 19, 2018; 10:00 a.m. – 5:30 p.m.*

**Wells Fargo Capitol Center Building  
150 Fayetteville Street, 13<sup>th</sup> Floor Large Conference Room, Raleigh, NC 27601**

*"The mission of the NCBMBT is to regulate the practice of massage and bodywork therapy in the State of North Carolina to ensure competency, and to protect the public health, safety and welfare."*

#### **TIME AND PLACE**

The North Carolina Board of Massage and Bodywork Therapy met in Open Session in the offices of the Board on April 19, 2018 at 10:15 a.m.

#### **MEMBERS PRESENT**

Ms. Holly Foster, Ms. Dianne Layden, Ms. Renee Hays, Ms. Nancy Harrell, Ms. Kim Turk, Ms. Rachael Goolsby and Dr. Tim Taft

#### **MEMBERS ABSENT**

None

#### **OTHERS PRESENT**

Mr. Charles Wilkins and Mr. Ben Thompson, Legal Counsel to the Board, Ms. Elizabeth Kirk, Administrative Director and Ms. Julia Arnette, Administrative Assistant

#### **CHAIR**

Ms. Foster, Chair

#### **RECORDING SECRETARY**

Ms. Kirk

#### **CONFLICT OF INTEREST**

Ms. Foster asked if any Board member had any conflict of interest with any item on the meeting's agenda. There being no conflict, the agenda was approved.

### **APPROVAL OF MINUTES**

The Board approved its minutes of February 15, 2018.

### **TREASURER'S REPORT**

The Treasurer's Report was reviewed and approved as presented.

### **ADMINISTRATIVE REPORTS**

#### **Rules**

There are no rules currently at the Rules Review Commission. The Board held a public hearing at 1 p.m. to receive public comments to the amendments to Rules .0302, .0401, .0701, .0702, .0902, and .0905 and the adoptions of Rules .0405, .0703, .1001, .1002, .1003, .1004, .1005, .1006, .1007, .1008, .1009, .1010, .1011, .1012, .1013, and .1014.

#### **Status of Amendments to Practice Act**

There are no amendments to the Practice Act pending at the Legislature .

#### **Disciplinary Hearings**

Mr. Wilkins informed the Board of proposed Consent Orders regarding: Justin Harrelson, Jean Rowe and Rolando Zevallos for practicing massage and bodywork therapy with an expired license; Stacy Striks for failing to timely, correctly and properly sign and complete intake forms and SOAP notes on clients; and Takara Davis and Susan O'Neill for aiding and abetting illegal massage and bodywork therapy practice. There is one disciplinary hearing scheduled for today.

Ms. Kirk reported:

#### **Licensee Report**

17,189 have been issued  
8,890 active licenses

#### **Renewal Report**

There are 4,017 licensees scheduled to renew for the 2018-2019 renewal period. 3,387 therapists have renewed. 2,612 therapists renewed online and 775 therapists renewed by mail. The routine Continuing Education Audit has started for 200 therapists who renewed online. Thirteen licensees were contacted via email to provide additional information. All licensees have replied and one licensee is taking an additional course to comply with the CE requirements.

### **COMMITTEE REPORTS**

## **Policy Committee**

Ms. Foster reported the Committee met April 18, 2018 and discussed the matters set forth in the minutes of the Committee.

### **Continuing Education**

**a. Update on CE rules**

The Committee discussed the rules review process and changes set forth in Section .0700 of the Rules and Regulations of the Board.

### **FSMTB**

**a. Regulatory Education and Competence Hub (REACH) program**

Ms. Harrell and Ms. Foster informed the Committee massage and bodywork therapy educators from a variety of states met to review and develop curriculum for the treatment planning/intake course to be available in the Fall of 2018.

**b. Massage Therapy Licensing Database (MTLD) program**

The Committee discussed the MTLT program and recommended that Board staff invite DEG to review the database process in the Board office.

**c. Exam Development Review meeting**

Ms. Harrell informed the Committee she and Ms. Kirk attended the exam development review meeting in Atlanta, Georgia March 9<sup>th</sup>-10<sup>th</sup>, 2018.

**d. Standard Setting meeting**

Ms. Harrell informed the Committee she attended the standard setting meeting in Chicago, Illinois.

**e. 2018 Member Board Executive Summit**

Ms. Arnette informed the Board she attended the member board executive summit in Kansas City, Missouri April 12<sup>th</sup>-13<sup>th</sup>, 2018.

### **Discussion of Reflexology**

The Committee reviewed the history of the reflexology exemption. Upon motion made, seconded and passed, the Board agreed Board staff will contact the NC Reflexology Association and the American Reflexology Certification Board to discuss Reflexology's exemption in the Guidelines of the Board.

### **Presentation by representatives from Massage Envy regarding stretch services**

The Committee discussed the presentation by representatives from Massage Envy and agreed to continue discussion on this topic.

### **Update on public comment for proposed rules**

The Committee discussed public comment expected for the April public hearing on the proposed Establishment Rules.

### **Review information regarding stretch services for Lastazia Backus**

The Committee discussed a resume' and past employment of Ms. Backus at Massage Envy in Charlotte, NC. Ms. Backus' file will be reviewed by the License Standards Committee.

### **Email from Sparkle Addison regarding scope of practice**

The Committee discussed an email from Sparkle Addison regarding scope of practice questions. The Committee determined neither the Practice Act nor the Rules of the Board provide LMBTs may tell clients to perform stretches, use products, use warm/cold therapy or increase water intake after massage and bodywork therapy services.

### **License Standards Committee**

Ms. Layden reported the Committee met February 16, 2018 and discussed the matters set forth in the minutes of the Committee.

### **School Approval Committee**

No written report. Mr. Wilkins reported on Board approval renewals and the status of three schools that are being sold.

### **Communications Committee**

No written report.

### **Continuing Education Ad Hoc Committee**

No written report.

## **OLD BUSINESS**

### **NC General Assembly Proposed Laws Affecting Licensing Boards**

Mr. Wilkins reported on proposed laws pending in the North Carolina General Assembly that may affect professional licensing boards.

### **2018 Strategic Planning Conference**

Ms. Foster reported the Board met for a Strategic Planning Conference on January 19-21, 2018 and discussed the matters set forth in the minutes of the conference.

#### **a. Appearance of the LMBT license**

The Board discussed the appearance of the LMBT license and agreed to add a large watermark on the license displaying the year the license expires. The Board also discussed providing all LMBTs with an original license and removing the license reprint button from the Board's website.

**b. Discussion on English proficiency**

Board staff sent a Memorandum to Board approved schools and community college massage and bodywork therapy programs advising they add a statement in their catalog and in their Student Enrollment Agreement requiring all students be proficient in the English language.

**CLEAR 2018 meeting**

**a. 2018 Annual meeting**

The 2018 Annual Educational Conference will be held in Philadelphia, Pennsylvania, September 26-29, 2018. Ms. Layden agreed to attend.

**b. 2018-19 Membership**

The Board reviewed the membership renewal for July 1, 2018 – June 30, 2019. Upon motion made, seconded and passed, the Board agreed to renew its membership for 2018-2019.

**FSMTB**

**a. 2018 Annual meeting**

The 2018 FSMTB annual meeting will be held in Salt Lake City, Utah, October 4-6, 2018. Upon motion made, seconded and passed, the Board agreed Ms. Kirk will represent the Board as its delegate.

**b. March and April In Touch Newsletters**

The Board reviewed emails dated February 28, 2018 and March 30, 2018, respectively, regarding the March and April "In Touch" newsletters.

**c. Email regarding job satisfaction among practitioners**

The Board reviewed an email dated March 20, 2018 regarding job satisfaction among practitioners.

**Response to Narcisa Woods regarding human trafficking awareness signs**

The Board reviewed and approved Mr. Wilkins' response to Narcisa Woods regarding human trafficking awareness signs.

**NEW BUSINESS**

## **Email from Polaris Project regarding Stop Enabling Sex Traffickers Act (SESTA)**

The Board reviewed an email dated March 21, 2018 from Polaris Project regarding Stop Enabling Sex Traffickers Act (SESTA).

## **News articles regarding sex trafficking on Craigslist and Backpage.com**

The Board reviewed news articles on Craigslist and Backpage.com regarding the shutdown of their pages that may facilitate sex trafficking.

## **PUBLIC COMMENT**

The Board received comments from the public.

## **RECESS FOR LUNCH**

The Board recessed for lunch at 11:55 a.m.

## **RETURN TO OPEN SESSION**

The Board returned to Open Session on April 19, 2018 at 1:00 p.m.

### **Takara Davis**

The Board reported Ms. Davis' Consent Order was approved.

### **Justin Harrelson**

The Board reported Mr. Harrelson's Consent Order was approved.

### **Susan O'Neill**

The Board reported Ms. O'Neill's Consent Order was approved.

### **Jean Rowe**

The Board reported Ms. Rowe's Consent Order was approved.

### **Stacy Striks**

The Board reported Ms. Strik's Consent Order was approved.

### **Rolando Zevallos**

The Board reported Mr. Zevallos' Consent Order was approved.

## **DISCIPLINARY HEARINGS**

**Shuli Johnson**

The Board conducted a disciplinary hearing regarding allegations Ms. Johnson aided and abetted illegal massage and bodywork therapy at her place of business. Ms. Johnson appeared for the hearing with her attorney.

**CLOSED SESSION**

Upon motion made, seconded, and passed, and pursuant to NCGS 143-318.11(a)(1), (3) and (7) as well as NCGS 143-318.18(6), the Board went into Closed Session on April 19, 2018 at 3:30 p.m.

**RETURN TO OPEN SESSION**

The Board returned to Open Session on April 19, 2018 at 5:25 p.m.

**Shuli Johnson**

Ms. Foster reported the Board reviewed the evidence presented during Ms. Johnson’s hearing and was of the opinion Ms. Johnson aided and abetted the illegal practice of massage and bodywork therapy at her place of business. The Board ordered Ms. Johnson’s license be revoked and she pay a civil penalty of \$1000 and disciplinary costs of \$1000.

**2017-18 2<sup>nd</sup> Quarter Legal Services for Broughton, Wilkins, Sugg & Thompson, PLLC**

Ms. Foster reported the Board reviewed and approved payment to Broughton, Wilkins, Sugg & Thompson, PLLC for in court legal services provided in the 2<sup>nd</sup> quarter in fiscal year 2017-2018.

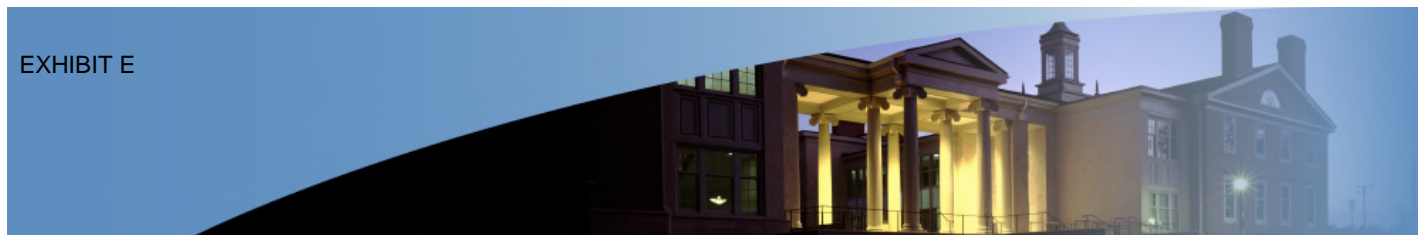
**ADJOURNMENT**

Upon motion duly made, seconded and passed, the meeting was adjourned at 5:30 p.m.

\_\_\_\_\_  
Ms. Holly Foster, Chair

\_\_\_\_\_  
Ms. Dianne Layden, Treasurer

## EXHIBIT E



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## Is a Quorum Necessary for a Public Hearing?

### About the author

Frayda Bluestein



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This entry was posted on April 25th, 2014 and is filed under [Board Structure & Procedures](#), [Board Structures](#), [Open Government](#), [Open Meetings](#), [Public Hearings](#), [Quorum & Voting Requirements](#).



In accordance with [G.S. 160A-364](#), a city has scheduled a public hearing on a proposed amendment to its zoning ordinance. Notice of the hearing has been provided in accordance with the statute, but it now appears that there will not be a quorum present on the day of the hearing. The council does not expect to take action on the ordinance at the meeting. May the city go forward with public hearing without a quorum? The answer is “no.” To fulfill the statutory requirement, a public hearing must take place at a properly noticed meeting with a quorum present, and any specific notice requirements for the hearing must also be met.

When a statute requires a local government to hold or conduct a public hearing, the purpose is to provide public input into a decision to be made by a local government unit or body. So it should be understood that the public hearing must occur at a legally convened meeting of the public body. Although there is no North Carolina case specifically on this point, a case from Georgia notes that a quorum is necessary for a public hearing because it is part of the official business of the board. *Vaughn v. Duke*, 207 S.E. 2d 509 (Ga. 1974) (invalidating a public hearing on a zoning ordinance due to lack of quorum). Indeed,

“conducting hearings” is one of the activities of a public body that constitutes an official meeting under the [open meetings law](#). In addition, parallel statutes for [cities](#) and [counties](#) provide that if a quorum is not present for a public hearing it is automatically continued until the next regular meeting without further advertisement.

Almost always, when a statute requires a public hearing, it specifies the timing and method of notice that must be provided. This notice is separate from and in addition to the notice that is required for the meeting at which the public hearing will occur. It is important to comply with the specific notice requirements that apply to a public hearing. Failure to do so will create a risk of invalidation, even if the notice for the meeting at which the hearing takes place meets the requirements under the open meetings law.

This discussion has been about public hearings that are required by statute. (A list of statutorily required public hearings is provided in a [blog post here](#).) Sometimes a local government uses a public hearing or other type of forum to solicit citizen feedback even when no statute requires it. In this situation, it is up to the governing board, or other public body that calls for the hearing, to set the notice requirements and procedures for the hearing. For example, the city council or the planning board might establish a set of public hearings or community forums to receive feedback on proposed neighborhood land use plans. As part of the process, the board may designate specific council members and planning staff to attend. In this situation, there is no legal requirement for a quorum. If a majority of a public body attends, however, notice may be required under the open meetings law.

For more on what constitutes a quorum and when notice is required, see my earlier blog posts [here](#) and [here](#).

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## Brincefield, Julie

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**From:** rrc.comments  
**Sent:** Monday, September 17, 2018 12:08 PM  
**To:** Brincefield, Julie  
**Subject:** FW: [External] Written Comment re: Submitted Board of Massage and Bodywork Therapy Rule 21 NCAC 30.1004 Establishment Operations

Comment #1 for Massage.

*Amanda J. Reeder  
Counsel to the Rules Review Commission  
NC Office of Administrative Hearings  
919/431-3079*

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**From:** Mark Little [mailto:marklittle@elementsmassage.com]  
**Sent:** Sunday, September 09, 2018 9:10 AM  
**To:** rrc.comments <rrc.comments@oah.nc.gov>  
**Cc:** 'Charles Wilkins' <cwilkins@bws-law.com>  
**Subject:** [External] Written Comment re: Submitted Board of Massage and Bodywork Therapy Rule 21 NCAC 30.1004 Establishment Operations

**CAUTION:** External email. Do not click links or open attachments unless verified. Send all suspicious email as an attachment to Report Spam.

This comment is being submitted pursuant to 26 NCAC 05 .0103 SUBMISSION OF WRITTEN COMMENTS CONCERNING PERMANENT RULES TO THE RRC.

Having reviewed the RRC Staff requests for technical changes, I would like to make an additional comment regarding

1. Failure to meet the RRC review standard of: Clarity. All rules must be clear and unambiguous (G.S. 150b-21.9(a)(2)).
2. Failure to meet the RRC review standard of: Compliance with the Procedural Requirements. {G.S. 150b-21.9(g)(3) (Non-adoption of rules that differ substantially from proposed rule as a result of producing an effect that could not reasonably be expected based on proposed text prior to comment period).

1 21 NCAC 30 .1004 (proposed as .1005) is adopted with changes as published in 32:18 NCR 1789-1797:

2

3 **21 NCAC 30 .1005 .1004 ESTABLISHMENT OPERATIONS**

4 Licensed establishments shall comply with the following requirements:

5 (1) Facility requirements:

6 (a) comply with State and local building code requirements, State fire safety codes, and State  
7 health inspection codes;

8 (b) provide for the use of clients and therapists a restroom with at least one toilet and one sink  
9 with running water. The facilities shall be equipped with toilet tissue, soap dispenser with  
10 soap or other hand cleaning materials, sanitary towels or other hand drying device such as a  
11 wall-mounted electric blow dryer, and waste receptacle. Restroom and shower facilities  
12 shall be lighted, ventilated and maintained in good repair. Establishments located in  
13 buildings housing multiple businesses under one roof, such as shopping malls, terminals, or  
14 hotels, may substitute centralized toilet facilities;

15 (c) if equipped with a whirlpool bath, sauna, steam cabinet, or steam room, maintain clean  
16 shower facilities on the premises; and

17 ~~(d) provide treatment rooms for massage and bodywork therapy that are least 10 feet by 12 feet~~  
18 ~~in size, with a minimum of three linear feet of open floor space around all sides of the~~  
19 ~~massage treatment table; and~~

20 ~~(d)~~ display the original Massage and Bodywork Therapy Establishment License, and the licenses  
21 of all LMBTs in a prominent place at the establishment so as to be visible for inspection.

22 (2) Safety and sanitary requirements:

23 (a) provide for safe and unobstructed human passage in the public areas of the premises;

24 (b) provide for removal of garbage and refuse;

25 (c) provide for safe storage or removal of flammable materials;

26 (d) exterminate all vermin, insects, termites, and rodents on the premises;

27 (e) maintain all equipment used to perform massage and bodywork therapy services on the  
28 premises in a safe and sanitary ~~condition, including the application of cleansers and~~  
29 ~~bactericidal agents to the massage table.~~ condition. Clean sheets, towels, blankets, or other  
30 coverings shall be used for each client and to cover the massage table for each client; and

31 (f) maintain a supply of clean drapes, towels, gowns, or sheets, for the purpose of draping each  
32 client while the client is being massaged, and launder before reuse all linens furnished for  
33 the personal use of the client.

34 (3) Treatment requirements:

35 (a) All massage and bodywork therapy treatments shall be administered by LMBTs licensed in  
36 North Carolina;

1. The following excerpt from (2)(e) and (2)(f) lines 29 to 33 is not clear and unambiguous. It is not clear which of the following "all lines" in line 32 applies to:

- Sheets
- Towels
- Blankets
- Other Coverings
- Drapes
- Gowns

Standard industry practice does not include laundering blankets between clients unless they have come into direct contact with a client (which is normally not the case based on proper use of sheets). Linens in and of itself it not a clear term as definitions of it range from very narrowly sheet to including all manner of bedding including blankets and bedspreads.

While correspondence with the Rulemaking Coordinator Contact for the Agency indicate the Board not intend for blankets to be included in the meaning of linens and thus required to be laundered before each client, the fact remains that as written, the submitted rule is ambiguous in that regard.

29 ... Clean sheets, towels, blankets, or other  
30 coverings shall be used for each client and to cover the massage table for each client; and  
31 (f) maintain a supply of clean drapes, towels, gowns, or sheets, for the purpose of draping each  
32 client while the client is being massaged, and launder before reuse all linens furnished for

2. If a technical change or rewrite is made that would unambiguously include blankets as part of lines 32 and 33 then the rule will also fail to comply with the RRC review standard of: Compliance with the Procedural Requirements. {G.S. 150b-21.9(g)(3) (Non-adoption if a submitted rule differs substantially from proposed rule because it produces an effect that could not reasonably be expected based on proposed text prior to comment period).
  - a. As indicated by the underline the image above from the RRC site, “blankets” was not included in the original proposed text posted prior to the public comment period. A requirement to launder blankets prior to the use of client clearly would produce an effect that could not be expected based on the rule as originally proposed without the word blankets. In the case of my own business, this would increase monthly expenses on the order of \$3000 to \$5000 and month.
  - b. Note that the increased expense of laundering blankets across all massage providers affected by the rule would almost certainly exceed \$1 million dollars, thus constituting a “substantial economic impact and trigger the Financial and Regulatory Impact Analysis on Rules required under (G.S. 150b-21.4b1). Since to my knowledge, this hasn’t be done, that would also become a basis for objecting to the rule.

I look forward to reviewing the Agency’s retyping of the rule due to the RRC staff by 9/13, assuming they will be posted on the RRC site (if not I respectfully request a copy) and will based on the retyped version consider the need to submit further written comments prior to 5pm on the business day prior to the RRC meeting (thus 5/19) per 26 NCAC 05 .0103 (d) at that time.

Thank you in advance for your consideration of these comments.

Respectfully submitted,

Mark D. Little

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