

RRC STAFF OPINION

PERIODIC REVIEW AND EXPIRATION OF EXISTING RULES REPORT

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED REPORT AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT REPORT. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Medical Board

REPORT: 21 NCAC 32

RECOMMENDED ACTION:

- X Note staff's comment
- X Find the comments for Rules 21 NCAC 32A .0112, .0113, and .0114, and 32N .0106 and .0107 do not have merit.
- X Find that the submission of comments not addressing specific rules and the text of Rules 21 NCAC 32N .0108, .0109, .0110 and .0111 are not "public comments" as defined by G.S. 150B-21.3A(a)(5)
- X Approve the report as submitted by the agency

Please note, all comments attributed as public comment and the agency response were taken verbatim from the agency submission. They were not edited by Commission staff. The full text of the public comment and Board responses are attached to the report.

21 NCAC 32A .0104 MEETINGS

The Board customarily meets at regularly scheduled intervals as appropriate to carry out Board business. Other meetings may be called by the President of the Board or upon written request of the majority of the members of the Board.

*History Note: Authority G.S. 90-5;
Eff. February 1, 1976;
Amended Eff. May 1, 1990; May 1, 1989.*

Public Comment:

The Board customarily meets at regularly scheduled intervals as appropriate to carry out Board business.

This is ambiguous because it does not provide any specific information about the meeting schedule. Reference to custom is not appropriate in a rule. There is ambiguity with respect to the opportunity for the public to participate in and receive information about meetings.

Amanda J. Reeder
Commission Counsel

Information regarding public access to meetings, agendas, and minutes is necessary so that the public can have a reasonable opportunity to participate. The NCMB has closed portions of public meetings in the past year without providing the public with a statutory explanation for the closed meeting. The NCMB has held public meetings in the past year with inadequate public notice of the agenda. (standard of review 150B-21.9.(a) (3)).

Revision of the rule is necessary to reduce the burden upon those persons or entities who must comply with the rule. Revision of this rule is necessary to serve the public interest. (standard of review 150B-21.9.(a) (4)).

Agency Response:

The agency reclassified this Rule as “necessary with substantive public interest.”

Staff Recommendation:

As the agency has already classified this Rule as “necessary with substantive public interest,” staff recommends approving the classification as G.S. 150B-21.3A requires the Commission to review comments for merit if the rule is not already classified as “necessary with substantive public interest.”

Amanda J. Reeder
Commission Counsel

21 NCAC 32A .0111 REQUEST FOR DECLARATORY RULING

(a) All requests for declaratory rulings shall be written and mailed to the Board at 1203 Front Street, Raleigh, North Carolina 27609. The envelope containing the request shall bear the notation: "REQUEST FOR DECLARATORY RULING".

(b) Each Request for Declaratory Ruling must include the following information:

- (1) the name and address of the person requesting the ruling;
- (2) the statute or rule to which the request relates;
- (3) a concise statement of the manner in which the requesting person is affected by the statute or rule or its potential application to that person;
- (4) a statement whether an oral hearing is desired and, if so, the reason therefore.

History Note: *Authority G.S. 150B-4;*
 Eff. February 1, 2007.

Public Comment:

It is not reasonably necessary for requests for declaratory rulings to be mailed. Adding the option of email would ease the burden on the requestor and provide a record of the request (standard of review 150B-21.9.(a) (4)).

The rule is not clear in terms of proceedings in which declaratory rulings are decided. It could be interpreted to mean that the proceeding is private (standard of review 150B-21.9.(a) (2)). Except under limited statutory circumstances, proceedings of the NCMB are open to the public, so all deliberations concerning rulings should be public. If a person does not request a hearing, are deliberations conducted in a non public forum? Declaratory rulings should be on the agenda of the regular Board meeting, and a notice should be posted in advance along with instructions for public commentary. The rule should indicate that the hearing is public and could ask the submitter to indicate if they would like to be allotted time to present at the meeting.

It is not reasonably necessary to limit persons requesting declaratory rulings to individuals who may be personally affected. Individuals or organizations interested in advocating for the citizens of NC should be able to request a ruling, as long as they are clear with respect to the application and effect to a specific situation or class of persons. The NCMB would benefit from the foresight, perspective, and expertise of a variety of stakeholders. (standard of review 150B-21.9.(a) (4)). Pursuant to § 150B-4 : “Upon request, an agency shall also issue a declaratory ruling to resolve a conflict or inconsistency within the agency regarding an interpretation of the law or a rule adopted by the agency.” The language of this statute is not limited to aggrieved persons. It defines an alternate condition for requesting a declaratory ruling; specifically an inconsistency or conflict inherent to the statute, rule, or agency interpretation. Any party could identify such an issue and request a ruling. Therefore it is reasonably necessary for the rule to be amended to make clear that any party may request a declaratory ruling if a conflict or inconsistency is identified. (standard of review 150B-21.9.(a) (4))

Agency Response:

The agency reclassified this Rule as “necessary with substantive public interest.”

Amanda J. Reeder
Commission Counsel

Staff Recommendation:

As the agency has already classified this Rule as “necessary with substantive public interest,” staff recommends approving the classification as G.S. 150B-21.3A requires the Commission to review comments for merit if the rule is not already classified as “necessary with substantive public interest.”

Amanda J. Reeder
Commission Counsel

21 NCAC 32A .0112 DISPOSITION OF REQUEST

- (a) Upon receipt of a Request for Declaratory Ruling, the Board shall determine whether a ruling is appropriate under the facts stated.
- (b) When the Board determines that the issuance of a declaratory ruling is inappropriate, the Board shall notify, in writing, the person requesting the ruling, stating the reasons for the denial of the request.
- (c) The Board shall decline to issue a declaratory ruling where:
- (1) there has been a similar controlling factual determination made by the Board in a contested case;
 - (2) the rule-making record shows that the factual issues raised by the request were specifically considered prior to adoption of the rule; or
 - (3) the subject-matter of the request is involved in pending litigation in any state or federal court in North Carolina;
 - (4) the petitioner fails to show that the circumstances are so changed since the adoption of the statute or rule that a ruling is warranted.

History Note: Authority G.S. 150B-4;
Eff. February 1, 2007.

Public Comment:

The current text misconstrues grounds for a declaratory judgment *affirming the status quo* as grounds for denial of a *request* for declaratory judgment. Therefore, it fails to meet the standard of being clear and unambiguous. (standard of review 150B-21.9.(a) (2))

It is inappropriate to deny a request for declaratory judgment because the petitioner fails to show that circumstances have changed since the adoption of the rule. There is no readily available means for a petitioner to obtain this information. Similarly, there is no readily available means for a petitioner to know what determinations were made during prior rule review or in contested cases. The Board does not consistently publish this information and it is not indexed in this fashion. Therefore these rules are unduly burdensome and do not serve the public interest (standard of review 150B-21.9.(a) (4)).

If the Board finds that the request does not warrant a modified interpretation of a rule or statute, it is appropriate to issue a declaratory judgment to that effect rather than to refuse to rule at all. Therefore theses (sic) rules are not reasonably necessary to implement the authorizing statute (standard of review 150B-21.9.(a) (3)).

It is unduly burdensome in terms of cost and labor for the NCMB to determine if the subject matter of the request is involved in any pending litigation in the state. (standard of review 150B-21.9.(a) (4)). At any time there are many thousands of pending cases, in which new issues may continually emerge, and which may take years to resolve. This rule would create a state of perpetual limbo in which the NCMB could not react to emergent issues to uphold its duties to the people of NC. Procedures already exist for the NCMB to address any future unanticipated circumstances that may affect the validity of a rule. Therefore this rule is not reasonably necessary to implement the authorizing statute (standard of review 150B-21.9.(a) (3)). Furthermore, the NCMB is currently involved in litigation (as the defendant)¹ concerning a constitutional question, yet has taken upon itself, absent statutory mandate, the review of 124 rules. It does not appear that pending litigation is an obstacle to the Board's review of rules or issuance of declaratory rulings.

¹ 5:14-cv-00504-BO Jemsek v. North Carolina et al. The state was dismissed from the case.

Amanda J. Reeder
Commission Counsel

Agency Response:

The NCMB rules list standard and obvious reasons for denying a request for a declaratory ruling. (Numerous other occupational licensing agency rules include this exact language.) Moreover, a petitioner who believes the Board wrongly denied a request for a declaratory ruling can always seek judicial review of that decision. N.C. Gen. Stat. §150B-4(a1)(2). The pending litigation basis is not burdensome because the Board would be a party to the pending litigation and thus would know about it.

Staff Recommendation:

Staff does not believe this comment has merit, as it appears the agency has written the rule within the confines of G.S. 150B-4.

Amanda J. Reeder
Commission Counsel

21 NCAC 32A .0113 PROCEDURE FOR DECLARATORY RULING

Prior to issuing a declaratory ruling, the Board shall give notice of the declaratory ruling proceedings to any person(s) it deems appropriate and shall direct that fact-finding proceedings appropriate to the circumstances of the particular request be conducted. The proceedings may consist of written submissions, an oral hearing, or other proceedings.

History Note: *Authority G.S. 150B-4;*
Eff. February 1, 2007

Public Comment:

The substance of the rules regarding declaratory rulings are not clear and unambiguous (standard of review 150B-21.9.(a) (3)). The criteria for certain decisions are limited to whatever is deemed “appropriate” to the Board. This leaves ample room for abuse of discretion and provides inadequate guidance for judicial review.

§ 150B-2 (8a) 9g) defines a rule as NOT including “Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, **investigations**, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.” Therefore the statement in 21 NCAC 32A .0113: “...the Board... shall direct that **fact-finding proceedings** appropriate to the circumstances of the particular request be conducted” falls outside the definition of a rule because a fact finding proceeding is an investigation. Therefore this issue is not within the authority delegated to the agency by the General Assembly (standard of review 150B-21.9.(a) (1)).

Agency Response:

This rule gives the Board appropriate discretion in deciding how best to proceed with a declaratory ruling. All decisions are subject to judicial review to determine if they are arbitrary or capricious. N.C.Gen.Stat. § 150B-2 (8a)(g) provides an exception from rulemaking as to how the staff of an agency performs its duties, much akin to a Standard Operating Procedure. This exception does not apply to how an agency conducts the evidence gathering portion in a declaratory ruling proceeding.

Staff Recommendation:

Staff does not believe this comment has merit. The rule is written within the confines of G.S. 150B-4.

Amanda J. Reeder
Commission Counsel

21 NCAC 32A .0114 SUSPENSION OF AUTHORITY TO EXPEND FUNDS

In the event the Board's authority to expend funds is suspended pursuant to G.S. 93B-2(d), the Board shall continue to issue and renew licenses and all fees tendered shall be placed in an escrow account maintained by the Board for this purpose. Once the Board's authority is restored, the funds shall be moved from the escrow account into the general operating account.

*History note: Authority G.S. 93B-2(d);
 Eff. March 1, 2011.*

Public Comment:

§ 150B-2 (8a) 9g) defines a rule as NOT including “Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; **in settling financial disputes or negotiating financial arrangements**; or in the defense, prosecution, or settlement of cases.” Therefore the statement in 21 NCAC 32A .0114: “...all fees tendered shall be placed in an escrow account maintained by the Board for this purpose. Once the Board's authority is restored, the funds shall be moved from the escrow account into the general operating account...” falls outside the definition of a rule because it concerns the settling of a financial dispute and the negotiation of financial arrangements. Therefore this issue is not within the authority delegated to the agency by the General Assembly (standard of review 150B-21.9.(a) (1)).

Agency Response:

This rule was adopted to conform with N.C. Gen. Stat. §93B-2 (d), which primarily addresses Boards’ obligations to file annual reports with state leaders. Failure to file such an annual report “shall result in a suspension of the board’s authority to expend funds until such time as the report is filed.”

The NCMB continually receives fees for license applications, license renewals, corporate registrations, and a few other types of service. In the unlikely event that the Board failed to file said annual report, this money would still be received. It is important to have a mechanism to create an escrow account in which to place those funds. It would also be important for the work of the Medical Board to continue, meeting its obligations “to regulate the practice of medicine and surgery for the benefit and protection of the people of North Carolina.”

Furthermore, the mechanism set out in the statute and the rule would not factually constitute the settling of financial disputes or the negotiation of financial arrangements.

Staff Recommendation:

G.S. 93B-2(d) requires all occupational licensing boards to adopt a rule to govern what will happen to funds received if the agency fails to submit mandated reports. Staff does not believe this comment has merit.

Amanda J. Reeder
Commission Counsel

Statutory Authority for Rule 21 NCAC 32A .0114:

§ 93B-2. Annual reports required; contents; open to inspection; sanction for failure to report.

(a) No later than October 31 of each year, each occupational licensing board shall file electronically with the Secretary of State, the Attorney General, and the Joint Legislative Administrative Procedure Oversight Committee an annual report containing all of the following information:

- (1) The address of the board, and the names of its members and officers.
- (1a) The total number of licensees supervised by the board.
- (2) The number of persons who applied to the board for examination.
- (3) The number who were refused examination.
- (4) The number who took the examination.
- (5) The number to whom initial licenses were issued.
- (5a) The number who failed the examination.
- (6) The number who applied for license by reciprocity or comity.
- (7) The number who were granted licenses by reciprocity or comity.
- (7a) The number of official complaints received involving licensed and unlicensed activities.
- (7b) The number of disciplinary actions taken against licensees, or other actions taken against nonlicensees, including injunctive relief.
- (8) The number of licenses suspended or revoked.
- (9) The number of licenses terminated for any reason other than failure to pay the required renewal fee.
- (10) The substance of any anticipated request by the occupational licensing board to the General Assembly to amend statutes related to the occupational licensing board.
- (11) The substance of any anticipated change in rules adopted by the occupational licensing board or the substance of any anticipated adoption of new rules by the occupational licensing board.

(b) No later than October 31 of each year, each occupational licensing board shall file electronically with the Secretary of State, the Attorney General, the Office of State Budget and Management, and the Joint Legislative Administrative Procedure Oversight Committee a financial report that includes the source and amount of all funds credited to the occupational licensing board and the purpose and amount of all funds disbursed by the occupational licensing board during the previous fiscal year.

(c) The reports required by this section shall be open to public inspection.

(d) The Joint Legislative Administrative Procedure Oversight Committee shall notify any board that fails to file the reports required by this section. Failure of a board to comply with the reporting requirements of this section by October 31 of each year shall result in a suspension of the board's authority to expend any funds until such time as the board files the required reports. Suspension of a board's authority to expend funds under this subsection shall not affect the board's duty to issue and renew licenses or the validity of any application or license for which fees have been tendered in accordance with law. Each board shall adopt rules establishing a procedure for implementing this subsection and shall maintain an escrow account into which any fees tendered during a board's period of suspension under this subsection shall be deposited. (1957, c. 1377, s. 2; 1969, c. 42; 2006-70, s. 1; 2007-323, s. 23.2; 2009-125, s. 2; 2011-291, ss. 2.19, 2.20; 2014-120, s. 4.)

Amanda J. Reeder
Commission Counsel

21 NCAC 32N .0106 DEFINITIONS

As used in this Section:

- (1) "Disciplinary Proceedings" means hearings conducted pursuant to G.S. 90-14.2 through 90-14.7, and Article 3A of Chapter 150B.
- (2) "Good cause" related to motions or requests to continue or for additional time for responding includes:
 - (a) death or incapacitating illness of a party, or attorney of a party;
 - (b) a court order requiring a continuance;
 - (c) lack of proper notice of the hearing;
 - (d) a substitution of the attorney of a party if the substitution is shown to be required;
 - (e) agreement for a continuance by all parties if either more time is demonstrated to be necessary to complete mandatory preparation for the case, such as authorized discovery, and the parties and the Board have agreed to a new hearing date or the parties have agreed to a settlement of the case that has been or is likely to be approved by the Board; and
 - (f) where, for any other reason, either party has shown that the interests of justice require a continuance or additional time.
- (3) "Good cause" related to motions or requests to continue or for additional time for responding shall not include:
 - (a) intentional delay;
 - (b) unavailability of a witness if the witness testimony can be taken by deposition; and
 - (c) failure of the attorney or respondent to use effectively the statutory notice period provided in G.S. 90-14.2(a) to prepare for the hearing.
- (4) "Licensee" means all persons to whom the Board has issued a license as defined in G.S. 90-1.1.
- (5) "Respondent" means the person licensed or approved by the Board who is named in the Notice of Charges and Allegations.

History Note: Authority G.S. 90-5.1(a)(3); 90-14.2; 150B-38(h); 150B-40(c)(4);
Eff. February 1, 2012.

Public Comment:

The definitions section does not provide sufficient information to differentiate and define the terms within the subchapter. As a user, I find the wording within the subsections extremely confusing. (standard of review 150B-21.9.(a) (3)) For example, "disciplinary proceedings" only relates to disciplinary hearings, so it does not need to be called proceedings. This causes confusion with other proceedings mentioned in the subsections. The distinction between an investigation and an inquiry are unclear. The distinction between an order and an invitation are unclear. The distinction between a prehearing conference and a precharge conference are unclear. Many definitions needed to clarify the process of investigative and disciplinary proceedings are missing.

Agency Response:

We disagree that the definitions are unclear or confusing. A "precharge conference" is defined by N.C.Gen.Stat. § 90-14(i) and (j). A prehearing conference is an order by the Board President for the purposes set out in N.C.Gen.Stat. § 150B-40(c)(5), to "Direct the parties to appear and confer to consider simplification of the issues by consent of the parties..."

As stated previously, these rules were approved by the Rules Review Commission before they became effective February 1, 2012.

Staff Recommendation:

Staff recommends finding this comment does not have merit. Staff does not believe these definitions are unclear in the Rule.

Amanda J. Reeder
Commission Counsel

21 NCAC 32N .0107 INVESTIGATIONS AND COMPLAINTS

(a) At the time of first oral or written communication from the Board or staff or agent of the Board to a licensee regarding a complaint or investigation, the Board shall provide the notices set forth in G.S. 90-14(i), except as provided in Paragraph (e) of this Rule.

(b) A licensee shall submit a written response to a complaint received by the Board within 45 days from the date of a written request by Board staff. The Board shall grant up to an additional 30 days for the response where the licensee demonstrates good cause for the extension of time. The response shall contain accurate and complete information. Where a licensee fails to respond in the time and manner provided herein, the Board may treat that as a failure to respond to a Board inquiry in a reasonable time and manner as required by G.S. 90-14(a)(14).

(c) The licensee's written response to a complaint submitted to the Board in accordance with Paragraph (b) of this Rule shall be provided to the complainant upon written request as permitted in G.S. 90-16(e1), except that the response shall not be provided where the Board determines that the complainant has misused the Board's complaint process or that the release of the response would be harmful to the physical or mental health of the complainant who was a patient of the responding licensee.

(d) A licensee shall submit to an interview within 30 days from the date of an oral or written request from Board staff. The Board may grant up to an additional 15 days for the interview where the licensee demonstrates good cause for the extension of time. The responses to the questions and requests for information, including documents, during the interview shall be complete and accurate. Where respondent fails to respond in the time and manner provided herein, the Board may treat that as a failure to respond to a Board inquiry in a reasonable time and manner as required by G.S. 90-14(a)(14).

(e) The licensee who is the subject of a Board inquiry may retain and consult with legal counsel of his or her choosing in responding to the inquiries as set out in G.S. 90-14(i).

History Note: Authority G.S. 90-5.1(a)(3); 90-14(a)(14); 90-14(i); 90-16(e1);
Eff. February 1, 2012.

Public Comment:

The complaint section is very confusing and incomplete from the perspective of a complainant's roles, responsibilities, and rights. (standard of review 150B-21.9.(a) (2)) It is unclear from this section whether a complainant is a "person aggrieved" within the meaning of NCGS 150 B-2 (6). The NCMB currently does not interpret NCGS NCGS (sic) 150 B-2 (6) as applying to patients who file complaints with the Board.

Agency Response:

NCMB Response: as stated previously, N.C. Gen. Stat. 150B-2(6) defines a "person aggrieved" for purposes of the Administrative Procedure Act. Determination of who is a "person aggrieved" depends on the facts and circumstances of any particular situation. .

The Board takes seriously its obligation to be transparent in its communications with the public. In order to better serve the public, the Board has created an online tutorial which is posted on its website that explains the process and scope of the complaint process. Its intended audience is the public, from which most complaints originate. http://www.ncmedboard.org/consumer_resources/complaints.

The Board also created a brochure called "A Consumer's Guide to the Complaint Process" which is sent via email to a person who files a complaint online, and is mailed to a person who is unable to submit a complaint online. It may be found at:
http://www.ncmedboard.org/images/uploads/publications_uploads/Complaint_brochure_2013.pdf

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Commission Counsel

Another resource available on the Board's website is directed at licensees who may be the subject of an investigation but would also provide information to complainants. This may be found at:

http://www.ncmedboard.org/images/uploads/publications_uploads/Investigations_brochure.pdf

Staff Recommendation:

Staff recommends finding this comment does not have merit. It appears that the commenter has conflated requests for declaratory rulings under G.S. 150B-4 and investigating a complaint and taking disciplinary action under G.S. 90-14 and 90-16. This Rule applies to investigations of complaints against licensees.

Amanda J. Reeder
Commission Counsel

Statutory Authority for Rule 21 NCAC 32N .0107:

§ 90-14. Disciplinary Authority.

(a) The Board shall have the power to place on probation with or without conditions, impose limitations and conditions on, publicly reprimand, assess monetary redress, issue public letters of concern, mandate free medical services, require satisfactory completion of treatment programs or remedial or educational training, fine, deny, annul, suspend, or revoke a license, or other authority to practice medicine in this State, issued by the Board to any person who has been found by the Board to have committed any of the following acts or conduct, or for any of the following reasons:

- (1) Immoral or dishonorable conduct.
- (2) Producing or attempting to produce an abortion contrary to law.
- (3) Made false statements or representations to the Board, or willfully concealed from the Board material information in connection with an application for a license, an application, request or petition for reinstatement or reactivation of a license, an annual registration of a license, or an investigation or inquiry by the Board.
- (4) Repealed by Session Laws 1977, c. 838, s. 3.
- (5) Being unable to practice medicine with reasonable skill and safety to patients by reason of illness, drunkenness, excessive use of alcohol, drugs, chemicals, or any other type of material or by reason of any physical or mental abnormality. The Board is empowered and authorized to require a physician licensed by it to submit to a mental or physical examination by physicians designated by the Board before or after charges may be presented against the physician, and the results of the examination shall be admissible in evidence in a hearing before the Board.
- (6) Unprofessional conduct, including, but not limited to, departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice, or the ethics of the medical profession, irrespective of whether or not a patient is injured thereby, or the committing of any act contrary to honesty, justice, or good morals, whether the same is committed in the course of the licensee's practice or otherwise, and whether committed within or without North Carolina. The Board shall not revoke the license of or deny a license to a person, or discipline a licensee in any manner, solely because of that person's practice of a therapy that is experimental, nontraditional, or that departs from acceptable and prevailing medical practices unless, by competent evidence, the Board can establish that the treatment has a safety risk greater than the prevailing treatment or that the treatment is generally not effective.
- (7) Conviction in any court of a crime involving moral turpitude, or the violation of a law involving the practice of medicine, or a conviction of a felony; provided that a felony conviction shall be treated as provided in subsection (c) of this section.
- (8) By false representations has obtained or attempted to obtain practice, money or anything of value.
- (9) Has advertised or publicly professed to treat human ailments under a system or school of treatment or practice other than that for which the physician has been educated.
- (10) Adjudication of mental incompetency, which shall automatically suspend a license unless the Board orders otherwise.
- (11) Lack of professional competence to practice medicine with a reasonable degree of skill and safety for patients or failing to maintain acceptable standards of one or more areas of professional physician practice. In this connection the Board may consider repeated acts of a physician indicating the physician's failure to properly treat a patient. The Board may, upon reasonable grounds, require a physician to submit to inquiries or examinations, written or oral, as the Board deems necessary to determine the

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professional qualifications of such licensee. In order to annul, suspend, deny, or revoke a license of an accused person, the Board shall find by the greater weight of the evidence that the care provided was not in accordance with the standards of practice for the procedures or treatments administered.

- (11a) Not actively practiced medicine or practiced as a physician assistant, or having not maintained continued competency, as determined by the Board, for the two-year period immediately preceding the filing of an application for an initial license from the Board or a request, petition, motion, or application to reactivate an inactive, suspended, or revoked license previously issued by the Board. The Board is authorized to adopt any rules or regulations it deems necessary to carry out the provisions of this subdivision.
- (12) Promotion of the sale of drugs, devices, appliances or goods for a patient, or providing services to a patient, in such a manner as to exploit the patient, and upon a finding of the exploitation, the Board may order restitution be made to the payer of the bill, whether the patient or the insurer, by the physician; provided that a determination of the amount of restitution shall be based on credible testimony in the record.
- (13) Having a license to practice medicine or the authority to practice medicine revoked, suspended, restricted, or acted against or having a license to practice medicine denied by the licensing authority of any jurisdiction. For purposes of this subdivision, the licensing authority's acceptance of a license to practice medicine voluntarily relinquished by a physician or relinquished by stipulation, consent order, or other settlement in response to or in anticipation of the filing of administrative charges against the physician's license, is an action against a license to practice medicine.
- (14) The failure to respond, within a reasonable period of time and in a reasonable manner as determined by the Board, to inquiries from the Board concerning any matter affecting the license to practice medicine.
- (15) The failure to complete an amount not to exceed 150 hours of continuing medical education during any three consecutive calendar years pursuant to rules adopted by the Board.

The Board may, in its discretion and upon such terms and conditions and for such period of time as it may prescribe, restore a license so revoked or otherwise acted upon, except that no license that has been revoked shall be restored for a period of two years following the date of revocation.

(b) The Board shall refer to the North Carolina Physicians Health Program all licensees whose health and effectiveness have been significantly impaired by alcohol, drug addiction or mental illness. Sexual misconduct shall not constitute mental illness for purposes of this subsection.

(c) A felony conviction shall result in the automatic revocation of a license issued by the Board, unless the Board orders otherwise or receives a request for a hearing from the person within 60 days of receiving notice from the Board, after the conviction, of the provisions of this subsection. If the Board receives a timely request for a hearing in such a case, the provisions of G.S. 90-14.2 shall be followed.

(d) Repealed by Session Laws 2006-144, s. 4, effective October 1, 2006, and applicable to acts or omissions that occur on or after that date.

(e) The Board and its members and staff shall not be held liable in any civil or criminal proceeding for exercising, in good faith, the powers and duties authorized by law.

(f) A person, partnership, firm, corporation, association, authority, or other entity acting in good faith without fraud or malice shall be immune from civil liability for (i) reporting, investigating, assessing, monitoring, or providing an expert medical opinion to the Board regarding the acts or omissions of a licensee or applicant that violate the provisions of subsection (a) of this section or any other provision of law relating to the fitness of a licensee or applicant to practice medicine and (ii) initiating or conducting proceedings against a licensee or applicant if a complaint is made or action is taken in good faith without fraud or malice. A person shall not be held liable in any civil proceeding for testifying before the Board in good faith and

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Commission Counsel

without fraud or malice in any proceeding involving a violation of subsection (a) of this section or any other law relating to the fitness of an applicant or licensee to practice medicine, or for making a recommendation to the Board in the nature of peer review, in good faith and without fraud and malice.

(g) Prior to taking action against any licensee for providing care not in accordance with the standards of practice for the procedures or treatments administered, the Board shall whenever practical consult with a licensee who routinely utilizes or is familiar with the same modalities and who has an understanding of the standards of practice for the modality administered. Information obtained as result of the consultation shall be available to the licensee at the informal nonpublic precharge conference.

(h) No investigation of a licensee shall be initiated upon the direction of a single member of the Board without another Board member concurring. A Board member shall not serve as an expert in determining the basis for the initiation of an investigation.

(i) At the time of first communication from the Board or agent of the Board to a licensee regarding a complaint or investigation, the Board shall provide notice in writing to the licensee that informs the licensee: (i) of the existence of any complaint or other information forming the basis for the initiation of an investigation; (ii) that the licensee may retain counsel; (iii) how the Board will communicate with the licensee regarding the investigation or disciplinary proceeding in accordance with subsections (m) and (n) of this section; (iv) that the licensee has a duty to respond to inquiries from the Board concerning any matter affecting the license, and all information supplied to the Board and its staff will be considered by the Board in making a determination with regard to the matter under investigation; (v) that the Board will complete its investigation within six months or provide an explanation as to why it must be extended; and (vi) that if the Board makes a decision to initiate public disciplinary proceedings, the licensee may request in writing an informal nonpublic precharge conference.

(j) After the Board has made a nonpublic determination to initiate disciplinary proceedings, but before public charges have been issued, the licensee requesting so in writing, shall be entitled to an informal nonpublic precharge conference. At least five days prior to the informal nonpublic precharge conference, the Board will provide to the licensee the following: (i) all relevant information obtained during an investigation, including exculpatory evidence except for information that would identify an anonymous complainant; (ii) the substance of any written expert opinion that the Board relied upon, not including information that would identify an anonymous complainant or expert reviewer; (iii) notice that the licensee may retain counsel, and if the licensee retains counsel all communications from the Board or agent of the Board regarding the disciplinary proceeding will be made through the licensee's counsel; (iv) notice that if a Board member initiated the investigation then that Board member will not participate in the adjudication of the matter before the Board or hearing committee; (v) notice that the Board may use an administrative law judge or designate hearing officers to conduct hearings as a hearing committee to take evidence; (vi) notice that the hearing shall proceed in the manner prescribed in Article 3A of Chapter 150B of the General Statutes and as otherwise provided in this Article; and (vii) any Board member who serves as a hearing officer in this capacity shall not serve as part of the quorum that determines the final agency decision.

(k) Unless the conditions specified in G.S. 150B-3(c) exist, the Board shall not seek to require of a licensee the taking of any action adversely impacting the licensee's medical practice or license without first giving notice of the proposed action, the basis for the proposed action, and information required under subsection (i) of this section.

(l) The Board shall complete any investigation initiated pursuant to this section no later than six months from the date of first communication required under subsection (i) of this section, unless the Board provides to the licensee a written explanation of the circumstances and reasons for extending the investigation.

(m) If a licensee retains counsel to represent the licensee in any matter related to a complaint, investigation, or proceeding, the Board shall communicate to the licensee through the licensee's counsel.

(n) Notwithstanding subsection (m) of this section, if the licensee has retained counsel and the Board has not made a nonpublic determination to initiate disciplinary proceedings, the Board may serve orders to

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produce, orders to appear, or provide notice that the Board will not be taking any further action against a licensee to both the licensee and the licensee's counsel. (C.S., s. 6618; 1921, c. 47, s. 4; Ex. Sess. 1921, c. 44, s. 6; 1933, c. 32; 1953, c. 1248, s. 2; 1969, c. 612, s. 4; c. 929, s. 6; 1975, c. 690, s. 4; 1977, c. 838, s. 3; 1981, c. 573, ss. 9, 10; 1987, c. 859, ss. 6-10; 1993, c. 241, s. 1; 1995, c. 405, s. 4; 1997-443, s. 11A.118(a); 1997-481, s. 1; 2000-184, s. 5; 2003-366, ss. 3, 4; 2006-144, s. 4; 2007-346, s. 14; 2009-363, ss. 2, 3; 2009-558, ss. 1.2, 1.3, 1.4.)

§ 90-16. Self-reporting requirements; confidentiality of Board investigative information; cooperation with law enforcement; patient protection; Board to keep public records.

(a) The North Carolina Medical Board shall keep a regular record of its proceedings with the names of the members of the Board present, the names of the applicants for license, and other information as to its actions. The North Carolina Medical Board shall publish the names of those licensed within 30 days after granting the license.

(b) The Board may in a closed session receive evidence involving or concerning the treatment of a patient who has not expressly or impliedly consented to the public disclosure of such treatment as may be necessary for the protection of the rights of such patient or of the accused physician and the full presentation of relevant evidence.

(c) All records, papers, investigative files, investigative reports, other investigative information and other documents containing information in the possession of or received or gathered by the Board, or its members or employees or consultants as a result of investigations, inquiries, assessments, or interviews conducted in connection with a licensing, complaint, assessment, potential impairment matter, disciplinary matter, or report of professional liability insurance awards or settlements pursuant to G.S. 90-14.13, shall not be considered public records within the meaning of Chapter 132 of the General Statutes and are privileged, confidential, and not subject to discovery, subpoena, or other means of legal compulsion for release to any person other than the Board, its employees or consultants involved in the application for license, impairment assessment, or discipline of a license holder, except as provided in subsections (d) and (e1) of this section. For purposes of this subsection, investigative information includes information relating to the identity of, and a report made by, a physician or other person performing an expert review for the Board and transcripts of any deposition taken by Board counsel in preparation for or anticipation of a hearing held pursuant to this Article but not admitted into evidence at the hearing.

(d) The Board shall provide the licensee or applicant with access to all information in its possession that the Board intends to offer into evidence in presenting its case in chief at the contested hearing on the matter, subject to any privilege or restriction set forth by rule, statute, or legal precedent, upon written request from a licensee or applicant who is the subject of a complaint or investigation, or from the licensee's or applicant's counsel, unless good cause is shown for delay. The Board is not required to provide any of the following:

- (1) A Board investigative report.
- (2) The identity of a non-testifying complainant.
- (3) Attorney-client communications, attorney work product, or other materials covered by a privilege recognized by the Rules of Civil Procedure or the Rules of Evidence.

(e) Information furnished to a licensee or applicant, or counsel for a licensee or applicant, under subsection (d) of this section shall be subject to discovery or subpoena between and among the parties in a civil case in which the licensee is a party.

(e1) When the Board receives a complaint regarding the care of a patient, the Board shall provide the licensee with a copy of the complaint as soon as practical and inform the complainant of the disposition of the Board's inquiry into the complaint and the Board's basis for that disposition. If providing a copy of the complaint identifies an anonymous complainant or compromises the integrity of an investigation, the Board shall provide the licensee with a summary of all substantial elements of the complaint. Upon written request

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of a patient, the Board may provide the patient a licensee's written response to a complaint filed by the patient with the Board regarding the patient's care. Upon written request of a complainant, who is not the patient but is authorized by State and federal law to receive protected health information about the patient, the Board may provide the complainant a licensee's written response to a complaint filed with the Board regarding the patient's care. Any information furnished to the patient or complainant pursuant to this subsection shall be inadmissible in evidence in any civil proceeding. However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were included in the Board's review or were the subject of information furnished to the patient or complainant pursuant to this subsection.

(f) Any notice or statement of charges against any licensee, or any notice to any licensee of a hearing in any proceeding shall be a public record within the meaning of Chapter 132 of the General Statutes, notwithstanding that it may contain information collected and compiled as a result of any such investigation, inquiry or interview; and provided, further, that if any such record, paper or other document containing information theretofore collected and compiled by the Board, as hereinbefore provided, is received and admitted in evidence in any hearing before the Board, it shall thereupon be a public record within the meaning of Chapter 132 of the General Statutes.

(g) In any proceeding before the Board, in any record of any hearing before the Board, and in the notice of the charges against any licensee (notwithstanding any provision herein to the contrary) the Board may withhold from public disclosure the identity of a patient who has not expressly or impliedly consented to the public disclosure of treatment by the accused physician.

(h) If investigative information in the possession of the Board, its employees, or agents indicates that a crime may have been committed, the Board may report the information to the appropriate law enforcement agency or district attorney of the district in which the offense was committed.

(i) The Board shall cooperate with and assist a law enforcement agency or district attorney conducting a criminal investigation or prosecution of a licensee by providing information that is relevant to the criminal investigation or prosecution to the investigating agency or district attorney. Information disclosed by the Board to an investigative agency or district attorney remains confidential and may not be disclosed by the investigating agency except as necessary to further the investigation.

(j) All persons licensed under this Article shall self-report to the Board within 30 days of arrest or indictment any of the following:

- (1) Any felony arrest or indictment.
- (2) Any arrest for driving while impaired or driving under the influence.
- (3) Any arrest or indictment for the possession, use, or sale of any controlled substance.

(k) The Board, its members and staff, may release confidential or nonpublic information to any health care licensure board in this State or another state or authorized Department of Health and Human Services personnel with enforcement or investigative responsibilities about the issuance, denial, annulment, suspension, or revocation of a license, or the voluntary surrender of a license by a licensee of the Board, including the reasons for the action, or an investigative report made by the Board. The Board shall notify the licensee within 60 days after the information is transmitted. A summary of the information that is being transmitted shall be furnished to the licensee. If the licensee requests in writing within 30 days after being notified that the information has been transmitted, the licensee shall be furnished a copy of all information so transmitted. The notice or copies of the information shall not be provided if the information relates to an ongoing criminal investigation by any law enforcement agency or authorized Department of Health and Human Services personnel with enforcement or investigative responsibilities. (1858-9, c. 258, s. 12; Code, s. 3129; Rev., s. 4500; C.S., s. 6620; 1921, c. 47, s. 6; 1977, c. 838, s. 5; 1993 (Reg. Sess., 1994), c. 570, s. 6; 1995, c. 94, s. 17; 1997-481, s. 4; 2006-144, s. 7; 2007-346, s. 22; 2009-363, s. 4; 2009-558, s. 6.)

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Additional Statements Made and the Text of Rules 21 NCAC 32N .0108, .0109, .0110, and .0111.

In the document, the commenter made multiple statements regarding rules without clearly identifying which rule the individual was objecting to. In addition, the individual included the full text of Rules 21 NCAC 32N .0108, .0109, .0110, and .0111.

G.S. 150B-21.3(a)(5) defines a “public comment” thusly:

- (5) Public comment. - Means written comments objecting to the rule, in whole or in part, received by an agency from any member of the public, including an association or other organization representing the regulated community or other members of the public.

Staff does not believe that general statements of concern regarding Subchapters or reciting text qualifies as “public comment” as defined in the statute. However, even if the Commission were to find these are public comments, staff notes that the Commission’s charge in reviewing comments is set forth in G.S. 150B-21.3A(c)(2):

- (2) Step 2: The Commission shall review the reports received from the agencies pursuant to subdivision (1) of this subsection. If a public comment relates to a rule that the agency determined to be necessary and without substantive public interest or unnecessary, the Commission shall determine whether the public comment has merit and, if so, designate the rule as necessary with substantive public interest. For purposes of this subsection, a public comment has merit if it addresses the specific substance of the rule and relates to any of the standards for review by the Commission set forth in G.S. 150B-21.9(a).

Staff does not believe that these statements address specific substance of any rule.

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