

## RRC STAFF OPINION

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 rule at its next meeting, or 2) an opinion of that attorney as to some matter concerning that rule. The agency and members of the public are invited to submit their own comments and recommendations (according to RRC rules) to the Commission.

AGENCY: State Board of Chiropractic Examiners

RULE CITATION: 21 NCAC 10 .0305

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
  - ☒ Lack of statutory authority
  - ☐ Unclear or ambiguous
  - ☐ Unnecessary
  - ☐ Failure to comply with the APA
- ☐ Extend the period of review

COMMENT:

### Lack of Statutory Authority

Counsel is recommending objection to 21 NCAC 10 .0305 for lack of statutory authority. It is counsel's position that the Board does not have the authority to regulate peer reviews based on the authority cited.

The Board cited G.S. 90-142, 90-147, 90-154, and 90-154.2 as authority for this Rule. G.S. 90-142 gives the State Board of Chiropractic Examiners authority to "adopt suitable rules and regulations for the performance of their duties and the enforcement of the provisions of [Article 8]." It appears the Board's adoption of 21 NCAC 10 .0305 is attempting to regulate who can be hired by third-party payors to perform "peer reviews" and also who can actually perform "peer reviews" in motor vehicle liability claims for personal injury and in motor vehicle medical payments claims. It is counsel's opinion that the Board's adoption of this Rule goes beyond their given authority.

As cited by the Board, G.S. 90-147 provides that a person practicing chiropractic without a license shall be guilty of a misdemeanor. G.S. 90-143(a) defines "chiropractic" as "the science of adjusting the cause of disease by realigning the spine, releasing pressure on nerves radiating from the spine to all parts of the body, and allowing the nerves to carry their full quota of health current (nerve energy) from the brain to all parts of the body." It is counsel's opinion that performing peer reviews does not fall into the statutory definition of "chiropractic."

The Board also cited G.S. 90-154 as authority. G.S. 90-154(b) sets forth the grounds for professional discipline for practitioners or applicants. As none of the grounds set forth by this statute allow the Board to subject a person to disciplinary action for performing a peer review, it is

Amber Cronk May  
Commission Counsel

counsel's opinion that it is not within the Board's authority to subject a person to disciplinary action for performing one.

Lastly, the Board cited G.S. 90-154.2 as authority. G.S. 90-154.2 sets forth the definition for "unethical conduct." It appears as though the Board is attempting to expand the statutory definition of "unethical conduct" through the proposed rule. It is counsel's opinion that the Board has no authority to do so.

For the foregoing reasons, counsel is recommending objection to 21 NCAC 10 .0305 for lack of statutory authority.

Unclear or ambiguous

If it determined that the Board does have statutory authority for this Rule, it is counsel's opinion that this Rule is unclear or ambiguous. Paragraph (b) provides that a reviewer will opine whether services rendered were "clinically necessary" and whether the charges billed were "reasonable"; however, no factors or additional information is provided to set forth how this will be determined.

In addition, Paragraph (d) requires that the reviewer apply the "standards of acceptable care in effect in this State at the time services were rendered"; however, no additional information is provided to indicate what the applicable standard of care is, nor where it can be found.

Further, Paragraph (e) requires that a reviewer provide his or her identity to the treating chiropractor; however, no additional information is provided as to how this is to be done.

#### **§ 90-142. Rules and regulations.**

The State Board of Chiropractic Examiners may adopt suitable rules and regulations for the performance of their duties and the enforcement of the provisions of this Article. (1919, c. 148, s. 4; C.S., s. 6714; 1967, c. 263, s. 2.)

#### **§ 90-143. Definitions of chiropractic; examinations; educational requirements.**

(a) "Chiropractic" is herein defined to be the science of adjusting the cause of disease by realigning the spine, releasing pressure on nerves radiating from the spine to all parts of the body, and allowing the nerves to carry their full quota of health current (nerve energy) from the brain to all parts of the body.

(b) It shall be the duty of the North Carolina State Board of Chiropractic Examiners (hereinafter referred to as "Board") to examine for licensure to practice chiropractic in this State any applicant who is or will become, within 60 days of examination, a graduate of a four-year chiropractic college that is either accredited by the Council on Chiropractic Education or deemed by the Board to be the equivalent of such a college and who furnishes to the Board, in the manner prescribed by the Board, all of the following:

- (1) Satisfactory evidence of good moral character.
- (2) Proof that the applicant has received a baccalaureate degree from a college or university accredited by a regional accreditation body recognized by the United States Department of Education.
- (3) A transcript confirming that the applicant has received at least 4,200 hours of accredited chiropractic education. The Board shall not count any hours earned at an institution that was not accredited by the Council on Chiropractic Education or was not, as determined by the Board, the equivalent of such an institution at the time the hours were earned.
- (4) The examination shall include the following studies: neurology, chemistry, pathology, anatomy, histology, physiology, embryology, dermatology, diagnosis, microscopy, gynecology, hygiene, eye, ear, nose and throat, orthopody, diagnostic radiology, North Carolina jurisprudence, palpation, nerve tracing, chiropractic philosophy, theory, teaching and practice of chiropractic, and any other related studies as the Board may consider necessary to determine an applicant's fitness to practice. The Board may include as part of the examination any examination developed and administered by the National Board of Chiropractic Examiners or its successor organization that the Board considers appropriate, and the examination may be administered by a national testing service. The Board shall set the passing scores for all parts of the examination.

(c) The Board shall not issue a license to any applicant until the applicant exhibits a diploma or other proof that the Doctor of Chiropractic degree has been conferred.

(d) The Board may grant a license to an applicant if the applicant's scores on all parts of the examination required by the Board equal or exceed passing scores set by the Board and the applicant satisfies all other requirements for licensure as provided in this Article. (1917, c. 73, s. 5; 1919, c. 148, ss. 1, 2, 5; C.S., s. 6715; 1933, c. 442, s. 1; 1937, c. 293, s. 1; 1963, c. 646, s. 2; 1967, c. 263, s. 3; 1977, c. 1109, s. 1; 1981, c. 766, s. 4; 1987, c. 304; 1989, c. 555, ss. 2, 3, 4; 1997-230, s. 1; 2003-155, s. 1.)

#### **§ 90-147. Practice without license a misdemeanor; injunctions.**

Any person practicing chiropractic in this State without possessing a license as provided in this Article shall be guilty of a Class 1 misdemeanor.

The Board of Chiropractic Examiners may appear in its own name in the superior court in an action for injunctive relief to prevent violation of this section, and the superior court shall have the power to grant such injunction regardless of whether criminal prosecution has been or may be instituted. An

action under this section shall be commenced in the superior court district in which the respondent resides or has his principal place of business or in which the alleged violation occurred. (1917, c. 73, s. 9; C.S., s. 6719; 1993, c. 539, s. 631; 1994, Ex. Sess., c. 24, s. 14(c); 2001-281, s. 4.)

**§ 90-154. Grounds for professional discipline.**

(a) The Board of Chiropractic Examiners may impose any of the following sanctions, singly or in combination, when it finds that a practitioner or applicant is guilty of any offense described in subsection (b):

- (1) Permanently revoke a license to practice chiropractic;
- (2) Suspend a license to practice chiropractic;
- (3) Refuse to grant a license;
- (4) Censure a practitioner;
- (5) Issue a letter of reprimand;
- (6) Place a practitioner on probationary status and require him to report regularly to the Board upon the matters which are the basis of probation.

(b) Any one of the following is grounds for disciplinary action by the Board under subsection (a):

- (1) Advertising services in a false or misleading manner.
- (2) Conviction of a felony or of a crime involving moral turpitude.
- (3) Addiction to or severe dependency upon alcohol or any other drug that impairs the ability to practice safely.
- (4) Unethical conduct as defined in G.S. 90-154.2.
- (5) Negligence, incompetence, or malpractice in the practice of chiropractic.
- (6) Repealed by Session Laws 1995, c. 188, s. 1.
- (7) Not rendering acceptable care in the practice of the profession as defined in G.S. 90-154.3.
- (8) Lewd or immoral conduct toward a patient.
- (9) Committing or attempting to commit fraud, deception, or misrepresentation.
- (10) Offering to waive a patient's obligation to pay any deductible or copayment required by the patient's insurer.
- (11) Failing to honor promptly a patient's request for a copy of any claim form submitted to the patient's insurer.
- (12) Rebating or offering to rebate to a patient any portion of the funds received from the patient's insurer, unless the sum rebated constitutes the refund of an overpayment to which the patient is lawfully entitled.
- (13) Advertising any free or reduced rate service without prominently stating in the advertisement the usual fee for that service.
- (14) Charging an insurer or other third-party payor a fee greater than a patient would be charged for the same service if the patient were paying directly.
- (15) Charging an insurer or other third-party payor a fee greater than the advertised fee for the same service.
- (16) Violating the provisions of G.S. 90-154.1.
- (17) Physical, mental, or emotional infirmity of such severity as to impair the ability to practice safely.
- (18) Violating the provisions of G.S. 90-151 regarding the extent and limitation of license.
- (19) Concealing information from the Board or failing to respond truthfully and completely to an inquiry from the Board concerning any matter affecting licensure.
- (20) Failing to comply with a decision of the Board that is final.

- (21) Committing an act on or after October 1, 2007, which demonstrates a lack of good moral character which would have been a basis for denying a license under G.S. 90-143(b)(1), had it been committed before application for a license.

(c) If a licensee is found guilty in a contested case arising under subsection (b) of this section, the Board may assess the licensee the reasonable cost of the hearing held to make such a determination if the Board finds that the licensee's defense at the hearing was dilatory or not asserted in good faith. (1917, c. 73, s. 14; C.S., s. 6725; 1949, c. 785, s. 3; 1963, c. 646, s. 3; 1981, c. 766, s. 7; 1983 (Reg. Sess., 1984), c. 1067, s. 1; 1985, c. 367, ss. 1, 2; c. 760, ss. 2, 3; 1995, c. 188, s. 1; 1999-430, s. 1; 2007-525, s. 4.)

#### **§ 90-154.2. Unethical conduct.**

Unethical conduct is defined as:

(1) The over-utilization or improper use, in the providing of treatment, physiological therapeutics, radiographics, or any other service not commensurate with the stated diagnosis and clinical findings. This determination shall be based upon the collective findings and experience of the Board utilizing the best available, relative information and advice. There must be a rationale for the services provided the patient.

(2) The billing or otherwise charging of a fee to a third party payor for a service offered by the doctor as a free service, which service is accepted as a free service by any patient when, in fact, the doctor of chiropractic is transmitting any charge to a third-party payor for payment.

(3) The over-utilization of ionizing radiation in the re-X-ray of a patient. The acceptable guidelines for re-X-ray are:

- a. When fractures are evident;
- b. When bone pathologies are under evaluation;
- c. When soft tissue pathologies are under evaluation;
- d. When there is reinjury;
- e. When the original X-ray findings have revealed limitations of ranges and motion, re-X-ray may be done after clinical progress has revealed objective improvement, but not within 12 days and only limited views would be indicated.

(4) Any licensee's failure to use the words Chiropractic Physician, Chiropractor or the initials D.C. in conjunction with the use of his name in his capacity as a Chiropractor on all reports, statements of claim for services rendered and on all signs, letterheads, business cards, advertising, and any other items of identification.

(5) Violation of the Rules of Ethics of Advertising and Publicity.

(6) The allowance of any unlicensed person to practice chiropractic in the office of a licensed chiropractic. (1985, c. 760, s. 4.)

## REQUEST FOR TECHNICAL CHANGE

AGENCY: Board of Chiropractic Examiners

RULE CITATION: 21 NCAC 10 .0305

**DEADLINE FOR RECEIPT: Friday, June 12, 2015**

**NOTE WELL:** *This request when viewed on computer extends several pages. Please be sure you have reached the end of the document.*

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

In reviewing these rules, the staff determined that the following technical changes need to be made:

Please format revisions following publication in accordance with 26 NCAC 02C .0405(b)(1).

In (a), line 4, did you mean "on" rather than "in"?

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

Amber Cronk May  
Commission Counsel  
Date submitted to agency: June 2, 2015

21 NCAC 10 .0305 as published in 29:15 NCR 1742 is adopted with changes, as follows:

**21 NCAC 10 .0305      PAPER PEER REVIEWS**

(a) Scope of Rule. This Rule shall apply only to motor vehicle liability claims for personal injury and to motor vehicle medical payments claims. This Rule shall not apply to workers compensation claims, general accident and health claims, and claims submitted by or in behalf of enrollees to health benefit plans.

(b) Paper Peer Review Defined. As used in this Rule, “paper peer review” means the retrospective review of the treatment and billing records of a chiropractic patient, performed by a person who was not the patient’s treating chiropractor, for the purpose of advising a third-party payor as to whether, in the reviewer’s opinion, the services rendered by the treating chiropractor were clinically necessary or whether the charges billed by the treating chiropractor were reasonable.

(c) Qualifications of Reviewer. Any person who performs a paper peer review upon the clinical and billing records of a North Carolina chiropractor shall:

- (1) Hold a current chiropractic license in this State;
- (2) Have practiced chiropractic in this State during the immediately preceding five-year period;
- (3) Derive at least half of his or her professional income from providing care and treatment to chiropractic patients.
- (4) If reviewing the treatment and billing records of a chiropractor who is a Diplomate in a specialty recognized by the State Board of Chiropractic Examiners, hold a Diploma in the same specialty;
- (5) Not collect a fee based on the extent to which the reviewer recommends that the treating chiropractor’s bill be reduced.

(d) Standards of Care. When performing a paper peer review, the reviewer shall apply the standards of acceptable care in effect in this State at the time services were rendered.

(e) Disclosure of Identity. Any person performing a paper peer review shall disclose his or her identity and office address to the treating chiropractor.

(f) Enforcement. Any chiropractor licensed by the Board of Chiropractic Examiners who fails to comply with this Rule shall be guilty of unethical conduct and shall be subject to disciplinary action under N.C.G.S. 90-154(b)(4). Any person not licensed by the Board who fails to comply with this Rule shall be in violation of N.C.G.S. 90-147 and shall be subject to prosecution or injunctive relief for the unlicensed practice of chiropractic.

*History Note:      Authority G.S. 90-142; 90-147; 90-154; 90-154.2;  
Eff. July 1, 2015.*