



NORTH CAROLINA BOARD OF
MASSAGE & BODYWORK THERAPY

December 14, 2015

Ms. Amber May
Rules Review Commission Counsel
Office of Administrative Hearings – Rules Division
6714 Mail Service Center
Raleigh, NC 27699-6700

Re: 21 NCAC 30 .1001 – 21 NCAC 30 .1015

Dear Ms. May and Members of the Rules Review Commission:

Pursuant to 150B-21.2(a)(2), The North Carolina Board of Massage and Bodywork Therapy has decided not to change the above-listed rules and requests that the rules be returned to the Board.

Sincerely,

Charles P. Wilkins, Legal Counsel



STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS

Mailing address:
6714 Mail Service Center
Raleigh, NC 27699-6714

Street address:
1711 New Hope Church Rd
Raleigh, NC 27609-6285

September 21, 2015

Charles Wilkins
North Carolina Board of Massage and Bodywork Therapy
Sent via email to cwilkins@bws-law.com

Re: Objections to Rules 21 NCAC 30 .0702, .1001, .1002, .1003, .1004, .1005, .1006, .1007, .1008, .1009, .1010, .1011, .1012, .1013, .1014, and .1015

Dear Mr. Wilkins:

At its meeting on September 17, 2015, the Rules Review Commission objected to the above-referenced rules in accordance with G.S. 150B-21.10.

The Commission objected to Rule 21 NCAC 30 .0702, finding the agency failed to comply with the Administrative Procedure Act. Specifically, the Commission found that changing the contact hours' equivalency for a semester credit hour at a post-secondary institution from "21" to "15" in Item (3) after publication constitutes a "substantial change" pursuant to G.S. 150B-21.2(g).

The Commission objected to Rules 21 NCAC 30 .1001 through .1015, finding the Board of Massage and Bodywork Therapy lacks the statutory authority to promulgate these rules regulating establishments.

In addition to the overall objection to Rules 21 NCAC 30 .1001 through .1015 for lack of statutory authority, the Commission issued additional objections to 21 NCAC 30 .1002, .1003, .1004, .1005, .1008, .1013, .1014, and .1015.

The Commission objected to Rule 21 NCAC 30 .1002 for lack of statutory authority to charge "the fee set forth in G.S. 90-628(b)(1) and (2)" contained in Subparagraph (a)(1). The Commission also objected to the requirement that establishments provide "proof of property damage and bodily injury liability insurance coverage" contained in Subparagraph (a)(2) for lack of statutory authority.

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The Commission objected to Rule 21 NCAC 30 .1003 for lack of statutory authority to charge “the required fees required in Rule .1013 of this Chapter.” The Commission also objected to the requirements contained in Items (2), (3), and (4) for lack of statutory authority. Further, the Commission objected to the requirement in Item (7) as being unclear and ambiguous. Item (7) requires that the applicant has “satisfied G.S. 90-629(3).” G.S. 90-629(3) requires that the applicant be “of good moral character as determined by the Board.” As written, the Rule provides no additional information regarding how “good moral character” will be determined by the Board.

The Commission objected to Rule 21 NCAC 30 .1004 for lack of statutory authority as not being “necessary to carry out the purposes of [Article 39] and the duties and responsibilities of the Board.”

The Commission objected to Rule 21 NCAC 30 .1005 for lack of statutory authority as not being “necessary to carry out the purposes of [Article 39] and the duties and responsibilities of the Board.

The Commission objected to 21 NCAC 30 .1008 for lack of statutory authority to charge the fee contained in Paragraphs (a) and (b).

The Commission objected to 21 NCAC 30 .1013 for lack of statutory authority to charge the fees contained in this Rule. The Commission also objected to this Rule as being unclear and ambiguous as it is unclear whether this Rule exclusively pertains to establishments.

The Commission objected to 21 NCAC 30 .1014 for lack of statutory authority to charge the fees contained in Paragraph (a). The Commission also objected to this Rule as being unclear and ambiguous as it is unclear whether this Rule exclusively pertains to establishments.

The Commission objected to 21 NCAC 30 .1015 as being unclear and ambiguous as it is unclear whether this Rule exclusively pertains to establishments. It also objected to the requirement that “the applicant provide all documentation related to the applicant’s compliance with 90-629(3).” G.S. 90-629(3) requires that the applicant be “of good moral character as determined by the Board.” As written, the Rule provides no additional information regarding how “good moral character” will be determined by the Board.

Please respond to this letter in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission’s actions, please let me know.

Sincerely,


Amber Cronk May
Commission Counsel



STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS

Mailing address:
6714 Mail Service Center
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Street address:
1711 New Hope Church Rd
Raleigh, NC 27609-6285

July 17, 2015

Charles Wilkins
North Carolina Board of Massage and Bodywork Therapy
Sent via email to cwilkins@bws-law.com

Re: Extension of the Period of Review for Rules 21 NCAC .0201, .0701 - .0702, and .1001 - .1015

Dear Mr. Wilkins:

At its meeting yesterday, the Rules Review Commission (RRC) voted to extend the period of review for the above referenced rules in accordance with G.S. 150B-21.10 until their September 2015 meeting. They did so in response to a request from the Board of Massage and Bodywork Therapy to extend the period of review to provide the Board additional time due to the extent and nature of issued Staff Opinions and summer conflicts.

Should you have any questions regarding the Commission's actions, please let me know.

Sincerely,

Amber Cronk May
Commission Counsel

Cc: Elizabeth Kirk

Administration
919/431-3000
fax: 919/431-3100

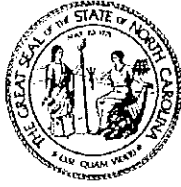
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NORTH CAROLINA BOARD OF
MASSAGE & BODYWORK THERAPY

VIA EMAIL ATTACHMENT

July 7, 2015

Ms. Amber Cronk May
Rules Review Commission Counsel
Office of Administrative Hearings – Rules Division

**Re: 21 NCAC 30 .0201, 21 NCAC 30.0701 and 21 NCAC 30 .0702
21 NCAC 30 .1001 – 21 NCAC 30 .1015**

Dear Ms. May,

The Board is in receipt of your email of June 30, 2015 and the attached Staff Opinions and Technical Change Requests. It is my understanding the above Rules are scheduled to be submitted for RRC's review at their July 16, 2015 meeting. Due to the extent and nature of the Staff Opinions, the limited time before the July 16, 2015 RRC meeting, and summer conflicts, the Board requests that the review of the Board's above proposed rules by the RRC be extended from July 16, 2015 to September 17, 2015.

The Board also agrees that Friday, September 4, 2015 shall be the deadline for the Board to respond to Staff Opinions and Technical Change Requests. I trust this is satisfactory.

Thanks for your assistance.

Sincerely,

Charles P. Wilkins, Legal Counsel

REQUEST FOR TECHNICAL CHANGE

AGENCY: North Carolina Board of Massage and Bodywork Therapy

RULE CITATION: **All Rules**

DEADLINE FOR RECEIPT: Friday, July 10, 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. Approval of any rule is contingent upon making technical changes as set forth in G.S. 150B-21.10.

Please update the history note to include effective dates, in accordance with 26 NCAC 02C .0108.

Please include/correct introductory statements in accordance with 26 NCAC 02C .0404.

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: Tuesday, June 30, 2015

REQUEST FOR TECHNICAL CHANGE

AGENCY: North Carolina Board of Massage and Bodywork Therapy

RULE CITATION: **21 NCAC 30 .0201**

DEADLINE FOR RECEIPT: Friday, July 10, 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. Approval of any rule is contingent upon making technical changes as set forth in G.S. 150B-21.10.

Please correct the Rule citation on line 3.

Please correct the tab on line 4 in accordance with 26 NCAC 02C .0108(2)(a).

Please indicate where the application form on line 4 can be found? Is this available on your website? Also, what information is required in the form? Pursuant to G.S. 150B-2(8a)(d), a form is not considered a Rule so long as "the contents or substantive requirements of which are prescribed by rule or statute." Please indicate what the requirements of the application form are (assuming that this is not set forth in another rule or statute.)

In (5), please delete or define "successfully."

In (5), please change "which" to "that" on lines 14 and 17 and "must" to "shall" on lines 16, 18, and 20.

In (5), how does the Board determine whether to review the applicant's school and educational credentials when the applicant's school is not approved by the Board? When the Board does decide to review the school and credentials, how does the Board determine whether to approve them? Please list factors or otherwise indicate how this decision is made by the Board?

In (5), line 18, to what exemption statute are you referring?

In (5), is a list of approved schools available on your website? If so, please provide that information. If not, how does your regulated public know what schools or programs are considered to be approved?

In (7), please remove the highlight from "~~two~~ four" as this was the published language. Highlights are only used for changes made to text following publication. Please see 26 NCAC 02C .0405.

Amber Cronk May
Commission Counsel

Date submitted to agency: Tuesday, June 30, 2015

In (7), where can the form be found? Also, what do you mean by “good moral character and adherence to ethical standards”? I understand that 90-629 requires that an applicant be “of good moral character as determined by the Board,” but how does the Board make this determination? Also, to what “ethical standards” are you referring?

In (8), where can the form be found? Also, what is considered an “official fingerprinting agency”?

In (9), where can the form be found?

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: Tuesday, June 30, 2015

21 NCAC 30.0201 is proposed for amendment with changes as follows:

.0201 APPLICATION AND SCOPE

Each applicant for a license as a massage and bodywork therapist shall complete an application form provided by the Board. This form shall be submitted to the Board and shall be accompanied by:

- (1) One original color photograph of the applicant taken within six months preceding the date of the application of sufficient quality for identification. The photograph shall be of the head and shoulders, passport type, two inches by two inches in size;
- (2) The proper fees, as required by Rule .0204 of this Section and G.S. 90-629.1(b);
- (3) Documentation that the applicant has earned a high school diploma or equivalent;
- (4) Documentation that the applicant is 18 years of age or older;
- (5) Documentation that the applicant has successfully completed a course of study at a school approved by the Board according to these rules and consisting of a minimum of 500 classroom hours of supervised instruction. If the applicant attended a school which is not approved by the Board, the Board may elect to review that applicant's school and educational credentials for approval on a case-by-case basis. The documentation of such training must come from a school which is licensed by the educational licensing authority in the state, territory or country in which it operates, or is exempt by statute. In North Carolina the documentation must come from a proprietary school approved by the Board or a college-based massage program that is exempt from Board approval. The curriculum must meet or be substantially equivalent to the standards set forth in Rule .0620(2) of this Chapter;
- (6) Documentation that the applicant has achieved a passing score on a competency assessment examination administered by the Board or approved by the Board that meets generally accepted psychometric principles and standards;
- (7) Forms provided by the Board containing signed statements from **two four** persons attesting to the applicant's good moral character and adherence to ethical standards;
- (8) Fingerprint card provided by the Board and executed by an official fingerprinting agency, and
- (9) A form provided by the Board consenting to a criminal history record check by the North Carolina Department of Justice.

History Note: Authority G.S. 90-626(2); 90-629;
Temporary Adoption Eff February 15, 2000;
Eff. April 1, 2001;
Amended Eff. **August 1, 2015**; October 1, 2008.

REQUEST FOR TECHNICAL CHANGE

AGENCY: North Carolina Board of Massage and Bodywork Therapy

RULE CITATION: **21 NCAC 30 .0701**

DEADLINE FOR RECEIPT: Friday, July 10, 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. Approval of any rule is contingent upon making technical changes as set forth in G.S. 150B-21.10.

In (b) and (e), please remove the highlight from the changed text as this was the published language. Highlights are only used for changes made to text following publication. Please see 26 NCAC 02C .0405.

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: Tuesday, June 30, 2015

21 NCAC 30 .0701 is proposed for amendment with changes as follows:

21 NCAC 30 .0701 CONTINUING EDUCATION REQUIREMENTS

(a) Pursuant to G.S. 90-632, a licensee, when renewing a license, shall document that they have completed at least 24 contact hours of approved continuing education during the immediately preceding licensure period, provided the licensure period is two years or more. If the licensure period is less than two years, but more than one year, the licensee shall document that they have completed at least 12 contact hours of approved continuing education.

(b) For the purposes of this Section, "approved continuing education" means a course offered as follows:

(1) by an approved provider as defined in Rule .0702; or

~~(2) a course approved by the National Certification Commission for Acupuncture and Oriental Medicine (NCCAOM); or~~

~~(3)(2)~~ a course in anatomy, physiology, pathology pathology, psychology, pharmacology, massage and bodywork therapy or business management taken at a post secondary institution of higher learning.

(c) Distance learning, as defined in Rule .0702 of this Section, shall not comprise more than 12 hours of the required continuing education hours per licensure period.

(d) Licensees shall document that they have completed at least three contact hours of continuing education in professional ethics as defined in Rule .0702 of this Section, out of the minimum of 24 hours of approved continuing education required for license renewal. This may be obtained through supervised classroom instruction or distance learning.

(e) Business management, as defined in Rule .0702 of this Section, shall not comprise more than three eight hours of the minimum 24 hours of approved continuing education required for license renewal.

(f) Licensees shall ensure that each continuing education course for which they claim credit on their application for renewal of licensure is consistent with the definitions and requirements set forth in this Section.

(g) The Board may audit licensees at random to assure compliance with these requirements.

*History Note: Authority G.S. 90-626(9); 90-632(a)(1);
Temporary Adoption Eff. February 15, 2000;
Eff. April 1, 2001;
Amended Eff. August 1, 2015; November 1, 2008; September 2, 2005.*

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: N.C. BOARD OF MASSAGE AND BODYWORK THERAPY

RULE CITATION: **21 NCAC 30 .0702**

RECOMMENDED ACTION:

- ☒ Approve, but note staff's comment
- ☒ Object, based on:
 - Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
- ☒ Failure to adopt the rule in accordance with the APA
- ☐ Extend the period of review
- ☐ Return the rule to the agency for failure to comply with the Administrative Procedure Act

COMMENT:

As adopted by the Board and submitted for RRC for review, Counsel is concerned that there has been a substantial change that “produces an effect that could not reasonably have been expected based on the proposed text of the rule” pursuant to G.S. 150B-21.2(g)(3).

In (3), one semester credit hour at a post-secondary institution was equivalent to 21 contact hours as published in the North Carolina Register on March 16, 2015; however, as submitted for review, the Rule now indicates that one semester credit hour is only equivalent to 15 contact hours. It is Counsel’s opinion that having a reduction of 6 contact hours for one semester credit hour is a result that could not have reasonably been expected; therefore, Counsel is recommending objection to the revision in (3) for adopting a rule that differs substantially from the text of a proposed rule published in the North Carolina Register in accordance with 150B-21.2(g).

REQUEST FOR TECHNICAL CHANGE

AGENCY: North Carolina Board of Massage and Bodywork Therapy

RULE CITATION: **21 NCAC 30 .0702**

DEADLINE FOR RECEIPT: Friday, July 10, 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. Approval of any rule is contingent upon making technical changes as set forth in G.S. 150B-21.10.

In (3) and (7), please keep highlights on text that was changed following publication, please remove the highlights from all other language. Please see 26 NCAC 02C .0405.

In (4), please change "which" to "that."

In (7), how does the Board determine whether it will recognize a continuing education provider outside of the United States? Is the only requirement that it be "verifiable"? Please also delete or define "verifiable", or otherwise provide additional information to make this clearer.

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: Tuesday, June 30, 2015

21 NCAC 30 .0702 is proposed for amendment with changes as follows:

21 NCAC 30 .0702 CONTINUING EDUCATION DEFINITIONS

The following definitions apply to this Section:

- (1) Continuing education. -- Learning experiences that enhance and expand the skills, knowledge, and attitudes of massage and bodywork therapists that enable them to render competent professional service to clients, the profession and the public.
- (2) Distance learning. -- Courses taken by home study that are produced by an approved provider, whether delivered by videotape, audiotape, printed materials, or computer-based means. The licensee shall demonstrate achievement of learning objectives and completion of course requirements to the provider before credit is given.
- (3) One "contact hour" of continuing education. -- At least 50 minutes of any one clock hour during which the student participates in a learning activity in the physical presence of an instructor, or in a distance learning activity designed by an approved provider. One semester credit hour at a post-secondary institution shall be equivalent to ~~16~~ **[24]** ~~15~~ contact hours.
- (4) Professional ethics. -- A system of conduct guided by principles which are intended to ensure the safe and effective practice of massage and bodywork therapy. Acceptable subject matter for required professional ethics courses may include: compliance with Practice Act and Rules of the Board, management of the client/therapist relationship, boundary functions, professional communication skills, conflict resolution, cultural diversity issues, and standards of practice.
- (5) Business management. -- Courses that enable the licensee to learn and apply business skills to create a successful professional practice.
- (6) Post secondary institution of higher learning – A degree granting institution accredited by an accrediting agency recognized by the United States Department of Education.
- (7) Approved provider. -- ~~One that has been granted the designation of "Approved Provider for Continuing Education" by the National Certification Board for Therapeutic Massage and Bodywork (NCBTMB).~~ **One that has been approved by [an] any entity with which the Board has reached a contractual agreement for the approval of continuing education providers and courses.**
The provider shall have this designation when the course begins and shall maintain this designation continuously until the course is completed. The Board does not recognize any retroactive designation of provider approval. Except as herein stated, the provider shall follow all regulations set forth by its accrediting agency. The Board may also recognize a verifiable continuing education provider outside the United States or its territories that is a post-secondary institution of higher learning approved by the educational regulation authority of that foreign country.

38 *History Note:* *Authority G.S. 90-26(9); 90-632;*
39 *Temporary Adoption Eff. February 15, 2000;*
40 *Eff. April 1, 2001;*
41 *Amended Eff. August 1, 2015; April 1, 2005.*

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: N.C. BOARD OF MASSAGE AND BODYWORK THERAPY

RULE CITATION: 21 NCAC 30 .1001 – 21 NCAC 30 .1015

RECOMMENDED ACTION:

- X Approve, but note staff's comment
- X Object, based on:
 - X Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
 - Failure to adopt the rule in accordance with the APA
- Extend the period of review
- Return the rule to the agency for failure to comply with the Administrative Procedure Act

COMMENT:

Counsel is recommending objection to Rules 21 NCAC 30 .1001 through 21 NCAC .1015 as it is Counsel's opinion that the Board lacks the statutory authority to regulate massage and bodywork therapy **establishments**.

Pursuant to the Submission for Permanent Rule Forms, the Board is promulgating Rules relating to the regulation of massage and bodywork therapy establishments, including licensing, operational requirements, records retention, inspections, sexual activity, discipline, fees, and background investigation. All cited authority refers to "applicant for licensure under this Article," "licensed under this Article," "licensees," "a massage and bodywork therapist," etc. G.S. 90-623(a) provides that "a person shall not practice or hold himself or herself to others as a massage and bodywork therapist without first applying for and receiving from the Board a license to engage in that practice." G.S. 90-622 (4) defines a "massage and bodywork therapist" as "a person licensed under this Article." Read together, it is Counsel's opinion that any reference in the cited authority to "applicant for licensure under this Article," "licensed under this Article," "licensees," "a massage and bodywork therapist," etc. refers to the individual practicing massage and bodywork therapy, not the establishment.

Counsel does acknowledge the clause contained in G.S. 90-626(9) that the Board shall "adopt, amend, or repeal any rules necessary to carry out the purpose of this Article and the duties and responsibilities of the Board, including...massage and bodywork therapy establishments." Counsel finds, however, that the remainder of the Article substantially lacks any duties or responsibilities of the Board as it relates to "massage and bodywork therapy establishments,"

Amber Cronk May
Commission Counsel

and therefore any Rules attempting to regulate establishments, beyond advertising pursuant to G.S. 90-623(c) (addressed in 21 NCAC 30 .0404), is outside of the given statutory authority.

Counsel notes that The Article (Article 36 of Chapter 90 of the General Statutes) was initially created to regulate massage and bodywork therapy. The Article was later amended to regulate massage and bodywork therapy schools. In its current version, the Article is nearly silent on regulation of massage and bodywork therapy establishments. It is further noted that the term “establishment” is only contained in the governing Article in two locations. In G.S. 90-623(c) regarding advertising (addressed in current Rule 21 NCAC 30 .0404) and in G.S. 90-626(9).

§ 90-623. License required.

(a) A person shall not practice or hold out himself or herself to others as a massage and bodywork therapist without first applying for and receiving from the Board a license to engage in that practice.

(b) A person holds out himself or herself to others as a massage and bodywork therapist when the person adopts or uses any title or description including "massage therapist", "bodywork therapist", "masseur", "masseuse", "massagist", "somatic practitioner", "body therapist", "structural integrator", or any derivation of those terms that implies this practice.

(c) It shall be unlawful to advertise using the term "massage therapist" or "bodywork therapist" or any other term that implies a soft tissue technique or method in any public or private publication or communication by a person not licensed under this Article as a massage and bodywork therapist. Any person who holds a license to practice as a massage and bodywork therapist in this State may use the title "Licensed Massage and Bodywork Therapist". No other person shall assume this title or use an abbreviation or any other words, letters, signs, or figures to indicate that the person using the title is a licensed massage and bodywork therapist. An establishment employing or contracting with persons licensed under this Article may advertise on behalf of those persons.

(d) The practice of massage and bodywork therapy shall not include any of the following:

- (1) The diagnosis of illness or disease.
- (2) Medical procedures, chiropractic adjustive procedures, electrical stimulation, ultrasound, or prescription of medicines.
- (3) The use of modalities for which a license to practice medicine, chiropractic, nursing, physical therapy, occupational therapy, acupuncture, or podiatry is required by law.
- (4) Sexual activity, which shall mean any direct or indirect physical contact, by any person or between persons, which is intended to erotically stimulate either person, or which is likely to cause such stimulation and includes sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse. As used in this subdivision, masturbation means the manipulation of any body tissue with the intent to cause sexual arousal. Sexual activity can involve the use of any device or object and is not dependent on whether penetration, orgasm, or ejaculation has occurred. (1998-230, s. 10; 2008-224, s. 3.)

§ 90-626. Powers and duties.

The Board shall have the following powers and duties:

- (1) Represent the diversity within the profession at all times when making decisions and stay current and informed regarding the various branches of massage and bodywork therapy practice.
- (2) Evaluate the qualifications of applicants for licensure under this Article.
- (3) Issue, renew, deny, suspend, or revoke licenses under this Article.
- (4) Reprimand or otherwise discipline licensees under this Article.
- (5) Conduct investigations to determine whether violations of this Article exist or constitute grounds for disciplinary action against licensees under this Article.
- (5a) Approve and regulate massage and bodywork schools, not otherwise exempt from the requirements of Board approval, by formulating the criteria and standards for approval of massage and bodywork schools, investigating massage and bodywork schools applying for approval, issuing approvals to

massage and bodywork schools that meet the standards established by the Board, providing periodic inspections of approved massage and bodywork schools, and requiring periodic reports of approved massage and bodywork schools.

- (6) Conduct administrative hearings in accordance with Chapter 150B of the General Statutes when a contested case, as defined in G.S. 150B-2(2), arises under this Article.
- (7) Employ professional, clerical, or other special personnel necessary to carry out the provisions of this Article and purchase or rent necessary office space, equipment, and supplies.
- (8) Pursuant to the maximum amounts set by this Article and other specific authority authorizing fees, establish reasonable fees for applications for examination, certificates of licensure and renewal, approval of massage and bodywork therapy schools, and other services provided by the Board.
- (9) Adopt, amend, or repeal any rules necessary to carry out the purposes of this Article and the duties and responsibilities of the Board, including rules related to the approval of massage and bodywork therapy schools, continuing education providers, examinations for licensure, the practice of advanced techniques or specialties, and massage and bodywork therapy establishments. Any rules adopted or amended shall take into account the educational standards of national bodywork and massage therapy associations and professional organizations.
- (10) Appoint from its own membership one or more members to act as representatives of the Board at any meeting where such representation is deemed desirable.
- (11) Maintain a record of all proceedings and make available to certificate holders and other concerned parties an annual report of the Board.
- (12) Adopt a seal containing the name of the Board for use on all certificates and official reports issued by it.
- (13) Provide a system for grievances to be presented and resolved.
- (14) Assess civil penalties pursuant to G.S. 90-634.1.
- (15) Assess the costs of disciplinary actions pursuant to G.S. 90-634.1(d).

The powers and duties set out in this section are granted for the purpose of enabling the Board to safeguard the public health, safety, and welfare against unqualified or incompetent practitioners and are to be liberally construed to accomplish this objective. (1998-230, s. 10; 2003-348, s. 3; 2008-224, ss. 6, 7.)

§ 90-628. Expenses and fees.

(a) All salaries, compensation, and expenses incurred or allowed for the purposes of this Article shall be paid by the Board exclusively out of the fees received by the Board as authorized by this Article or from funds received from other sources. In no case shall any salary, expense, or other obligations of the Board be charged against the General Fund.

(b) The Board may impose the following fees up to the amounts listed below:

- | | |
|----------------------------------|---------|
| (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. (1998-230, s. 10; 2008-224, s. 8.)

§ 90-629. Requirements for licensure.

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. (1998-230, s. 10; 2008-224, s. 9; 2014-100, s. 17.1(o).)

§ 90-632. License renewal and continuing education.

- (a) The license to practice under this Article shall be renewed every two years.
- (b) The continuing education requirement for the initial license renewal 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 license renewals, 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. (1998-230, s. 10; 2008-224, s. 16.)

§ 90-633. Disciplinary action.

- (a) The Board may deny, suspend, revoke, or refuse to license a massage and bodywork therapist or applicant for any of the following:
 - (1) The employment of fraud, deceit, or misrepresentation in obtaining or attempting to obtain a license or the renewal of a license.
 - (2) The use of drugs or intoxicating liquors to an extent that affects professional competency.
 - (3) Conviction of an offense under any municipal, State, or federal narcotic or controlled substance law.

- (4) Conviction of a felony or other public offense involving moral turpitude.
 - (5) An adjudication of insanity or incompetency.
 - (6) 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 these provisions or rules. For purposes of this subdivision, the phrase "aiding, abetting, or assisting any other person" does not include acts intended to inform the individual who is not in compliance with this Article of the steps necessary to comply with this Article or any rules adopted by the Board.
 - (7) The commission of an act of malpractice, gross negligence, or incompetency.
 - (8) Practice as a licensee under this Article without a valid certificate or renewal.
 - (9) Engaging in conduct that could result in harm or injury to the public.
 - (10) The employment of fraud, deceit, or misrepresentation when communicating with the general public, health care professionals, or other business professionals.
 - (11) Falsely holding out himself or herself as licensed or certified in any discipline of massage and bodywork therapy without successfully completing training approved by the Board in that specialty.
 - (12) The application of systems of activity by a massage and bodywork therapist during the course of therapy with the intent of providing sexual stimulation or otherwise pursuing sexual contact.
- (b) The Board may reinstate a revoked license, revoke censure or other judgment, or remove other licensure restrictions if the Board finds that the reasons for revocation, censure, or other judgment or other licensure restrictions no longer exist and the massage and bodywork therapist or applicant can reasonably be expected to safely and properly practice as a massage and bodywork therapist. (1998-230, s. 10; 2008-224, s. 17.)

REQUEST FOR TECHNICAL CHANGE

AGENCY: North Carolina Board of Massage and Bodywork Therapy

RULE CITATION: **21 NCAC 30 .1001**

DEADLINE FOR RECEIPT: Friday, July 10, 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. Approval of any rule is contingent upon making technical changes as set forth in G.S. 150B-21.10.

To what do these definitions apply? To this Section or to the entire Chapter?

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: Tuesday, June 30, 2015

1 **21 NCAC 30 .1001 ~~DEFINTIONS~~ DEFINITIONS**

2 In addition to the definitions set forth in G.S. 90-622(1) through (5) and Rule .0102 (1) through (10) of this Chapter,
3 the following definitions apply:

4 (1) "Owner" means the person, ~~sole proprietor, persons,~~ partnership, limited partnership, or corporation that ~~operates~~
5 owns, supervises, directs, organizes, controls, or in any other way is responsible for or in charge of the conduct of
6 the activities within the a massage and bodywork therapy establishment.

7 (2) "Massage and bodywork therapy establishment" means any duly licensed site or premises in which massage and
8 bodywork therapy is practiced. This shall not include:

9 (a) on-site massage performed at the location of the client;

10 (b) stand-alone devices, such as chairs, that are operated by the customer;

11 (c) establishments located within the confines of a hospital, nursing home, or other similar
12 establishment or facility licensed or otherwise regulated by the Department of Health and Human
13 Services;

14 ~~(d) massage and bodywork therapy provided by a sole practitioner; or~~

15 ~~(e)(d)~~ a student clinic run by a Board Approved School or a massage and bodywork therapy program
16 offered by community colleges in North Carolina that are accredited by the Southern Association
17 of Colleges and Schools, or massage and bodywork therapy programs offered by a degree or
18 diploma granting college or university accredited by any accrediting agency that is recognized by
19 the United States Department of Education and is licensed by the North Carolina Community
20 College System or The University of North Carolina Board of ~~Governors.~~ Governors; or

21 ~~(f)(e)~~ establishments wherein a profession is practiced by persons who are licensed, certified, or
22 registered under other laws of this State and the services performed and the persons performing
23 the services are within the authorized scope of practice of the profession.

24 (3) "Business name" means the name under which the owner applies for the establishment license to provide
25 massage therapy, if different from the name of the owner.

26 (4) "Sole practitioner" means one massage and bodywork therapist currently licensed in North Carolina offering
27 massage or bodywork therapy services from a space the licensed massage and bodywork therapist controls and from
28 which only the licensed massage and bodywork therapist offers and provides the services.

29
30 *Authority G.S. 90-626(9)*

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: N.C. BOARD OF MASSAGE AND BODYWORK THERAPY

RULE CITATION: **21 NCAC 30 .1002**

RECOMMENDED ACTION:

- X Approve, but note staff's comment
- X Object, based on:
 - X Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
 - Failure to adopt the rule in accordance with the APA
- Extend the period of review
- Return the rule to the agency for failure to comply with the Administrative Procedure Act

COMMENT:

In addition to the recommendation to object to all Rules attempting to regulate massage and bodywork therapy establishments as previously noted, Counsel is recommending objecting to Sub-Paragraph (a)(1) and (a)(2) of this Rule for lack of statutory authority.

Sub-Paragraph (a)(1) requires that a Massage and Bodywork Therapy License Application be accompanied by the fees set forth in G.S. 90-628(b)(1) and (2); however, the cited authority pertains to licensing fees. As previously noted, 90-623 provides no licensing authority for establishments. Pursuant to G.S. 12-3.1 "the legislative grant of authority to an agency to adopt rules shall not be construed as a grant of authority to the agency to establish by rule a fee or a charge... unless the statute expressly provides for the grant of authority to establish a fee or charge for that specific service." Further, G.S. 150B-19(5) indicates that "an agency may not adopt a rule that establishes a fee or other charge providing services in fulfillment of a duty unless a law specifically authorizes the agency to do so..." As the Board has not been granted the specific authority to establish a licensing fee for establishments, they lack the statutory authority to do so; therefore, Counsel is recommending objection to Sub-Paragraph (a)(1) of this Rule for lack of statutory authority.

Sub-Paragraph (a)(2) requires that a massage and bodywork therapy establishment seeking licensure provide "proof of property damage and bodily injury liability insurance coverage." The applicable Article is silent on any insurance requirements; therefore, Counsel is recommending objection to Sub-Paragraph (a)(2) as the Board lacks the statutory authority to impose this

Amber Cronk May
Commission Counsel

requirement as it is not “necessary to carry out the purposes of [Article 39] and the duties and responsibilities of the Board...”

§ 90-628. Expenses and fees.

(a) All salaries, compensation, and expenses incurred or allowed for the purposes of this Article shall be paid by the Board exclusively out of the fees received by the Board as authorized by this Article or from funds received from other sources. In no case shall any salary, expense, or other obligations of the Board be charged against the General Fund.

(b) The Board may impose the following fees up to the amounts listed below:

- (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. (1998-230, s. 10; 2008-224, s. 8.)

REQUEST FOR TECHNICAL CHANGE

AGENCY: North Carolina Board of Massage and Bodywork Therapy

RULE CITATION: **21 NCAC 30 .1002**

DEADLINE FOR RECEIPT: Friday, July 10, 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. Approval of any rule is contingent upon making technical changes as set forth in G.S. 150B-21.10.

In (b), what information is required in the form? Pursuant to G.S. 150B-2(8a)(d), a form is not considered a Rule so long as "the contents or substantive requirements of which are prescribed by rule or statute." Please indicate what the requirements of the application form are (assuming that this is not set forth in another rule or statute.)

In (e), is the only way a person may be exempt pursuant to 21 NCAC 30 .1001(2)? If so, please consider making this clearer. Suggested language would be "Any person exempt from obtaining a license to operate a massage and bodywork therapy establishment pursuant to 21 NCAC 30 .1001(2) shall..."

What do you mean by (e)(2)? Do all licensees have to obtain an establishment license unless they are working for someone else? Sub-paragraph (e)(2) makes it seem as if there is a presumption that everyone is running an establishment requiring a license, and they have to prove that they are not. Is this a correct reading? Please make this clearer.

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: Tuesday, June 30, 2015

21 NCAC 30 .1002 is proposed for adoption as follows:

**21 NCAC 30 .1002 LICENSURE OF MASSAGE AND BODYWORK THERAPY
ESTABLISHMENTS**

(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:

- (1) the fee set forth in G.S. 90-628(b)(1) and (2);
- (2) proof of property damage and bodily injury liability insurance coverage;
- (3) verifications from all state licensing boards from which the owner holds or has held any health related professional license;
- (4) criminal history documentation;
- (5) ~~ownership~~ owner information, including type of ownership, name of owner, name of authorized representative, if owner is not a person, address of establishment, social security number or federal tax identification number, email address, phone number, and hours of operation;
- (6) previous licensure and disciplinary history; and
- (7) signature of all owners or authorized representative, if owner is not a person;

(b) The Massage and Bodywork Therapy Establishment Licensure Application and the application instructions may be obtained from the Board office at 150 Fayetteville Street, Suite 1900, Raleigh, NC 27601 or from the website located at <http://www.bmbt.org>.

(c) 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.

(d) An owner may operate an establishment under a name other than the name of the owner, provided the owner complies with Rule .0402 of this Chapter. Any advertisement by the establishment shall include the business name, and shall comply with Rule .0404 of this Chapter.

(e) Any person exempt from obtaining a license to operate a massage and bodywork therapy establishment shall:

- (1) provide proof they are exempt under Rule .1001(2); or
- (2) provide proof they work at a site or premise that is a duly licensed massage and bodywork therapy establishment.

Authority G.S. 90-626(9)

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: N.C. BOARD OF MASSAGE AND BODYWORK THERAPY

RULE CITATION: **21 NCAC 30 .1003**

RECOMMENDED ACTION:

- ☒ Approve, but note staff's comment
- ☒ Object, based on:
 - ☒ Lack of statutory authority
 - ☒ Unclear or ambiguous
 - ☐ Unnecessary
 - ☐ Failure to adopt the rule in accordance with the APA
- ☐ Extend the period of review
- ☐ Return the rule to the agency for failure to comply with the Administrative Procedure Act

COMMENT:

In addition to the recommendation to object to all Rules attempting to regulate massage and bodywork therapy establishments as previously noted, Counsel is recommending objecting to the reference to fees on line 4 and Items (2), (3), and (4) of this Rule for lack of Statutory Authority. Counsel is also recommending objection to Item 7 as being unclear and ambiguous.

Line 4 requires the payment of fees referenced in Rule .1013. Pursuant to G.S. 12-3.1 "the legislative grant of authority to an agency to adopt rules shall not be construed as a grant of authority to the agency to establish by rule a fee or a charge... unless the statute expressly provides for the grant of authority to establish a fee or charge for that specific service." Further, G.S. 150B-19(5) indicates that "an agency may not adopt a rule that establishes a fee or other charge providing services in fulfillment of a duty unless a law specifically authorizes the agency to do so..." As the Board has not been granted the specific authority to establish a licensing fee for establishments, they lack the statutory authority to do so; therefore, Counsel is recommending objection to the reference of fees on line 4 of this Rule for lack of statutory authority.

Item (2), requires that an applicant for a massage and bodywork therapy establishment "has space and facilities for providing massage and bodywork therapy services", Item (3) requires that an applicant "has restroom facilities," and Item (4) requires that an applicant "has property damage and bodily injury liability insurance coverage." The applicable Article is silent on all of these requirements; therefore, Counsel is recommending objection to Items (2), (3), and (4) as the Board

lacks the statutory authority to impose these requirements as they are not “necessary to carry out the purposes of [Article 39] and the duties and responsibilities of the Board...”

Further, Item (7) requires that the applicant has “satisfied G.S. 90-629(3).” G.S. 90-629(3) requires that the applicant be “of good moral character as determined by the Board.” As written, the Rule provides no additional information regarding how “good moral character” will be determined by the Board. As such, Item (7) is unclear and ambiguous as written.

§ 90-626. Powers and duties.

The Board shall have the following powers and duties:

- (1) Represent the diversity within the profession at all times when making decisions and stay current and informed regarding the various branches of massage and bodywork therapy practice.
- (2) Evaluate the qualifications of applicants for licensure under this Article.
- (3) Issue, renew, deny, suspend, or revoke licenses under this Article.
- (4) Reprimand or otherwise discipline licensees under this Article.
- (5) Conduct investigations to determine whether violations of this Article exist or constitute grounds for disciplinary action against licensees under this Article.
- (5a) Approve and regulate massage and bodywork schools, not otherwise exempt from the requirements of Board approval, by formulating the criteria and standards for approval of massage and bodywork schools, investigating massage and bodywork schools applying for approval, issuing approvals to massage and bodywork schools that meet the standards established by the Board, providing periodic inspections of approved massage and bodywork schools, and requiring periodic reports of approved massage and bodywork schools.
- (6) Conduct administrative hearings in accordance with Chapter 150B of the General Statutes when a contested case, as defined in G.S. 150B-2(2), arises under this Article.
- (7) Employ professional, clerical, or other special personnel necessary to carry out the provisions of this Article and purchase or rent necessary office space, equipment, and supplies.
- (8) Pursuant to the maximum amounts set by this Article and other specific authority authorizing fees, establish reasonable fees for applications for examination, certificates of licensure and renewal, approval of massage and bodywork therapy schools, and other services provided by the Board.
- (9) Adopt, amend, or repeal any rules necessary to carry out the purposes of this Article and the duties and responsibilities of the Board, including rules related to the approval of massage and bodywork therapy schools, continuing education providers, examinations for licensure, the practice of advanced techniques or specialties, and massage and bodywork therapy establishments. Any rules adopted or amended shall take into account the educational standards of national bodywork and massage therapy associations and professional organizations.
- (10) Appoint from its own membership one or more members to act as representatives of the Board at any meeting where such representation is deemed desirable.
- (11) Maintain a record of all proceedings and make available to certificate holders and other concerned parties an annual report of the Board.
- (12) Adopt a seal containing the name of the Board for use on all certificates and official reports issued by it.
- (13) Provide a system for grievances to be presented and resolved.
- (14) Assess civil penalties pursuant to G.S. 90-634.1.
- (15) Assess the costs of disciplinary actions pursuant to G.S. 90-634.1(d).

The powers and duties set out in this section are granted for the purpose of enabling the Board to safeguard the public health, safety, and welfare against unqualified or incompetent practitioners and are to be liberally construed to accomplish this objective. (1998-230, s. 10; 2003-348, s. 3; 2008-224, ss. 6, 7.)

§ 90-629. Requirements for licensure.

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. (1998-230, s. 10; 2008-224, s. 9; 2014-100, s. 17.1(o).)

REQUEST FOR TECHNICAL CHANGE

AGENCY: North Carolina Board of Massage and Bodywork Therapy

RULE CITATION: **21 NCAC 30 .1003**

DEADLINE FOR RECEIPT: Friday, July 10, 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. Approval of any rule is contingent upon making technical changes as set forth in G.S. 150B-21.10.

In Item (5), what is a self-evaluation inspection report? Is this on a form provided by the Board? What is required in this report?

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: Tuesday, June 30, 2015

21 NCAC 30 .1003 is proposed for adoption as follows:

21 NCAC 30 .1003 REQUIREMENTS FOR LICENSURE

Upon application to the Board and the payment of the required fees required in Rule .1013 of this Chapter, an applicant shall be licensed as a massage and bodywork therapy establishment if the applicant meets all of the following qualifications:

- (1) contracts with, employs, hires, or plans to contract with, employ or hire a massage and bodywork therapist who holds a current license from the Board;
- (2) has space and facilities for providing massage and bodywork therapy services;
- (3) has restroom facilities;
- (4) has property damage and bodily injury liability insurance coverage for the proposed establishment. If the establishment is operated under a business name, the proof of insurance shall include both the name of the owner and the business name;
- (5) has completed a self evaluation inspection report showing compliance with this Rule;
- (6) is currently a licensed massage and bodywork therapist in North Carolina or has submitted fingerprint cards 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 North Carolina Department of Justice; and
- (7) has satisfied G.S. 90-629(3).

Authority G.S. 90-626(2); 90-626(3)

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: N.C. BOARD OF MASSAGE AND BODYWORK THERAPY

RULE CITATION: **21 NCAC 30 .1004**

RECOMMENDED ACTION:

- X Approve, but note staff's comment
- X Object, based on:
 - X Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
 - Failure to adopt the rule in accordance with the APA
- Extend the period of review
- Return the rule to the agency for failure to comply with the Administrative Procedure Act

COMMENT:

In addition to the recommendation to object to all Rules attempting to regulate massage and bodywork therapy establishments as previously noted, Counsel is recommending objecting to this Rule for lack of Statutory Authority.

The applicable Article is silent on operations of establishments as set forth by this Rule; therefore, Counsel is recommending objection for lack of statutory authority as this Rule is not "necessary to carry out the purposes of [Article 39] and the duties and responsibilities of the Board..."

Counsel notes that there is specific language in G.S. 90-631(a)(1) providing that massage and bodywork therapy schools shall maintain "adequate, safe, and sanitary facilities." There is not similar language contained in the Article pertaining to establishments.

Counsel further notes that G.S. 90-626 states that the "the powers and duties set out in this section are granted for the purpose of enabling the Board to safeguard the public health, safety, and welfare against **unqualified or incompetent practitioners...**"

§ 90-626. Powers and duties.

The Board shall have the following powers and duties:

- (1) Represent the diversity within the profession at all times when making decisions and stay current and informed regarding the various branches of massage and bodywork therapy practice.
- (2) Evaluate the qualifications of applicants for licensure under this Article.
- (3) Issue, renew, deny, suspend, or revoke licenses under this Article.
- (4) Reprimand or otherwise discipline licensees under this Article.
- (5) Conduct investigations to determine whether violations of this Article exist or constitute grounds for disciplinary action against licensees under this Article.
- (5a) Approve and regulate massage and bodywork schools, not otherwise exempt from the requirements of Board approval, by formulating the criteria and standards for approval of massage and bodywork schools, investigating massage and bodywork schools applying for approval, issuing approvals to massage and bodywork schools that meet the standards established by the Board, providing periodic inspections of approved massage and bodywork schools, and requiring periodic reports of approved massage and bodywork schools.
- (6) Conduct administrative hearings in accordance with Chapter 150B of the General Statutes when a contested case, as defined in G.S. 150B-2(2), arises under this Article.
- (7) Employ professional, clerical, or other special personnel necessary to carry out the provisions of this Article and purchase or rent necessary office space, equipment, and supplies.
- (8) Pursuant to the maximum amounts set by this Article and other specific authority authorizing fees, establish reasonable fees for applications for examination, certificates of licensure and renewal, approval of massage and bodywork therapy schools, and other services provided by the Board.
- (9) Adopt, amend, or repeal any rules necessary to carry out the purposes of this Article and the duties and responsibilities of the Board, including rules related to the approval of massage and bodywork therapy schools, continuing education providers, examinations for licensure, the practice of advanced techniques or specialties, and massage and bodywork therapy establishments. Any rules adopted or amended shall take into account the educational standards of national bodywork and massage therapy associations and professional organizations.
- (10) Appoint from its own membership one or more members to act as representatives of the Board at any meeting where such representation is deemed desirable.
- (11) Maintain a record of all proceedings and make available to certificate holders and other concerned parties an annual report of the Board.
- (12) Adopt a seal containing the name of the Board for use on all certificates and official reports issued by it.
- (13) Provide a system for grievances to be presented and resolved.
- (14) Assess civil penalties pursuant to G.S. 90-634.1.
- (15) Assess the costs of disciplinary actions pursuant to G.S. 90-634.1(d).

The powers and duties set out in this section are granted for the purpose of enabling the Board to safeguard the public health, safety, and welfare against unqualified or incompetent practitioners and are to be liberally construed to accomplish this objective. (1998-230, s. 10; 2003-348, s. 3; 2008-224, ss. 6, 7.)

§ 90-631. Massage and bodywork therapy schools.

(a) The Board shall establish rules for the approval of massage and bodywork therapy schools. These rules shall include:

- (1) Basic curriculum standards that ensure graduates have the education and skills necessary to carry out the safe and effective practice of massage and bodywork therapy.
- (2) Standards for faculty and learning resources.
- (3) Requirements for reporting changes in instructional staff and curriculum.
- (4) A description of the process used by the Board to approve a school.

Any school that offers a training program in massage and bodywork therapy, not otherwise exempt from the requirements of Board approval, shall submit an application for approval to the Board. If a massage and bodywork therapy school offers training programs at more than one physical location, each location shall constitute a separate massage and bodywork therapy school. The Board shall grant approval to a school, whether in this State or another state, that meets the criteria established by the Board. The Board shall maintain a list of approved schools and a list of community college programs operating pursuant to subsection (b) of this section.

(a1) The Board shall have general supervision over massage and bodywork therapy schools, not otherwise exempt from the requirements of Board approval, in this State for the purpose of protecting the health, safety, and welfare of the public by requiring that massage and bodywork therapy schools carry out their advertised promises and contracts made with their students and patrons and by requiring that approved massage and bodywork therapy schools maintain:

- (1) Adequate, safe, and sanitary facilities.
- (2) Sufficient and qualified instructional and administrative staff.
- (3) Satisfactory programs of operation and instructions.

(b) A massage and bodywork therapy program operated by a North Carolina community college that is accredited by the Southern Association of Colleges and Schools is exempt from the approval process, licensure process, or both, established by the Board. The college shall certify annually to the Board that the program meets or exceeds the minimum standards for curriculum, faculty, and learning resources established by the Board. Students who complete the program shall qualify for licenses from the Board as if the program were approved, licensed, or both, by the Board.

(c) A massage and bodywork therapy program operated by a degree or diploma granting college or university that offers a degree or diploma in massage therapy and is accredited by any accrediting agency that is recognized by the United States Department of Education and is licensed by the North Carolina Community College System or The University of North Carolina Board of Governors is exempt from the approval process, licensure process, or both, established by the Board. The college or university shall certify annually to the Board that the program meets or exceeds the minimum standards for curriculum, faculty, and learning resources established by the Board. Students who complete the program shall qualify for licenses from the Board as if the program were approved, licensed, or both, by the Board. (1998-230, s. 10; 2005-276, s. 8.15(a); 2008-224, ss. 13, 14.)

REQUEST FOR TECHNICAL CHANGE

AGENCY: North Carolina Board of Massage and Bodywork Therapy

RULE CITATION: 21 NCAC 30 .1004

DEADLINE FOR RECEIPT: Friday, July 10, 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. Approval of any rule is contingent upon making technical changes as set forth in G.S. 150B-21.10.

Why is the reference to building code requirements in Sub-Paragraphs (a)(1) and (a)(2)? Is it necessary in both Sub-Paragraphs?

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: Tuesday, June 30, 2015

21 NCAC 30 .1004 is proposed for adoption as follows:

21 NCAC 30 .1004 ~~MASSAGE ESTABLISHMENT~~ ESTABLISHMENT OPERATIONS

(a) Each owner shall meet the following facility requirements:

- (1) comply with all local building code requirements, state fire safety codes, and state health inspection codes;
- (2) provide for the use of clients a restroom with at least one toilet and one sink with running water. The facilities shall be equipped with toilet tissue, soap dispenser with soap or other hand cleaning materials, sanitary towels or other hand-drying device such as a wall-mounted electric blow dryer, and waste receptacle. Restroom and shower facilities and fixtures shall be maintained in good repair, lighted and ventilated, and in compliance with State and local building codes;
- (3) maintain toilet facilities in a common area of the establishment. Establishments located in buildings housing multiple businesses under one roof, such as shopping malls, terminals, or hotels may substitute centralized toilet facilities; ~~and~~
- (4) if equipped with a whirlpool bath, sauna, steam cabinet, or steam room, maintain clean shower facilities on the ~~premises.~~ premises;
- (5) display the Massage and Bodywork Therapy Establishment License in a prominent place at the establishment so as to be visible for inspection and comply with Rule .0302 of this Chapter; and
- (6) comply with Rule .0404 of this Chapter.

(b) A licensed massage and bodywork therapist shall:

- (1) be on the premises of the establishment if a client is in a treatment room for the purpose of receiving massage or bodywork therapy; and
- (2) administer all massage or bodywork therapy treatment sessions.

(c) Each owner shall meet the following safety and sanitary requirements:

- (1) provide for safe and unobstructed human passage in the public areas of the premises;
- (2) provide for removal of garbage and refuse;
- (3) provide for safe storage or removal of flammable materials;
- (4) exterminate all vermin, insects, termites, and rodents on the premises;
- (5) maintain all equipment used to perform massage services on the premises in a safe and sanitary condition, including the application of cleansers and bactericidal agents to the massage table. Clean sheets, towels, or other coverings shall be used for each client and to cover the massage table for each client; and
- (6) maintain a supply of clean drapes, towels, gowns, or sheets, for the purpose of draping each client while the client is being massaged, and launder before reuse all linens furnished for the personal use of the client.

Authority G.S. 90-626(9)

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: N.C. BOARD OF MASSAGE AND BODYWORK THERAPY

RULE CITATION: **21 NCAC 30 .1005**

RECOMMENDED ACTION:

- X Approve, but note staff's comment
- X Object, based on:
 - X Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
 - Failure to adopt the rule in accordance with the APA
- Extend the period of review
- Return the rule to the agency for failure to comply with the Administrative Procedure Act

COMMENT:

In addition to the recommendation to object to all Rules attempting to regulate massage and bodywork therapy establishments as previously noted, Counsel is recommending objecting to this Rule for lack of Statutory Authority.

The applicable Article is silent regarding record retention and ownership; therefore, Counsel is recommending objection for lack of statutory authority as this Rule is not "necessary to carry out the purposes of [Article 39] and the duties and responsibilities of the Board..."

§ 90-626. Powers and duties.

The Board shall have the following powers and duties:

- (1) Represent the diversity within the profession at all times when making decisions and stay current and informed regarding the various branches of massage and bodywork therapy practice.
- (2) Evaluate the qualifications of applicants for licensure under this Article.
- (3) Issue, renew, deny, suspend, or revoke licenses under this Article.
- (4) Reprimand or otherwise discipline licensees under this Article.
- (5) Conduct investigations to determine whether violations of this Article exist or constitute grounds for disciplinary action against licensees under this Article.
- (5a) Approve and regulate massage and bodywork schools, not otherwise exempt from the requirements of Board approval, by formulating the criteria and standards for approval of massage and bodywork schools, investigating massage and bodywork schools applying for approval, issuing approvals to massage and bodywork schools that meet the standards established by the Board, providing periodic inspections of approved massage and bodywork schools, and requiring periodic reports of approved massage and bodywork schools.
- (6) Conduct administrative hearings in accordance with Chapter 150B of the General Statutes when a contested case, as defined in G.S. 150B-2(2), arises under this Article.
- (7) Employ professional, clerical, or other special personnel necessary to carry out the provisions of this Article and purchase or rent necessary office space, equipment, and supplies.
- (8) Pursuant to the maximum amounts set by this Article and other specific authority authorizing fees, establish reasonable fees for applications for examination, certificates of licensure and renewal, approval of massage and bodywork therapy schools, and other services provided by the Board.
- (9) Adopt, amend, or repeal any rules necessary to carry out the purposes of this Article and the duties and responsibilities of the Board, including rules related to the approval of massage and bodywork therapy schools, continuing education providers, examinations for licensure, the practice of advanced techniques or specialties, and massage and bodywork therapy establishments. Any rules adopted or amended shall take into account the educational standards of national bodywork and massage therapy associations and professional organizations.
- (10) Appoint from its own membership one or more members to act as representatives of the Board at any meeting where such representation is deemed desirable.
- (11) Maintain a record of all proceedings and make available to certificate holders and other concerned parties an annual report of the Board.
- (12) Adopt a seal containing the name of the Board for use on all certificates and official reports issued by it.
- (13) Provide a system for grievances to be presented and resolved.
- (14) Assess civil penalties pursuant to G.S. 90-634.1.
- (15) Assess the costs of disciplinary actions pursuant to G.S. 90-634.1(d).

The powers and duties set out in this section are granted for the purpose of enabling the Board to safeguard the public health, safety, and welfare against unqualified or incompetent practitioners and are to be liberally construed to accomplish this objective. (1998-230, s. 10; 2003-348, s. 3; 2008-224, ss. 6, 7.)

21 NCAC 30 .1005 is proposed for adoption as follows:

21 NCAC 30 .1005 CLIENT RECORDS RETENTION AND OWNERSHIP

(a) Records shall be maintained for every client, regardless of the procedure or modality used during the massage and bodywork therapy session. Client records shall be maintained by the licensee or practice owner as follows:

(1) in a secure manner that protects the confidentiality of the client and protects the records from damage or destruction; and

(2) for at least four years after the termination of the client-therapist relationship and shall be disposed of by shredding or burning.

(b) Records stored electronically shall be maintained with a weekly back-up system.

(c) Client records are the property of the:

(1) licensee when working as a sole ~~proprietor~~ practitioner or independent contractor; or

(2) ~~practice~~ owner, if the licensee is an employee.

(d) Release of Records.

(1) client records shall be released within thirty days when requested and authorized by the client in writing or when compelled by law or regulation.

(2) record owners may charge actual cost for duplicating client records.

Authority G.S. 90-626(9)

1 21 NCAC 30 .1006 is proposed for adoption as follows:

2
3 **21 NCAC 30 .1006 INSPECTION UPON APPLICATION FOR LICENSE**

4 Upon receipt of an application for a massage and bodywork therapy establishment license, employees of the Board
5 ~~shall~~ may inspect the site to confirm that the criteria enunciated in Rule .1003 of this Chapter are satisfied.

6
7 *Authority G.S. 90-626(5); 90-626(9)*

1 21 NCAC 30 .1007 is proposed for adoption as follows:

2
3 **21 NCAC 30 .1007 PERIODIC INSPECTIONS**

4 The Board may inspect all massage and bodywork therapy establishments licensed in this State to ensure
5 compliance with the Rules in this Chapter and Article 36 of G.S. Chapter 90.

6
7 *Authority G.S. 90-626(5); 90-626(9)*

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: N.C. BOARD OF MASSAGE AND BODYWORK THERAPY

RULE CITATION: **21 NCAC 30 .1008**

RECOMMENDED ACTION:

- X Approve, but note staff's comment
- X Object, based on:
 - X Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
 - Failure to adopt the rule in accordance with the APA
- Extend the period of review
- Return the rule to the agency for failure to comply with the Administrative Procedure Act

COMMENT:

In addition to the recommendation to object to all Rules attempting to regulate massage and bodywork therapy establishments as previously noted, Counsel is recommending objecting to any reference to fees in this Rule for lack of Statutory Authority.

Paragraph (a) and (b) requires that an owner shall pay a fee when he or she changes the business name of the establishment or transfers the license from one location to another as "provided in G.S. 90-628(b)(5)." G.S. 90-628(b)(5) has been repealed; therefore, the Board lacks the statutory authority to charge this fee.

§ 90-628. Expenses and fees.

(a) All salaries, compensation, and expenses incurred or allowed for the purposes of this Article shall be paid by the Board exclusively out of the fees received by the Board as authorized by this Article or from funds received from other sources. In no case shall any salary, expense, or other obligations of the Board be charged against the General Fund.

(b) The Board may impose the following fees up to the amounts listed below:

- | | | |
|-----|--|---------|
| (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. (1998-230, s. 10; 2008-224, s. 8.) | |

1 21 NCAC 30 .1008 is proposed for adoption as follows:

2
3 **21 NCAC 30 .1008 TRANSFER OF MASSAGE AND BODYWORK THERAPY ESTABLISHMENT**
4 **LICENSE**

5 (a) When there is no change of ownership or location, the owner may change the business name of the
6 establishment. The owner shall apply for a change of business name by submitting to the Board a written change of
7 name request accompanied by the fee provided in G.S. 90-628(b)(5). When a massage and bodywork therapy
8 establishment business name is changed, without a change in ownership or location, a new establishment inspection
9 shall not be required.

10 (b) When there is no change of ownership, the owner of a massage and bodywork therapy establishment may
11 transfer the license from one location to another. The owner shall apply for a change of location by submitting to
12 the Board a written change of location accompanied by the fee provided in G.S. 90-628(b)(5). A massage and
13 bodywork therapy establishment license may not be transferred from one location to another until compliance with
14 Rules .1003 and .1004 of this Chapter.

15
16 *Authority G.S. 90-626(9)*

21 NCAC 30 .1009 is proposed for adoption as follows:

21 NCAC 30 .1009 SEXUAL ACTIVITY PROHIBITED

(a) Sexual ~~activity~~ activity, as defined in Rule .0508 of this Chapter, by any person or persons in any massage and bodywork therapy establishment shall be 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 or use such establishment to make arrangements to engage in sexual activity in any other place.

Authority G.S. 90-623(d)(4); 90-626(9); 90-633(a)(12)

21 NCAC 30 .1010 is proposed for adoption as follows:

21 NCAC 30 .1010 DISCIPLINARY SANCTIONS; REPORTING REQUIREMENTS

The Board may utilize disciplinary sanctions for establishments set forth in Rule .0905(b) of this Chapter, if the licensed massage and bodywork therapy establishment violates the following:

- (1) any statute or rule required for licensure or approval of that establishment by any other licensing or approval authority; or
- (2) any applicable rule of this Chapter.

Authority G.S. 90-626(14); 90-626(15); 90-633(a)(6)

21 NCAC 30 .1011 is proposed for adoption as follows:

21 NCAC 30 .1011 REFUSAL TO ISSUE, SUSPENSION OR REVOCATION OF LICENSE

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

- (1) the employment of fraud, deceit, or misrepresentation in obtaining or attempting to obtain approval of a massage and bodywork therapy establishment;
- (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 and contractors, who provide massage and bodywork therapy services, be licensed to practice massage and bodywork therapy in this ~~state~~; State;
- (4) operating a massage and bodywork therapy establishment without approval 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 approved by this Board;
- (8) failure to allow Board members, employees, attorneys, or Board authorized inspectors 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 its accrediting agency or the North Carolina Department of Health and Human Services of a show cause action, probation action, or denial of accreditation; and
- (10) the applicant for or holder of 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.

Authority G.S. 90-633(a)

1 21 NCAC 30 .1012 is proposed for adoption as follows:

2
3 **21 NCAC 30 .1012 UNLICENSED PRACTICE**

4 A massage and bodywork therapy establishment shall not employ or contract with any person in this State to provide
5 massage and bodywork therapy unless such person has ~~obtained~~ a current license to practice massage and bodywork
6 therapy in this State.

7
8 *Authority G.S. 90-626(3); 90-626(9)*

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: N.C. BOARD OF MASSAGE AND BODYWORK THERAPY

RULE CITATION: **21 NCAC 30 .1013**

RECOMMENDED ACTION:

- X Approve, but note staff's comment
- X Object, based on:
 - X Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
 - Failure to adopt the rule in accordance with the APA
- Extend the period of review
- Return the rule to the agency for failure to comply with the Administrative Procedure Act

COMMENT:

In addition to the recommendation to object to all Rules attempting to regulate massage and bodywork therapy establishments as previously noted, Counsel is recommending objecting to this Rule for lack of Statutory Authority.

As written, it is unclear whether this Rule only pertains to establishments; however, the Submission for Permanent Rule Form indicates that it does. Assuming that is correct, this proposed Rule is imposing licensing and renewal fees on establishments. It is noted that the Board already has a Fee Rule regarding individual massage and bodywork therapists (21 NCAC 30 30.0204.)

Pursuant to G.S. 12-3.1 "the legislative grant of authority to an agency to adopt rules shall not be construed as a grant of authority to the agency to establish by rule a fee or a charge... unless the statute expressly provides for the grant of authority to establish a fee or charge for that specific service." Further, G.S. 150B indicates that "an agency may not adopt a rule that establishes a fee or other charge providing services in fulfillment of a duty unless a law specifically authorizes the agency to do so..." As the Board has not been granted the specific authority to establish a licensing fee for establishments, they lack the statutory authority to do so; therefore, Counsel is recommending objection to this Rule.

§ 90-628. Expenses and fees.

(a) All salaries, compensation, and expenses incurred or allowed for the purposes of this Article shall be paid by the Board exclusively out of the fees received by the Board as authorized by this Article or from funds received from other sources. In no case shall any salary, expense, or other obligations of the Board be charged against the General Fund.

(b) The Board may impose the following fees up to the amounts listed below:

- (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. (1998-230, s. 10; 2008-224, s. 8.)

REQUEST FOR TECHNICAL CHANGE

AGENCY: North Carolina Board of Massage and Bodywork Therapy

RULE CITATION: 21 NCAC 30 .1013

DEADLINE FOR RECEIPT: Friday, July 10, 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. Approval of any rule is contingent upon making technical changes as set forth in G.S. 150B-21.10.

As written, it is unclear that this Rule pertains to establishments as indicated by the Submission for Permanent Rule Form. Please add language clarifying to whom this applies.

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: Tuesday, June 30, 2015

21 NCAC 30 .1013 is proposed for adoption as follows:

21 NCAC 30 .1013 FEES

(a) Fees shall be as follows:

(1)	Application for Examination of Requirements for License	\$ 20.00
(2)	License fee	150.00
(3)	License renewal	100.00
(4)	Late renewal penalty	75.00
(5)	Duplicate license	25.00

(b) Fees shall be nonrefundable and 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.

(c) If the applicant is currently licensed to practice massage and bodywork therapy in North Carolina and is practicing massage and bodywork therapy as a sole practitioner, the establishment license fee and license renewal fee shall be waived.

Authority G.S. 90-626(8); 90-626(9); 90-628(b)

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: N.C. BOARD OF MASSAGE AND BODYWORK THERAPY

RULE CITATION: **21 NCAC 30 .1014**

RECOMMENDED ACTION:

- X Approve, but note staff's comment
- X Object, based on:
 - X Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
 - Failure to adopt the rule in accordance with the APA
- Extend the period of review
- Return the rule to the agency for failure to comply with the Administrative Procedure Act

COMMENT:

In addition to the recommendation to object to all Rules attempting to regulate massage and bodywork therapy establishments as previously noted, Counsel is recommending objecting to any reference to fees in this Rule for lack of Statutory Authority.

As written, it is unclear whether this Rule only pertains to establishments; however, the Submission for Permanent Rule Form indicates that it does. Assuming that is correct, this Rule relates to terms of licenses for establishments and references the payment of a fee.

Pursuant to G.S. 12-3.1 "the legislative grant of authority to an agency to adopt rules shall not be construed as a grant of authority to the agency to establish by rule a fee or a charge... unless the statute expressly provides for the grant of authority to establish a fee or charge for that specific service." Further, G.S. 150B indicates that "an agency may not adopt a rule that establishes a fee or other charge providing services in fulfillment of a duty unless a law specifically authorizes the agency to do so..." As the Board has not been granted the specific authority to establish a licensing fee for establishments, they lack the statutory authority to do so; therefore, Counsel is recommending objection to any reference to fees in this Rule.

§ 90-628. Expenses and fees.

(a) All salaries, compensation, and expenses incurred or allowed for the purposes of this Article shall be paid by the Board exclusively out of the fees received by the Board as authorized by this Article or from funds received from other sources. In no case shall any salary, expense, or other obligations of the Board be charged against the General Fund.

(b) The Board may impose the following fees up to the amounts listed below:

- (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. (1998-230, s. 10; 2008-224, s. 8.)

REQUEST FOR TECHNICAL CHANGE

AGENCY: North Carolina Board of Massage and Bodywork Therapy

RULE CITATION: 21 NCAC 30 .1014

DEADLINE FOR RECEIPT: Friday, July 10, 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. Approval of any rule is contingent upon making technical changes as set forth in G.S. 150B-21.10.

As written, it is unclear that this Rule pertains to establishments as indicated by the Submission for Permanent Rule Form. Please add language clarifying to whom this applies.

In (a), line 5, to what "additional period" are you referring? Would "an additional period..." be more appropriate? If so, please change accordingly.

In (a), please delete or define "full." Please also provide a cross-reference to the appropriate fee. It is noted, that this would define "full."

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: Tuesday, June 30, 2015

1 21 NCAC 30 .1014 is proposed for adoption as follows:

2
3 **21 NCAC 30 .1014 TERM OF LICENSE**

4 (a) Initial applications for licensure submitted between October 1 and December 31 shall be granted for two full
5 years, plus the additional period of up to three months. Initial applications submitted between January 1 and
6 September 30 shall pay the full fee, but the initial license period shall be two years, minus the period following
7 January 1.

8 (b) Pursuant to G.S. 90-632, a license shall be renewed for a term of two years, beginning on January 1 following
9 the initial expiration date.

10
11 *Authority G.S. 90-626(9); 90-632(a)*

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: N.C. BOARD OF MASSAGE AND BODYWORK THERAPY

RULE CITATION: **21 NCAC 30 .1015**

RECOMMENDED ACTION:

- X Approve, but note staff's comment
- X Object, based on:
 - Lack of statutory authority
 - X Unclear or ambiguous
 - Unnecessary
 - Failure to adopt the rule in accordance with the APA
- Extend the period of review
- Return the rule to the agency for failure to comply with the Administrative Procedure Act

COMMENT:

In addition to the recommendation to object to all Rules attempting to regulate massage and bodywork therapy establishments as previously noted, Counsel is recommending objecting to any reference to fees in this Rule for lack of Statutory Authority.

As written, it is unclear that this Rule pertains to massage and bodywork establishments as indicated by the Submission for Permanent Rule Form.

Further, the Rule indicates that the "applicant shall provide all documentation related to the applicant's compliance with G.S. 90-629(3)" at the request of the Board. G.S. 629(3) provides that an applicant shall be of "good moral character as determined by the Board"; however, the Rule provides no additional information regarding how "good moral character" will be determined by the Board nor does it indicate when such information will be requested. As such, Counsel is recommending objecting to this Rule as being unclear and ambiguous.

§ 90-629. Requirements for licensure.

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. (1998-230, s. 10; 2008-224, s. 9; 2014-100, s. 17.1(o).)

REQUEST FOR TECHNICAL CHANGE

AGENCY: North Carolina Board of Massage and Bodywork Therapy

RULE CITATION: 21 NCAC 30 .1015

DEADLINE FOR RECEIPT: Friday, July 10, 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. Approval of any rule is contingent upon making technical changes as set forth in G.S. 150B-21.10.

As written, it is unclear that this Rule pertains to establishments as indicated by the Submission for Permanent Rule Form. Please add language clarifying to whom this applies.

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: Tuesday, June 30, 2015

1 21 NCAC 30 .1015 is proposed for adoption as follows:

2

3 **21 NCAC 30 .1015 BACKGROUND INVESTIGATION REQUIRED FOR APPLICANT**

4 At the request of the Board, the applicant shall provide all documentation related to the applicant's compliance with
5 G.S. 90-629(3).

6

7 *Authority G.S. 90-629.1*