

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: Commission for MH/DD/SAS

RULE CITATION: Rules 10A NCAC 27H .0202, .0203, .0204 and .0207

RECOMMENDED ACTION:

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

COMMENT:

In January of 2014, the Commission for Mental Health, Developmental Disabilities and Substance Abuse Services (Commission for MH/DD/SAS) submitted eight temporary Rules pursuant to Session Law 2013-18. This Session Law amended N.C.G.S. 15A-1002 and gave the Commission for MH/DD/SAS the authority to require completion of training requirements necessary to be certified as a forensic evaluator and also require completion of continuing education.

On January 31, 2014, the RRC reviewed the filed temporary Rules at a special meeting. At that time, the RRC "objected to Rules 10A NCAC 27H .0202, .0203, .0204, and .0207, finding the Commission for MH/DD/SAS lacks the authority to set employment requirements for individuals and set the requirements of the evaluation report."¹ The RRC also objected to Rule .0204 as ambiguous.

On December 16, 2016, the Commission for MH/DD/SAS submitted the same eight Rules for review by the RRC at their January 2017 meeting. These Rules contain similar, if not identical language to that objected to in 2014. The statutory authority cited has not changed and the specific statutes cited have not been changed since 2013. As such, Staff is recommending objection to Rules 10A NCAC .0202, .0203, .0204 and .0207 for lack of statutory authority.

¹ Amanda Reeder to Dr. Greg Olley, January 31, 2014

In addition to objecting for the above reasons, the RRC also objected to all eight of the Rules submitted as they “did not meet the requirements for temporary rules set forth in G.S. 150B-21.1(a2).” As the Rules currently submitted for review are permanent Rules, this is not at issue. Staff has provided this history solely for informational purposes.

Provided below is a side by side comparison of the Rules that were previously objected to in 2014 and the Rules submitted for RRC review at their January 2017 meeting. Specifically, the highlighted language is the language at issue.

Rule 10A NCAC 27H .0202

Rule 10A NCAC 27H .0202 was objected to in 2014 as the RRC found that the Commission for MH/DD/SAS lacked the statutory authority to set employment requirements for individuals. It is Staff’s opinion that this is a continuing issue as no additional authority has been cited to require that forensic evaluators be employed by or under contract with an LME-MCO.

2014	2017
<p>For the purposes of Rules .0201 through .0207 of this Section the following terms shall have the meanings indicated:</p> <p>(1) "Forensic Evaluation" means an <u>a local examination ordered by the court to determine if the defendant has the capacity to proceed to trial, <u>does not have the capacity to proceed to trial, or needs further treatment at an inpatient facility or further evaluation at the Pre-Trial Evaluation Center.</u></u></p> <p>(2) "Pre-Trial Evaluation Center" means the forensic unit at Dorothea Dix Hospital. "Licensed Clinician" means the same as defined in Rule 10A NCAC 27G .0104.</p> <p>(3) "Qualified Mental Health Professional" means the same as defined in 10A NCAC 27G .0104(e) contained in Division publication, Rules for Mental Health, Developmental Disabilities and Substance Abuse Facilities and Services, APSM 40-2. "Local Certified Forensic Evaluator" means a Licensed Clinician who:</p> <p>(a) has completed the training for certification and annual training seminars described in Rule .0204 of this Section; and</p> <p>(b) is employed by, or under contract with a Local Management Entity-Managed Care Organization as a Certified Forensic Evaluator.</p> <p>(c) Individuals who were certified</p>	<p>For the purposes of Rules .0201 through .0207 of this Section <u>Section</u>, the following terms shall have the meanings indicated:</p> <p>(1) "Forensic Evaluation" means an <u>a local examination ordered by the court to determine if the defendant has the capacity to proceed to trial, <u>does not have the capacity to proceed to trial, or needs further treatment at an inpatient facility or further evaluation at the Pre-Trial Evaluation Center.</u></u></p> <p>(2) "Pre-Trial Evaluation Center" means the forensic unit at Dorothea Dix Hospital. "Licensed Clinician" means the same as defined in Rule 10A NCAC 27G .0104.</p> <p>(3) "Qualified Mental Health Professional" means the same as defined in 10A NCAC 27G .0104(e) contained in Division publication, Rules for Mental Health, Developmental Disabilities and Substance Abuse Facilities and Services, APSM 40-2. "Local Certified Forensic Evaluator" means a Licensed Clinician who:</p> <p>(a) has completed the training for certification and annual training seminars described in Rule .0204 of this Section; and</p> <p>(b) is employed by, or under contract with, an LME-MCO as a Certified Forensic Evaluator.</p> <p>(4) "Qualified Substance Abuse</p>

<p><u>under these rules and procedures prior to December 1, 2013 but who do not meet the requirements in Rule.0203(a)(1) of this Section continue to be eligible for certification provided they meet all other requirements.</u></p> <p>(4) <u>“Qualified Substance Abuse Professional” means the same as defined in 10A NCAC 27G .0104(e) contained in Division publication, Rules for Mental Health, Developmental Disabilities and Substance Abuse Facilities and Services, APSM 40 2. “Pre-Trial Evaluation Center” means the Forensic Services Unit so designated by the Secretary of the North Carolina Department of Health and Human Services.</u></p>	<p><u>Professional" means the same as defined in 10A NCAC 27G .0104(e) contained in Division publication, Rules for Mental Health, Developmental Disabilities and Substance Abuse Facilities and Services, APSM 40 2. “Pre-Trial Evaluation Center” means the Forensic Services Unit so designated by the Secretary of the North Carolina Department of Health and Human Services.</u></p>
---	--

Rule 10A NCAC 27H .0203

Rule 10A NCAC 27H .0203 was objected to in 2014 as the RRC found that the Commission for MH/DD/SAS lacked the statutory authority to set employment requirements for individuals. It is Staff’s opinion that this is a continuing issue as no additional authority has been cited to require that forensic evaluators to be an employee of, or work under contract with, an LME-MCO.

2014	2017
<p>(a) To be eligible for training as a <u>certified forensic evaluator</u> the applicant shall:</p> <ol style="list-style-type: none"> (1) be a qualified mental health professional or a qualified substance abuse professional; <u>be a licensed clinician pursuant to 10A NACA 27G .0104</u> (2) be an employee of, or work under contract with, an area program; LME-MCO; and (3) have his name submitted as an applicant for the training and <u>certification registration</u> program by the <u>area LME-MCO</u> director. <p>(b) The area program <u>LME-MCO</u> shall verify that the applicant <u>is licensed and has expertise with the population for whom the applicant will provide Forensic Evaluations. meets the appropriate standards for a qualified mental health professional that are referenced in Rule .0202 of this Section.</u></p> <p>(c) Individuals who were certified under these Rules and</p>	<p>(a) To be eligible for training as a <u>local certified forensic evaluator</u> the applicant shall:</p> <ol style="list-style-type: none"> (1) be a qualified mental health professional or a qualified substance abuse professional; <u>Licensed Clinician;</u> (2) be an employee of, or work under contract with, an area program; LME-MCO; and (3) have his name submitted as an applicant for the training and <u>registration certification</u> program by the <u>area LME-MCO</u> director. <p>(b) The area program <u>LME-MCO</u> shall verify that the applicant <u>is a Licensed Clinician, or meets the requirements of Rule .0201(c) of this Section, and has expertise with the mental health, developmental disabilities, or substance abuse (mh/dd/sa) population for whom the applicant will provide forensic evaluations. meets the appropriate standards for a qualified mental health professional that are referenced in Rule .0202 of this Section.</u></p>

<p><u>procedures prior to December 1, 2013 but who do not meet the requirements in Subparagraph (a)(1) of this Rule continue to be eligible for certification provided they meet all other requirements.</u></p>	
--	--

Rule 10A NCAC 27H .0204

Rule 10A NCAC 27H .0204 was objected to in 2014 as the RRC found that the Commission for MH/DD/SAS lacked the statutory authority to set requirements of a forensic evaluator’s report. The 2017 version of the Rule references “components of reports to be submitted” as a training topic in (a)(3). While Staff does believe that they have the statutory authority to promulgate rules regarding the preparation of written reports, Staff does not believe, and the RRC has previously found, that they have the authority to promulgate rules regarding the contents of the report. It is Staff’s opinion that it is not clear that the training topic contained within (a)(3) will be limited to the preparation and not the contents of the report; therefore, it is Staff’s opinion that the Commission for MH/DD/SAS continues to lack the statutory authority regarding this topic.

The RRC also objected for ambiguity as the Rule did not give any guidance as to “what body grants the certification, the initial training topics, that an examination will be required for the certification, and the hours required for both initial certification and the continuing education requirements.”

Staff does believe the ambiguity issues that were previously objected to have been addressed; therefore, Staff is not recommending objection to 10A NCAC 27H .0204 based upon ambiguity.

2014	2017
<p>(a) The applicant shall successfully complete training covering procedure, techniques, and reporting that is provided by the Mental Health Section of the Division in order to be registered <u>certified</u> as a forensic evaluator; and</p> <p>(b) The applicant shall successfully complete annual continuing education module(s) provided by the Pre-Trial Evaluation Center designated by the Secretary of the North Carolina Department of Health and Human Services.</p> <p>(c) Continuing Education Module topics may include:</p> <ol style="list-style-type: none"> (1) <u>evaluation skills training to enhance the skills acquired through the initial Basic Forensic Evaluator Training;</u> (2) <u>changes in current laws and current practices; and</u> (3) <u>evaluation of mh/dd/sa populations.</u> 	<p>(a) The applicant shall successfully complete <u>a minimum of six hours of initial training covering procedure, techniques, and reporting that is provided by the Mental Health Section of the</u> Division in order to be registered <u>certified</u> as a <u>local</u> forensic evaluator. <u>The initial training shall include:</u></p> <ol style="list-style-type: none"> (1) <u>current laws and practices including the role of the local forensic evaluator in the capacity to proceed evaluation process;</u> (2) <u>procedures for conducting interviews including evaluation for the presence of mh/dd/sa disorders, or other relevant conditions;</u> (3) <u>components of reports to be submitted to the court;</u> (4) <u>process for reporting findings to the court; and</u> (5) <u>an examination at the conclusion of the training which assesses comprehension of the training material and an understanding of the duties of a local forensic evaluator.</u>

	<p>(b) <u>Each local forensic evaluator is required to complete a minimum of four hours of required annual continuing education modules provided by the Pre-Trial Evaluation Center by December 31 of each calendar year.</u></p> <p>(c) <u>Local forensic evaluators shall be exempt from the continuing education requirement in the calendar year in which they are first certified and shall complete the annual continuing education requirement by December 31 of the following year and each calendar year thereafter.</u></p> <p>(d) <u>Continuing education module topics may include:</u></p> <p style="padding-left: 40px;">(1) <u>evaluation skills training to enhance skills acquired through the initial local forensic evaluator training;</u></p> <p style="padding-left: 40px;">(2) <u>changes in existing laws and current practices; and</u></p> <p style="padding-left: 40px;">(3) <u>evaluation of mh/dd/sa populations.</u></p>
--	--

Rule 10A NCAC 27H .0207

Rule 10A NCAC 27H .0207 was objected to in 2014 as the RRC found that the Commission for MH/DD/SAS lacked the statutory authority to set requirements of a forensic evaluator’s report to the Court. It is Staff’s opinion that this is a continuing issue as 15A-1002 sets forth the parameters of the report. Specifically, 15A-1002(b)(1a) states that the report will describe “the present state of the defendant’s mental health.” Also, 15A-1002(d) states that the report is to include a statement regarding “any conclusion as to whether the defendant has or lacks capacity to proceed.”

Further, other than allowing the Commission for MH/DD/SAS to require forensic evaluators to attend continuing education seminars on preparing written reports, there is no mention of “reports” in 143B-147. As there is no additional authority cited, it is Staff’s continuing opinion that the Commission for MH/DD/SAS lacks the statutory authority to specify the requirements of the evaluation report.

2014	2017
<p>When ordered by the court, the <u>Certified Forensic Evaluator</u> shall conduct a forensic evaluation or examination of the defendant and <u>report to the court</u> in accordance with G.S. 15A-1002, whether: <u>shall submit a report that:</u></p> <p style="padding-left: 40px;">(1) there is sufficient question of mental or emotional disorder to recommend inpatient evaluation or treatment; or</p> <p style="padding-left: 40px;">(2) there is sufficient information to recommend that the defendant does have capacity to proceed and further evaluation is not indicated.</p> <p>(1) <u>is limited to evaluation of capacity to proceed to trial and does not address criminal responsibility, legal insanity, or diminished capacity;</u></p> <p>(2) <u>indicates the opinion of the evaluator either that the</u></p>	<p>When ordered by the court, the <u>local certified forensic evaluator</u> shall conduct a forensic evaluation or a screening examination of the defendant and <u>report to the court</u> in accordance with G.S. 15A-1002 whether: <u>shall submit a report that:</u></p> <p style="padding-left: 40px;">(1) <u>there is sufficient question of mental or emotional disorder to recommend inpatient evaluation or treatment; or is limited to evaluation of capacity to proceed to trial and does not address criminal responsibility, legal insanity, or diminished capacity;</u></p> <p style="padding-left: 40px;">(2) <u>there is sufficient information to recommend that the defendant does have capacity to proceed and further evaluation is not indicated. indicates the</u></p>

<p><u>defendant clearly has the capacity to proceed, or that the defendant clearly lacks the capacity to proceed, or that the evaluator is unable to form a clear opinion;</u></p> <p>(3) <u>recommends a full evaluation at the Pre-Trial Evaluation Center if the evaluator is unable to form a clear opinion and the defendant is charged with any felony; and</u></p> <p>(4) <u>addresses the likelihood that the defendant will gain capacity if in the opinion of the evaluator the defendant clearly lacks the capacity to proceed.</u></p>	<p><u>opinion of the evaluator that the defendant clearly has the capacity to proceed, that the defendant clearly lacks the capacity to proceed, or that the evaluator is unable to form a clear opinion;</u></p> <p>(3) <u>addresses the likelihood that the defendant will gain capacity if, in the opinion of the evaluator, the defendant clearly lacks the capacity to proceed; and</u></p> <p>(4) <u>recommends a full evaluation at the Pre-Trial Evaluation Center if the evaluator is unable to form a clear opinion and the defendant is charged with a felony.</u></p>
--	---

In accordance with the RRC’s previous decision in 2014, Staff is recommending objection to 10A NCAC .0202, .0203, .0204, and .0207 as lacking statutory authority for the Commission for MH/DD/SAS to set employment requirements for individuals and set the requirements of the evaluation report.

§ 15A-1002. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.

(a) The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court. The motion shall detail the specific conduct that leads the moving party to question the defendant's capacity to proceed.

(b) (1) When the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed. If an examination is ordered pursuant to subdivision (1a) or (2) of this subsection, the hearing shall be held after the examination. Reasonable notice shall be given to the defendant and prosecutor, and the State and the defendant may introduce evidence.

(1a) In the case of a defendant charged with a misdemeanor or felony, the court may appoint one or more impartial medical experts, including forensic evaluators approved under rules of the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services, to examine the defendant and return a written report describing the present state of the defendant's mental health. Reports so prepared are admissible at the hearing. The court may call any expert so appointed to testify at the hearing with or without the request of either party.

(2) At any time in the case of a defendant charged with a felony, the court may order the defendant to a State facility for the mentally ill for observation and treatment for the period, not to exceed 60 days, necessary to determine the defendant's capacity to proceed. If a defendant is ordered to a State facility without first having an examination pursuant to subsection (b)(1a) of this section, the judge shall make a finding that an examination pursuant to this subsection would be more appropriate to determine the defendant's capacity. The sheriff shall return the defendant to the county when notified that the evaluation has been completed. The director of the facility shall direct his report on defendant's condition to the defense attorney and to the clerk of superior court, who shall bring it to the attention of the court. The report is admissible at the hearing.

(3) Repealed by Session Laws 1989, c. 486, s. 1.

(4) A presiding district or superior court judge of this State who orders an examination pursuant to subdivision (1a) or (2) of this subsection shall order the release of relevant confidential information to the examiner, including, but not limited to, the warrant or indictment, arrest records, the law enforcement incident report, the defendant's criminal record, jail records, any prior medical and mental health records of the defendant, and any school records of the defendant after providing the defendant with reasonable notice and an opportunity to be heard and then determining that the information is relevant and necessary to the hearing of the matter before the court and unavailable from any other source. This subdivision shall not be construed to relieve any court of its duty to conduct hearings and make findings required under relevant federal law before ordering the release of any private medical or mental health information or records related to substance abuse or HIV status or treatment. The records may be surrendered to the court for in camera review if surrender is necessary to make the required determinations. The records shall be withheld from public inspection and, except as provided in this subdivision, may be examined only by order of the court.

(b1) The order of the court shall contain findings of fact to support its determination of the defendant's capacity to proceed. The parties may stipulate that the defendant is capable of proceeding but shall not be allowed to stipulate that the defendant lacks capacity to proceed. If the court concludes that the defendant lacks capacity to proceed, proceedings for involuntary civil commitment under Chapter 122C of the General Statutes may be instituted on the basis of the report in either the county where the criminal proceedings are pending or, if the defendant is hospitalized, in the county in which the defendant is hospitalized.

(b2) Reports made to the court pursuant to this section shall be completed and provided to the court as follows:

- (1) The report in a case of a defendant charged with a misdemeanor shall be completed and provided to the court no later than 10 days following the completion of the examination for a defendant who was in custody at the time the examination order was entered and no later than 20 days following the completion of the examination for a defendant who was not in custody at the time the examination order was entered.
- (2) The report in the case of a defendant charged with a felony shall be completed and provided to the court no later than 30 days following the completion of the examination.
- (3) In cases where the defendant challenges the determination made by the court-ordered examiner or the State facility and the court orders an independent psychiatric examination, that examination and report to the court must be completed within 60 days of the entry of the order by the court.

The court may, for good cause shown, extend the time for the provision of the report to the court for up to 30 additional days. The court may renew an extension of time for an additional 30 days upon request of the State or the defendant prior to the expiration of the previous extension. In no case shall the court grant extensions totaling more than 120 days beyond the time periods otherwise provided in this subsection.

(c) The court may make appropriate temporary orders for the confinement or security of the defendant pending the hearing or ruling of the court on the question of the capacity of the defendant to proceed.

(d) Any report made to the court pursuant to this section shall be forwarded to the clerk of superior court in a sealed envelope addressed to the attention of a presiding judge, with a covering statement to the clerk of the fact of the examination of the defendant and any conclusion as to whether the defendant has or lacks capacity to proceed. If the defendant is being held in the custody of the sheriff, the clerk shall send a copy of the covering statement to the sheriff. The sheriff and any persons employed by the sheriff shall maintain the copy of the covering statement as a confidential record. A copy of the full report shall be forwarded to defense counsel, or to the defendant if he is not represented by counsel. If the question of the defendant's capacity to proceed is raised at any time, a copy of the full report must be forwarded to the district attorney, as provided in G.S. 122C-54(b). Until such report becomes a public record, the full report to the court shall be kept under such conditions as are directed by the court, and its contents shall not be revealed except as directed by the court. Any report made to the court pursuant to this section shall not be a public record unless introduced into evidence. (1973, c. 1286, s. 1; 1975, c. 166, ss. 20, 27; 1977, cc. 25, 860; 1979, 2nd Sess., c. 1313; 1985, c. 588; c. 589, s. 9; 1989, c. 486, s. 1; 1991, c. 636, s. 19(b); 1995, c. 299, s. 1; 1995 (Reg. Sess., 1996), c. 742, ss. 13, 14; 2013-18, s. 1.)

Part 4. Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services.

§ 143B-147. Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services – creation, powers and duties.

(a) There is hereby created the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services of the Department of Health and Human Services with the power and duty to adopt, amend and repeal rules to be followed in the conduct of State and local mental health, developmental disabilities, substance abuse programs including education, prevention, intervention, screening, assessment, referral, detoxification, treatment, rehabilitation, continuing care, emergency services, case management, and other related services. Such rules shall be designed to promote the amelioration or elimination of the mental illness, developmental disabilities, or substance abuse problems of the citizens of this State. Rules establishing standards for certification of child care centers providing Developmental Day programs are excluded from this section and shall be adopted by the Child Care Commission under G.S. 110-88. The Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services shall have the authority:

- (1) To adopt rules regarding the
 - a. Admission, including the designation of regions, treatment, and professional care of individuals admitted to a facility operated under the authority of G.S. 122C-181(a), that is now or may be established;
 - b. Operation of education, prevention, intervention, treatment, rehabilitation and other related services as provided by area mental health, developmental disabilities, and substance abuse authorities, county programs, and all providers of public services under Part 4 of Article 4 of Chapter 122C of the General Statutes;
 - c. Hearings and appeals of area mental health, developmental disabilities, and substance abuse authorities as provided for in Part 4 of Article 4 of Chapter 122C of the General Statutes; and
 - d and e. Repealed by Session Laws 2001-437, s. 1.21(a), effective July 1, 2002.
 - f. Standards of public services for mental health, developmental disabilities, and substance abuse services.
- (2) To adopt rules for the licensing of facilities for the mentally ill, developmentally disabled, and substance abusers, under Article 2 of Chapter 122C of the General Statutes. These rules shall include all of the following:
 - a. Standards for the use of electronic supervision devices during client sleep hours for facilities licensed under 10A NCAC 27G. 1700 or any related or subsequent regulations setting licensing standards for such facilities.
 - b. Personnel requirements for facilities licensed under 10A NCAC 27G. 1700, or any related or subsequent regulations setting licensing standards for such facilities, when continuous electronic supervision that meets the standards established under sub-subdivision a. of this of this subdivision is present.
- (3) To advise the Secretary of the Department of Health and Human Services regarding the need for, provision and coordination of education, prevention, intervention, treatment, rehabilitation and other related services in the areas of:
 - a. Mental illness and mental health,

- b. Developmental disabilities,
 - c. Substance abuse.
 - d. Repealed by Session Laws 2001-437, s. 1.21(a), effective July 1, 2002.
- (4) To review and advise the Secretary of the Department of Health and Human Services regarding all State plans required by federal or State law and to recommend to the Secretary any changes it thinks necessary in those plans; provided, however, for the purposes of meeting State plan requirements under federal or State law, the Department of Health and Human Services is designated as the single State agency responsible for administration of plans involving mental health, developmental disabilities, and substance abuse services.
- (5) To adopt rules relating to the registration and control of the manufacture, distribution, security, and dispensing of controlled substances as provided by G.S. 90-100.
- (6) To adopt rules to establish the professional requirements for staff of licensed facilities for the mentally ill, developmentally disabled, and substance abusers. Such rules may require that one or more, but not all staff of a facility be either licensed or certified. If a facility has only one professional staff, such rules may require that that individual be licensed or certified. Such rules may include the recognition of professional certification boards for those professions not licensed or certified under other provisions of the General Statutes provided that the professional certification board evaluates applicants on a basis which protects the public health, safety or welfare.
- (7) Except where rule making authority is assigned under that Article to the Secretary of the Department of Health and Human Services, to adopt rules to implement Article 3 of Chapter 122C of the General Statutes.
- (8) To adopt rules specifying procedures for waiver of rules adopted by the Commission.
- (9) To adopt rules establishing a process for non-Medicaid eligible clients to appeal to the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services of the Department of Health and Human Services decisions made by an area authority or county program affecting the client. The purpose of the appeal process is to ensure that mental health, developmental disabilities, and substance abuse services are delivered within available resources, to provide an additional level of review independent of the area authority or county program to ensure appropriate application of and compliance with applicable statutes and rules, and to provide additional opportunities for the area authority or county program to resolve the underlying complaint. Upon receipt of a written request by the non-Medicaid eligible client, the Division shall review the decision of the area authority or county program and shall advise the requesting client and the area authority or county program as to the Division's findings and the bases therefor. Notwithstanding Chapter 150B of the General Statutes, the Division's findings are not a final agency decision for purposes of that Chapter. Upon receipt of the Division's findings, the area authority or county program shall issue a final decision based on those findings. Nothing in this subdivision shall be construed to create an entitlement to mental health, developmental disabilities, and substance abuse services.

(10) The Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services shall develop and adopt rules by December 1, 2013, to require forensic evaluators appointed pursuant to G.S. 15A-1002(b) to meet the following requirements:

- a. Complete all training requirements necessary to be credentialed as a certified forensic evaluator.
- b. Attend annual continuing education seminars that provide continuing education and training in conducting forensic evaluations and screening examinations of defendants to determine capacity to proceed and in preparing written reports required by law.

(b) All rules hereby adopted shall be consistent with the laws of this State and not inconsistent with the management responsibilities of the Secretary of the Department of Health and Human Services provided by this Chapter and the Executive Organization Act of 1973.

(c) All rules and regulations pertaining to the delivery of services and licensing of facilities heretofore adopted by the Commission for Mental Health and Mental Retardation Services, controlled substances rules and regulations adopted by the North Carolina Drug Commission, and all rules and regulations adopted by the Commission for Mental Health, Mental Retardation and Substance Abuse Services shall remain in full force and effect unless and until repealed or superseded by action of the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services.

(d) All rules adopted by the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services shall be enforced by the Department of Health and Human Services.

(e) The Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services shall by December 1, 2013, adopt guidelines for treatment of individuals who are involuntarily committed following a determination of incapacity to proceed and a referral pursuant to G.S. 15A-1003. The guidelines shall require a treatment plan that uses best practices in an effort to restore the individual's capacity to proceed in the criminal matter. (1973, ch. 476, s. 129; 1977, c. 568, ss. 2, 3; c. 679, s. 1; 1981, c. 51, s. 1; 1983, c. 718, s. 5; 1983 (Reg. Sess., 1984), c. 1110, s. 6; 1985, c. 589, ss. 47-54; 1985 (Reg. Sess., 1986), c. 863, s. 33; 1989, c. 625, s. 23; 1991, c. 309, s. 1; 1993, c. 396, s. 6; 1997-443, s. 11A.118(a); 2001-437, s. 1.21(a); 2005-276, s. 10.35(a); 2009-187, s. 1; 2009-490, s. 6; 2013-18, ss. 9, 10.)

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: Commission for MH/DD/SAS

RULE CITATION: 10A NCAC 27H .0202

RECOMMENDED ACTION:

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

COMMENT:

Staff is recommending objection to Item (4), as it is unclear what the "Pre-Trial Evaluation Center" is, how the Secretary is to make the determination, and how the public will be made aware of what this is. It is important to note that pursuant to 10A NCAC 27H .0204, this center will be responsible for providing continuing education and maintaining records pursuant to 10A NCAC 27H .0205. Also of importance, pursuant to 10A NCAC 27H .0207, this center will be where individuals are referred if the forensic evaluator is unable to form an opinion as to an individual's capacity to proceed to trial. As such, it appears as though the pre-trial evaluation center serves an essential role to both the certified forensic evaluators and to the public, but it is not clear in the Rule what this Center is.

1 **10A NCAC 27H .0202 is amended with changes as published in 31:01 NCR 11 as follows:**

2
3 **10A NCAC 27H .0202 DEFINITIONS**

4 For the purposes of Rules .0201 through .0207 of this ~~Section~~ Section, the following terms shall have the meanings
5 indicated:

- 6 (1) "Forensic Evaluation" means ~~an a local~~ an a local examination ordered by the court to determine if the defendant
7 has the capacity to proceed to trial, does not have the capacity to proceed to trial, or needs further
8 ~~treatment at an inpatient facility or~~ further evaluation at the Pre-Trial Evaluation Center.
- 9 (2) "~~Pre-Trial Evaluation Center~~" means ~~the forensic unit at Dorothea Dix Hospital.~~ "Licensed Clinician"
10 means the same as defined in Rule 10A NCAC 27G .0104.
- 11 (3) "~~Qualified Mental Health Professional~~" means ~~the same as defined in 10A NCAC 27G .0104(e)~~
12 ~~contained in Division publication, Rules for Mental Health, Developmental Disabilities and Substance~~
13 ~~Abuse Facilities and Services, APSM 40-2.~~ "Local Certified Forensic Evaluator" means a Licensed
14 Clinician who:
 - 15 (a) has completed the training for certification and annual training seminars described
16 in
17 Rule .0204 of this Section; and
 - 18 (b) is employed by, or under contract with, an LME-MCO as a Certified Forensic
19 Evaluator.
- 20 (4) "~~Qualified Substance Abuse Professional~~" means ~~the same as defined in 10A NCAC 27G .0104(e)~~
21 ~~contained in Division publication, Rules for Mental Health, Developmental Disabilities and Substance~~
22 ~~Abuse Facilities and Services, APSM 40-2.~~ "Pre-Trial Evaluation Center" means the Forensic
23 Services Unit so designated by the Secretary of the North Carolina Department of Health and Human
24 Services.

25
26 *History Note:* Authority G.S. 15A-1002; 143B-147;
27 Eff. July 1, 1982;
28 Amended Eff. [] February 1, 2017; January 1, 1996; May 1, 1990.
29

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: Commission for MH/DD/SAS

RULE CITATION: 10A NCAC 27H .0203

RECOMMENDED ACTION:

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

COMMENT:

Staff is recommending objection to Paragraph (a) of this Rule, as it contains a reference to an "applicant," but there is no information contained within the Rules submitted to say what the "applicant" will need to do to apply to be certified as a forensic evaluator. It is unclear to whom the applicant will apply, what the application process is, and what exactly the timing of the training requirements is.

Further, staff is recommending objection to Paragraph (b) of this Rule as it is unclear how the LME-MCO is to determine whether the evaluator has expertise.

1 **10A NCAC 27H .0203 is amended with changes as published in 31:01 NCR 11 as follows:**
2

3 **10A NCAC 27H .0203 ELIGIBILITY FOR TRAINING**

4 (a) To be eligible for training as a local certified forensic evaluator the applicant shall:

- 5 (1) be a ~~qualified mental health professional or a qualified substance abuse professional;~~ Licensed
6 Clinician;
7 (2) be an employee of, or work under contract with, an ~~area program;~~ LME-MCO; and
8 (3) have his name submitted as an applicant for the training and ~~registration~~ certification program by the
9 ~~area~~ LME-MCO director.

10 (b) The ~~area program~~ LME-MCO shall verify that the applicant is a Licensed Clinician, or meets the requirements of
11 Rule .0201(c) of this Section, and has expertise with the mental health, developmental disabilities, or substance abuse
12 (mh/dd/sa) population for whom the applicant will provide forensic evaluations. meets the appropriate standards for a
13 ~~qualified mental health professional that are referenced in Rule .0202 of this Section.~~
14

15 *History Note:* Authority G.S. 15A-1002; 143B-147;
16 Eff. July 1, 1982;
17 Amended Eff. [] February 1, 2017; January 1, 1996; May 1, 1990.
18
19

1 **10A NCAC 27H .0204 is amended with changes as published in 31:01 NCR 11 as follows:**
2

3 **10A NCAC 27H .0204 TRAINING AND REGISTRATION CERTIFICATION**

4 ~~(a) The applicant shall successfully complete a minimum of six hours of initial training covering procedure, techniques,~~
5 ~~and reporting that is provided by the Mental Health Section of the Division in order to be registered certified as a local~~
6 ~~forensic evaluator. The initial training shall include:~~

- 7 (1) current laws and practices including the role of the local forensic evaluator in the capacity to proceed
8 evaluation process;
9 (2) procedures for conducting interviews including evaluation for the presence of mh/dd/sa disorders, or
10 other relevant conditions;
11 (3) components of reports to be submitted to the court;
12 (4) process for reporting findings to the court; and
13 (5) an examination at the conclusion of the training which assesses comprehension of the training material
14 and an understanding of the duties of a local forensic evaluator.

15 (b) Each local forensic evaluator is required to complete a minimum of four hours of required annual continuing
16 education modules provided by the Pre-Trial Evaluation Center by December 31 of each calendar year.

17 (c) Local forensic evaluators shall be exempt from the continuing education requirement in the calendar year in which
18 they are first certified and shall complete the annual continuing education requirement by December 31 of the following
19 year and each calendar year thereafter.

20 (d) Continuing education module topics may include:

- 21 (1) evaluation skills training to enhance skills acquired through the initial local forensic evaluator training;
22 (2) changes in existing laws and current practices; and
23 (3) evaluation of mh/dd/sa populations.
24

25
26 *History Note:* Authority G.S. 15A-1002; 143B-147;
27 Eff. July 1, 1982;
28 Amended Eff. [] February 1, 2017; May 1, 1990.
29

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: Commission for MH/DD/SAS

RULE CITATION: 10A NCAC 27H .0205

RECOMMENDED ACTION:

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

COMMENT:

As the RRC has previously determined that the Commission for MH/DD/SAS lacks the statutory authority to set employment requirements, specifically a requirement that evaluators be employed by or contract with an LME-MCO, and Staff is recommending continued objection to this provision, it is Staff's opinion that it is also beyond their statutory authority to promulgate Rules regarding LME-MCOs oversight of forensic evaluators. It is noted that there is a specific reference to a forensic evaluator being employed by an LME-MCO in (b) of this Rule.

Further, Staff is recommending objection as being unclear or ambiguous in the following instances:

- In (a), it is unclear what is meant by "sufficient."
- In (b), it is unclear as to how expertise of an evaluator is to be conveyed to the LME-MCO. Rule .0205 indicates that it will be self-reporting by the evaluator; however, Rule .0203 indicates that the LME-MCO is required to determine the expertise of the evaluator. It is unclear whether these two provisions conflict with each other or whether they are different processes.
- In (e), it is unclear as to what information is required to be maintained in the log.

1 **10A NCAC 27H .0205 is amended with changes as published in 31:01 NCR 11 as follow:**
2

3 **10A NCAC 27H .0205 ~~PERIOD OF REGISTRATION~~ LME-MCO OVERSIGHT OF FORENSIC**
4 **EVALUATOR PROGRAM**

5 ~~Registration shall continue to be valid unless registration is terminated as specified in Rule .0206 of this Section.~~

6 (a) The LME-MCO shall ensure there is a sufficient number of local certified forensic evaluators to conduct
7 forensic evaluations in its catchment area.

8 (b) Each LME-MCO shall maintain a list of local certified forensic evaluators who are currently employed or
9 contracted by the LME-MCO that includes the mh/dd/sa populations for which each evaluator has reported
10 having expertise to conduct forensic evaluations.

11 (c) The LME-MCO shall verify that each local forensic evaluator meets the requirements set forth in Rules .0203
12 and .0204 of this Section.

13 (d) The LME-MCO shall notify the Pre-Trial Evaluation Center of any changes which would result in termination
14 of certification per Rule .0206 of this Section.

15 (e) The LME-MCO shall maintain a log of local forensic evaluations done in each county within its catchment area
16 and provide that log to the Pre-Trial Evaluation Center on a monthly basis.

17 (f) The LME-MCO shall identify potentially qualified individuals to enroll in training for certification to replace
18 any evaluator whose certification has been terminated or to increase the number of evaluators due to increased
19 numbers of evaluations logged.

20 (g) The LME-MCO shall establish a mechanism to ensure a quality management process is included in the LME-
21 MCO's Quality Improvement System for oversight of the local certified forensic evaluators in its catchment area that
22 includes:

23 (1) identifying an individual who is a local certified forensic evaluator who will monitor the overall
24 quality and outcomes of the reports of forensic evaluations completed by other local forensic
25 evaluators; and

26 (2) establishing a procedure for responding to questions or concerns related to the quality of reports of
27 forensic evaluations completed by local certified forensic evaluators in its catchment area.

28
29 *History Note:* Authority G.S. 15A-1002; 143B-147;
30 Eff. July 1, 1982;
31 Amended Eff. [] February 1, 2017; May 1, 1990.
32

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: Commission for MH/DD/SAS

RULE CITATION: 10A NCAC 27H .0206

RECOMMENDED ACTION:

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

COMMENT:

Staff is recommending objection to this Rule as lacking statutory authority to delegate the termination of certifications to the LME-MCOs.

As the RRC has previously determined that the Commission for MH/DD/SAS lacks the statutory authority to set employment requirements, specifically a requirement that evaluators be employed by or contract with an LME-MCO, and Staff is recommending continued objection to this provision, it is Staff's opinion that it is also beyond their statutory authority to give termination responsibilities to the LME/MCOs.

Further, if the Commission for MH/DD/SAS does have authority to allow a LME-MCO to essentially overtake responsibility of certifications, it is unclear what the responsibilities and duties of the LME-MCO will be in terminating the certifications.

1 **10A NCAC 27H .0206 is amended with changes as published in 31:01 NCR 11 as follows:**
2

3 **10A NCAC 27H .0206 TERMINATION OF REGISTRATION-CERTIFICATION**

4 ~~A Forensic Evaluator Registration will be declared~~ The LME-MCO shall declare a forensic evaluator certification void
5 when:

- 6 (1) the evaluator notifies the LME-MCO in writing that he no longer ~~desires wishes~~ to be registered
7 certified; and perform the duties required by an evaluator;
8 (2) the evaluator is no longer employed by, or under contract with, an ~~area program;~~ LME-MCO;
9 (3) the evaluator no longer meets the ~~registration requirements.~~ eligibility requirements set forth in Rule
10 .0203 of this Section;
11 (4) the evaluator fails to complete annual continuing education modules as set forth in Rule .0204 of this
12 Section; or
13 (5) the evaluator fails to perform any of the duties described in Rule .0207 of this Section.
14

15 *History Note:* Authority G.S. 15A-1002; 143B-147;
16 Eff. July 1, 1982;
17 Amended Eff. [] February 1, 2017; May 1, 1990.
18

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: Commission for MH/DD/SAS

RULE CITATION: 10A NCAC 27H .0207

RECOMMENDED ACTION:

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

COMMENT:

Staff is recommending objection to this Rule as it is Staff's opinion that the Commission for MH/DD/SAS lacks the statutory authority to limit a recommendation by a forensic evaluator for a full evaluation at the Pre-Trial Evaluation Center *only* if the defendant is charged with a felony.

1 **10A NCAC 27H .0207 is amended with changes as published in 31:01 NCR 11 as follows:**

2
3 **10A NCAC 27H .0207 DUTIES OF REGISTERED CERTIFIED FORENSIC EVALUATOR**

4 When ordered by the court, the local certified forensic evaluator shall conduct a forensic evaluation or a ~~screening~~
5 examination of the defendant and ~~report to the court~~ in accordance with G.S. 15A-1002 ~~whether:~~ shall submit a report
6 that:

- 7 (1) ~~there is sufficient question of mental or emotional disorder to recommend inpatient evaluation or~~
8 ~~treatment; or is limited to evaluation of capacity to proceed to trial and does not address criminal~~
9 ~~responsibility, legal insanity, or diminished capacity;~~
- 10 (2) ~~there is sufficient information to recommend that the defendant does have capacity to proceed and~~
11 ~~further evaluation is not indicated. indicates the opinion of the evaluator that the defendant clearly has~~
12 ~~the capacity to proceed, that the defendant clearly lacks the capacity to proceed, or that the evaluator is~~
13 ~~unable to form a clear opinion;~~
- 14 (3) ~~addresses the likelihood that the defendant will gain capacity if, in the opinion of the evaluator, the~~
15 ~~defendant clearly lacks the capacity to proceed; and~~
- 16 (4) ~~recommends a full evaluation at the Pre-Trial Evaluation Center if the evaluator is unable to form a~~
17 ~~clear opinion and the defendant is charged with a felony.~~

18
19 *History Note:* Authority G.S. 15A-1002; 143B-147;
20 Eff. July 1, 1982;
21 Amended Eff. [] February 1, 2017; May 1, 1990.
22