

Hammond, Abigail M

From: Charles Wilkins <cwilkins@bws-law.com>
Sent: Wednesday, April 26, 2017 10:41 AM
To: Hammond, Abigail M
Cc: admin@bmbt.org
Subject: RE: Status inquiry

Abby,

Thanks. I never know exactly what words are necessary to comply BUT, as previously stated, the NC Board of Massage and Bodywork Therapy met on Thursday, April 20, 2017 at which time it reviewed the objections by the RRC to the Board's proposed Rules .0903 and .0906. After discussion, the Board agreed to request that the RRC return Rules .0903 and .0906 to the Board.

Charles

From: Hammond, Abigail M [mailto:abigail.hammond@oah.nc.gov]
Sent: Wednesday, April 26, 2017 9:52 AM
To: Charles Wilkins
Cc: admin@bmbt.org
Subject: RE: Status inquiry

Good morning Charles,

It was great to see both you and Elizabeth yesterday. Elizabeth, I apologize for not being able to speak with you.

For the two rules, let me double check procedurally where we are on these rules:

Rule .0903, the only proposed amendment to the rule is language that does not currently exist in the Code. It was the amendment language that received the objection, and not to existing language.

Rule .0906, the rule is proposed as an "adoption"

Based upon the requirements of [26 NCAC 05 .0107](#), which is what I use as a guiding principal in returning rules, that means that both rules may be returned to the agency in response to an objection. The concern for staff counsel would be returning a rule with an objection to existing language in the Code.

At this stage, [G.S. 150B-21.12\(d\)](#) just requires a request from the agency to the RRC. As for the RRC, I will be providing the "request to return the rule" on the RRC's online agenda. I will take that request in whatever format you prefer. If you would like me to use the email below, please let me know. Otherwise a new email just addressing the return of the rules is perfectly acceptable. Please just let me know your preference.

Thank you,
Abby

Abigail M. Hammond
Counsel to the Rules Review Commission

Notice: E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties by authorized State officials.

From: Charles Wilkins [<mailto:cwilkins@bws-law.com>]
Sent: Wednesday, April 26, 2017 9:37 AM
To: Hammond, Abigail M <abigail.hammond@oah.nc.gov>
Cc: admin@bmbt.org
Subject: RE: Status inquiry

Abby,

The NC Board of Massage and Bodywork Therapy met on Thursday, April 20, 2017 at which time it reviewed the objections by the RRC to the Board's proposed Rules .0903 and .0906. After discussion, the Board agreed to withdraw Rules .0903 and .0906 from further consideration by the RRC.

Is this all you need?

Charles

From: Hammond, Abigail M [<mailto:abigail.hammond@oah.nc.gov>]
Sent: Thursday, April 06, 2017 2:14 PM
To: Charles Wilkins
Cc: admin@bmbt.org
Subject: Re: Status inquiry

That was all that I needed. I will update the agenda to reflect the objection letter.

Thank you,
Abby

Abigail M. Hammond
Counsel to the Rules Review Commission
Office of Administrative Hearings
Direct Dial: (919) 431-3076

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From: Charles Wilkins <cwilkins@bws-law.com>
Sent: Thursday, April 6, 2017 2:03:18 PM
To: Hammond, Abigail M
Cc: admin@bmbt.org
Subject: RE: Status inquiry

Thank you for following up on this. I had to be in Phoenix for a meeting and it got put on the back burner.

You are correct, the next NCBMBT meeting is Thursday, April 20, 2017. I will respond within 10 days following that meeting, but will not be responding prior to that meeting or the next RRC meeting.

Charles

From: Hammond, Abigail M [<mailto:abigail.hammond@oah.nc.gov>]
Sent: Thursday, April 06, 2017 1:24 PM
To: 'CWilkins@bws-law.com'; 'admin@bmbt.org'
Subject: Status inquiry

Good afternoon,

There is no rush, as [G.S. 150B-21.12\(b\)](#) allows an agency that is a board or commission to respond 10 days after the next regularly scheduled meeting. Looking at the [Board of Massage & Bodywork Therapy](#) webpage, it looks like the next regularly scheduled meeting is April 20, 2017, the same date and time as the next Rules Review Commission meeting. For purposes of the [Rules Review Commission's April agenda](#), I just wanted to verify that I would not be receiving any response from the Board for the RRC's review.

Please just let me know if I am incorrect.

Thank you,
Abby

*Abigail M. Hammond
Counsel to the Rules Review Commission
Office of Administrative Hearings
Direct Dial: (919) 431-3076*

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**STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS**

Mailing address:
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1711 New Hope Church Rd
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March 16, 2017

Sent via email: CWilkins@bws-law.com
Charles Wilkins Rulemaking Coordinator
Board of Massage and Bodywork Therapy
Broughton, Wilkins, Sugg & Thompson PLLC
Post Office Box 2387
Raleigh, North Carolina 27602

Re: Rules 21 NCAC 30 .0903, .0906

Dear Mr. Wilkins:

At its March 16, 2017 meeting, the Rules Review Commission objected to the above-identified rules in accordance with G.S. 150B-21.9.

The Commission objected to 21 NCAC 30 .0903 based on lack of statutory authority. The Board of Massage and Bodywork Therapy lacks the statutory authority to make by rule an exception to the public records law of North Carolina. Without a specific statutory grant from the General Assembly, the materials generated or obtained by the Board in conducting an investigation are public records.

The Commission objected to 21 NCAC 30 .0906 based on lack of statutory authority and unclear or ambiguous language. The Board of Massage and Bodywork Therapy lacks the statutory authority to summarily suspend an occupational license based the cited authority in the Rule as filed with the Rules Review Commission. Further, the findings required by the Board that would lead to the immediate suspension of licensure are unclear or ambiguous as provided in the Rule.

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 action, please let me know.

Administration
919/431-3000
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Rules Division
919/431-3000
fax: 919/431-3104

Judges and
Assistants
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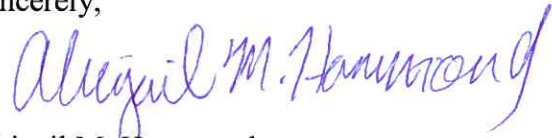
Clerk's Office
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Rules Review
Commission
919/431-3000
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Civil Rights
Division
919/431-3036
fax: 919/431-3103

An Equal Employment Opportunity Employer

Sincerely,



Abigail M. Hammond
Commission Counsel

cc: Elizabeth Kirk, Administrative Director
Sent via email: admin@bmbt.org

21 NCAC 30 .0903 is amended with changes as published in 31:10 NCR 979-980 as follows:

21 NCAC 30 .0903 ACTION ON A COMPLAINT

Action on a complaint consists of the following:

- (1) The Board shall receive and acknowledge complaints, open a **file file**, and initiate complaint tracking.
- (2) Complaints shall be screened to determine jurisdiction and the type of response appropriate for the complaint.
- (3) Investigation:
 - (a) If the facts indicate a Practice Act violation that cannot be verified and the complaint can be handled without an investigation, the Board may request that the licensee or school cease conduct that could result in a Practice Act violation.
 - (b) If the facts indicate a Practice Act violation, the Board shall commence an investigation. The Board may utilize additional personnel such as licensees, law enforcement officials, or other technical personnel that may be required in a particular case. If a Board member is utilized in the investigation, due process **must shall** be observed by separating
 - (i) investigation;
 - (ii) prosecution; and
 - (iii) hearings and final decision-making.No Board member shall participate in more than one of these three steps in the enforcement process.
 - (c) A confidential report of each investigation shall be prepared for the Board's review.
 - (d) Prior to a decision rendered by the Board, any materials generated or obtained by the Board in conducting an investigation shall be considered **[confidential]** **criminal** investigation records as set forth in G.S. 132-1.4(a), and not public records as defined by G.S. 132-1. However, **[not subject to the Public Records Act (Chapter 132 of the General Statutes); however,]** copies of such materials may be provided to a licensee subject to disciplinary action, or to the licensee's attorney, so long as identifying information concerning the treatment or delivery of professional services to a patient who has not consented to its public disclosure is deleted or redacted.
- (4) Formal and Informal Hearings:
 - (a) The Board, after review of an investigative file, may schedule an informal meeting.
 - (b) If the matter cannot be resolved informally, then a formal hearing shall be held.
 - (c) Members of the Board shall not make ex parte communication with parties to a hearing.
- (5) Final Orders: Within 60 days, the Board **will shall** issue its final decision in writing specifying the date on which it **will shall** take effect. The Board **will shall** serve one copy of the decision on each party to the hearing.

1 (6) Compliance: The Board Chair will cause a follow-up inquiry to determine that the orders of the
2 Board are being obeyed.

3
4 *History Note:* *Authority G.S. 90-626(5), (6), (7), (13);*
5 *Temporary Adoption Eff. February 15, 2000;*
6 *Eff. April 1, 2001;*
7 *Amended Eff. September 2, 2005;*
8 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. November*
9 *12, ~~2014~~, 2014;*
10 *Amended Eff. April 1, 2017.*

1 21 NCAC 30 .0906 is proposed with changes as published in 31:10 NCR 980 as follows:

2
3 **21 NCAC 30 .0906 SUMMARY SUSPENSION**

4 The Board may impose an immediate suspension of licensure in cases where the continued practice of a massage
5 and bodywork therapist poses an imminent and continuing threat to public health, ~~welfare~~ welfare, or safety so long
6 as the Board schedules a hearing to occur within 60 days of the effective date of the suspension order.

7
8 History Note: Authority G.S. 150B-3; 90-626(3)

9 Eff. April 1, 2017.

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: Board of Massage and Bodywork Therapy

RULE CITATION: 21 NCAC 30 .0903

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:

The Board of Massage and Bodywork Therapy has proposed an amendment to 21 NCAC 30 .0903, Action on a Complaint. The amendment to this Rule specifies that "materials generated or obtained by the Board in conducting an investigation shall be considered confidential records not subject to the Public Records Act." A review of the authority set forth in Article 36 of G.S. 90 does not provide the Board of Massage and Bodywork Therapy with authority to claim an exception to the Public Records Act. The only use of the term "confidential" in Article 36 of G.S. 90 is set forth in G.S. 90-629.1, "Criminal history record checks of applicants for licensure," and provides that "[t]he Board shall keep all information obtained pursuant to this section confidential."

The Board of Massage and Bodywork Therapy cites the following statutory authority for this Rule:

§ 90-626. Powers and duties.

The Board shall have the following powers and duties:

- ...
- (5) Conduct investigations to determine whether violations of this Article exist or constitute grounds for disciplinary action against licensees under this Article.
- ...

- (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.
- ...
- (13) Provide a system for grievances to be presented and resolved.

The cited statutes do not reference confidentiality or an exception from Chapter 132 of the General Statutes, Public Records.

The Board of Massage and Bodywork Therapy, in response to a technical change request to clarify the claim of confidentiality, has revised Subparagraph (3)(d) as follows:

(d) Prior to a decision rendered by the Board, any materials generated or obtained by the Board in conducting an investigation shall be considered ~~[confidential]~~ criminal investigation records as set forth in G.S. 132-1.4(a), and not public records as defined by G.S. 132-1. However, ~~[not subject to the Public Records Act (Chapter 132 of the General Statutes); however,]~~ copies of such materials may be provided to a licensee subject to disciplinary action, or to the licensee's attorney, so long as identifying information concerning the treatment or delivery of professional services to a patient who has not consented to its public disclosure is deleted or redacted.

This revised language creates an exception to records of criminal investigations. However, it is unclear to staff counsel that the intent of G.S. 132-1.4(b)(3) was to extend exceptions to the public records law to boards or commission, as the term "public law enforcement agency" is defined as follows:

(3) "Public law enforcement agency" means a municipal police department, a county police department, a sheriff's department, a company police agency commissioned by the Attorney General pursuant to G.S. 74E-1, et seq., and any State or local agency, force, department, or unit responsible for investigating, preventing, or solving violations of the law.

If the General Assembly wishes the investigative efforts of occupational licensing boards to qualify as an exception to the public records in the State of North Carolina, the General Assembly may legislate the specific exceptions that apply to a particular occupational licensing board. Please see the directive to the Medical Board set forth in G.S. 90-16(c), "Self-reporting requirements; confidentiality of Board investigative information; cooperation with law enforcement; patient protection; Board to keep public records;" and pending 2017 Senate Bill 73, Modernize Nursing Practice

For purposes of this Staff Opinion, the following documents are attached for review by the Rules Review Commission:

- (1) 21 NCAC 30 .0903 as submitted on February 17, 2017;
- (2) 21 NCAC 30 .0903 as submitted on March 3, 2017 with technical change requests incorporated;

- (3) Article 36 of G.S. 90, Massage and Bodywork Therapy Practice;
- (4) G.S. 132-1, "Public records" defined;
- (5) G.S. 132-1.4, Criminal investigations; intelligence information records; Innocence Inquiry Commission records;
- (6) G.S. 90-16; and
- (7) Senate Bill 73, Modernize Nursing Practice Act.

Summary:

The Board of Massage and Bodywork Therapy lacks the statutory authority to make by rule an exception the public records law of North Carolina. Without a specific statutory grant from the General Assembly, the materials generated or obtained by the Board in conducting an investigation are public records. The amendment to 21 NCAC 30 .0903 should be objected to due to lack of statutory authority.

21 NCAC 30 .0903 is proposed for amendment as published in 31:10 NCR 979-980 ~~with changes~~ as follows:

21 NCAC 30 .0903 ACTION ON A COMPLAINT

Action on a complaint consists of the following:

- (1) The Board shall receive and acknowledge complaints, open a file and initiate complaint tracking.
- (2) Complaints shall be screened to determine jurisdiction and the type of response appropriate for the complaint.
- (3) Investigation:
 - (a) If the facts indicate a Practice Act violation that cannot be verified and the complaint can be handled without an investigation, the Board may request that the licensee or school cease conduct that could result in a Practice Act violation.
 - (b) If the facts indicate a Practice Act violation, the Board shall commence an investigation. The Board may utilize additional personnel such as licensees, law enforcement officials, or other technical personnel that may be required in a particular case. If a Board member is utilized in the investigation, due process must be observed by separating
 - (i) investigation;
 - (ii) prosecution; and
 - (iii) hearings and final decision-making.No Board member shall participate in more than one of these three steps in the enforcement process.
 - (c) A confidential report of each investigation shall be prepared for the Board's review.
 - (d) Prior to a decision rendered by the Board, any materials generated or obtained by the Board in conducting an investigation shall be considered confidential investigation records not subject to the Public Records Act (Chapter 132 of the General Statutes); however, copies of such materials may be provided to a licensee subject to disciplinary action, or to the licensee's attorney, so long as identifying information concerning the treatment or delivery of professional services to a patient who has not consented to its public disclosure is deleted or redacted.
- (4) Formal and Informal Hearings:
 - (a) The Board, after review of an investigative file, may schedule an informal meeting.
 - (b) If the matter cannot be resolved informally, then a formal hearing shall be held.
 - (c) Members of the Board shall not make ex parte communication with parties to a hearing.
- (5) Final Orders: Within 60 days, the Board will issue its final decision in writing specifying the date on which it will take effect. The Board will serve one copy of the decision on each party to the hearing.
- (6) Compliance: The Board Chair will cause a follow-up inquiry to determine that the orders of the Board are being obeyed.

38

39 *History Note:* Authority G.S. 90-626(5), (6), (7), (13);

40 Temporary Adoption Eff. February 15, 2000;

41 Eff. April 1, 2001;

42 Amended Eff. April 1, 2017; September 2, 2005;

43 Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. November

44 12, 2014.

21 NCAC 30 .0903 is amended with changes as published in 31:10 NCR 979-980 as follows:

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 - (c) A confidential report of each investigation shall be prepared for the Board's review.
 - (d) Prior to a decision rendered by the Board, any materials generated or obtained by the Board in conducting an investigation shall be considered ~~[confidential]~~ criminal investigation records as set forth in G.S. 132-1.4(a), and not public records as defined by G.S. 132-1. However, ~~[not subject to the Public Records Act (Chapter 132 of the General Statutes); however,]~~ copies of such materials may be provided to a licensee subject to disciplinary action, or to the licensee's attorney, so long as identifying information concerning the treatment or delivery of professional services to a patient who has not consented to its public disclosure is deleted or redacted.
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- (5) Final Orders: Within 60 days, the Board will shall issue its final decision in writing specifying the date on which it will shall take effect. The Board will shall serve one copy of the decision on each party to the hearing.

(6) Compliance: The Board Chair will cause a follow-up inquiry to determine that the orders of the Board are being obeyed.

*History Note: Authority G.S. 90-626(5), (6), (7), (13);
Temporary Adoption Eff. February 15, 2000;
Eff. April 1, 2001;
Amended Eff. September 2, 2005;
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. November 12, ~~2014~~, 2014;
Amended Eff. April 1, 2017.*

Article 36.

Massage and Bodywork Therapy Practice.

§ 90-620. Short title.

This Article shall be known as the North Carolina Massage and Bodywork Therapy Practice Act. (1998-230, s. 10.)

§ 90-621. Declaration of purpose.

The purpose of this Article is to ensure the protection of the health, safety, and welfare of the citizens of this State receiving massage and bodywork therapy services. This purpose is achieved by establishing education and testing standards that ensure competency in the practice of massage and bodywork therapy. Mandatory licensure of those engaged in the practice of massage and bodywork therapy assures the public that each individual has satisfactorily met the standards of the profession and continues to meet both the ethical and competency goals of the profession. (1998-230, s. 10; 2008-224, s. 1.)

§ 90-622. Definitions.

The following definitions apply in this Article:

- (1) Accreditation. - Status granted to a postsecondary institution of higher learning that has met standards set by an accrediting agency recognized by the Secretary of the United States Department of Education. The accreditation for massage and bodywork schools may be institutional or programmatic in nature.
- (1a) Board. - The North Carolina Board of Massage and Bodywork Therapy.
- (2) Board-approved school. - Any massage and bodywork therapy school or training program in this State or another state that is not otherwise exempt from Board approval, that has met the standards set forth in this Article, and been granted approval by the Board.
- (2a) Criminal history record check. - A report resulting from a request made by the Board to the North Carolina Department of Public Safety for a history of conviction of a crime, whether a misdemeanor or felony, that bears on an applicant's fitness for licensure to practice massage and bodywork therapy.
- (3) Massage and bodywork therapy. - Systems of activity applied to the soft tissues of the human body for therapeutic, educational, or relaxation purposes. The application may include:
 - a. Pressure, friction, stroking, rocking, kneading, percussion, or passive or active stretching within the normal anatomical range of movement.
 - b. Complementary methods, including the external application of water, heat, cold, lubricants, and other topical preparations.
 - c. The use of mechanical devices that mimic or enhance actions that may possibly be done by the hands.
- (3a) Massage and bodywork therapy school. - Any educational institution that conducts a training program or curriculum for a tuition charge, which is intended to teach adults the knowledge, skills, and abilities necessary for the safe, effective, and ethical practice of massage and bodywork therapy.
- (4) Massage and bodywork therapist. - A person licensed under this Article.
- (5) Practice of massage and bodywork therapy. - The application of massage and bodywork therapy to any person for a fee or other consideration. (1998-230, s. 10; 2008-224, s. 2; 2014-100, s. 17.1(o).)

§ 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.)

§ 90-624. Exemptions.

Nothing in this Article shall be construed to prohibit or affect:

- (1) The practice of a profession by persons who are licensed, certified, or registered under other laws of this State and who are performing services within their authorized scope of practice.
- (2) The practice of massage and bodywork therapy by a person employed by the government of the United States while the person is engaged in the performance of duties prescribed by the laws and regulations of the United States.
- (3) The practice of massage and bodywork therapy by persons duly licensed, registered, or certified in another state, territory, the District of Columbia, or a foreign country when incidentally called into this State to teach a course related to massage and bodywork therapy or to consult with a person licensed under this Article.
- (4) Students enrolled in a Board-approved school while completing a clinical requirement for graduation that shall be performed under the supervision of a person licensed under this Article.
- (5) A person giving massage and bodywork therapy to members of that person's immediate family.
- (6) The practice of movement educators such as dance therapists or teachers, yoga teachers, personal trainers, martial arts instructors, movement repatterning practitioners, and other such professions.
- (7) The practice of techniques that are specifically intended to affect the human energy field.
- (8) A person employed by or contracting with a not-for-profit community service organization to perform massage and bodywork therapy on persons who are members of the not-for-profit community service organization and are of the same gender as the person giving the massage or bodywork therapy. (1998-230, s. 10; 2000-140, s. 93.)

§ 90-625. North Carolina Board of Massage and Bodywork Therapy.

(a) The North Carolina Board of Massage and Bodywork Therapy is created. The Board shall consist of seven members who are residents of this State and are as follows:

- (1) Five members shall be massage and bodywork therapists who have been licensed under this Article and have been in the practice of massage and bodywork therapy for at least five of the last seven years prior to their serving on the Board. Consideration shall be given to geographical distribution, practice setting, clinical specialty, involvement in massage and

bodywork therapy education, and other factors that will promote diversity of the profession on the Board. Two of the five members shall be appointed by the General Assembly, upon the recommendation of the Speaker of the House of Representatives, two shall be appointed by the General Assembly, upon the recommendation of the President Pro Tempore of the Senate, and one shall be appointed by the Governor.

- (2) One member shall be a physician licensed pursuant to Article 1 of Chapter 90 of the General Statutes or a person once licensed as a physician whose license lapsed while the person was in good standing with the profession and eligible for licensure. The appointment shall be made by the Governor and may be made from a list provided by the North Carolina Medical Society.
- (3) One member shall be a member of the general public who shall not be licensed under Chapter 90 of the General Statutes or the spouse of a person who is so licensed, or have any financial interest, directly or indirectly, in the profession regulated under this Article. The appointment shall be made by the Governor.

(b) Legislative appointments shall be made in accordance with G.S. 120-121. A vacancy in a legislative appointment shall be filled in accordance with G.S. 120-122.

(c) Each member of the Board shall serve for a term of three years, ending on June 30 of the last year of the term. A member shall not be appointed to serve more than two consecutive terms.

(d) The Board shall elect annually a chair and other officers as it deems necessary. The Board shall meet as often as necessary for the conduct of business but no less than twice a year. The Board shall establish procedures governing the calling, holding, and conducting of regular and special meetings. A majority of the Board shall constitute a quorum.

(e) Each member of the Board may receive per diem and reimbursement for travel and subsistence as set forth in G.S. 93B-5.

(f) Members may be removed by the official who appointed the member for neglect of duty, incompetence, or unprofessional conduct. A member subject to disciplinary proceedings as a licensee or other professional credential shall be disqualified from participating in the official business of the Board until the charges have been resolved by a determination that the misconduct does not rise to the level of disciplinary action resulting in the suspension or revocation of the member's professional credential. (1998-230, s. 10; 2008-224, s. 4.)

§ 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.)

§ 90-627. Custody and use of funds.

All fees and other moneys collected and received by the Board shall be used for the purposes of implementing this Article. (1998-230, s. 10.)

§ 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).)

§ 90-629.1. Criminal history record checks of applicants for licensure.

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

(b) The cost of the criminal history record check and the fingerprinting shall be borne by the applicant.

(c) If an applicant's criminal history record check reveals one or more criminal convictions, the conviction shall not automatically bar licensure. The Board shall consider all of the following factors regarding the conviction:

- (1) The level of seriousness of the crime.
- (2) The date of the crime.
- (3) The age of the person at the time of the conviction.
- (4) The circumstances surrounding the commission of the crime, if known.
- (5) The nexus between the criminal conduct of the person and the job duties of the position to be filled.
- (6) The person's prison, jail, probation, parole, rehabilitation, and employment records since the date the crime was committed.

If, after reviewing the factors, the Board determines that any of the grounds set forth in the subdivisions of G.S. 90-633(a) exist, the Board may deny licensure of the applicant. The Board may disclose to the applicant information contained in the criminal history record check that is relevant to the denial. The Board shall not provide a copy of the criminal history record check to the applicant. The applicant shall have the right to appear before the Board to appeal the Board's decision. However, an appearance before the full Board shall constitute an exhaustion of administrative remedies in accordance with Chapter 150B of the General Statutes.

(d) The Board, its officers, and employees, acting in good faith and in compliance with this section, shall be immune from civil liability for denying licensure to an applicant based on information provided in the applicant's criminal history record check. (2008-224, s. 10; 2014-100, s. 17.1(o).)

§ 90-630: Repealed by Session Laws 2008-224, s. 11, effective August 17, 2008.

§ 90-630.1. Licensure by endorsement.

(a) The Board may issue a license to a practitioner who is duly licensed, certified, or registered as a massage and bodywork therapist under the laws of another jurisdiction. The practitioner shall be eligible for licensure by endorsement if all of the following qualifications are met:

- (1) The applicant meets the requirements of G.S. 90-629(1), (2), (3), and (6) and submits the required application and fees to the Board.
- (2) The applicant currently holds a valid license, certificate, or registration as a massage and bodywork therapist in another jurisdiction, and that jurisdiction's requirements for licensure, certification, or registration as a massage and bodywork therapist are substantially equivalent to or exceed the requirements for licensure under this Article.
- (3) The applicant is currently a practitioner in good standing, with no disciplinary proceeding or unresolved complaint pending in any jurisdiction at the time a license is to be issued in this State.
- (4) The applicant passes a jurisprudence examination administered by the Board regarding laws and rules adopted by the Board for licensure under this Article.
- (5) The applicant, including applicants credentialed in a foreign country, demonstrates satisfactory proof of proficiency in the English language.

(b) The Board may issue a license by endorsement to a practitioner from another state that does not license, certify, or register massage and bodywork therapists if all of the following qualifications are met:

- (1) The applicant meets the requirements of G.S. 90-629(1), (2), (3), and (6) and submits the required application and fees to the Board.
- (2) The applicant has passed a competency assessment examination that meets generally accepted psychometric principles and standards and is approved by the Board.
- (3) The applicant has graduated from a massage and bodywork therapy school that: (i) offers a curriculum that meets or is substantially equivalent to the standards set forth in the Board's criteria for school approval; and (ii) is licensed or approved by the regulatory authority for schools of massage and bodywork therapy in the state, province, territory, or country in which it operates or is exempt by law.
- (4) The applicant is currently a practitioner in good standing, with no disciplinary proceeding or unresolved complaint pending in any jurisdiction at the time a license is to be issued in this State.
- (5) The applicant passes a jurisprudence examination administered by the Board regarding laws and rules adopted by the Board for licensure under this Article.
- (6) The applicant, including an applicant credentialed in a foreign country, demonstrates satisfactory proof of proficiency in the English language.
- (7) Notwithstanding the requirements of subdivisions (2) and (3) of this subsection, the applicant has other credentials, to be reviewed by the Board on a case-by-case basis, that are deemed by the Board to be substantially equivalent to the requirements in subdivisions (2) and (3) of this subsection.

(c) The Board shall maintain a list of jurisdictions whose regulatory standards for the practice of massage and bodywork therapy have been determined by the Board to be substantially equivalent to or to exceed the requirements for licensure under this Article. (2008-224, s. 12.)

§ 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.)

§ 90-631.1. Massage and bodywork therapy school approval required.

Unless exempt from the Board approval process, no individual, association, partnership, corporation, or other entity shall open, operate, or advertise a massage and bodywork therapy school in this State unless it has first complied with all the requirements of this Article and rules adopted by the Board and has been approved by the Board. (2008-224, s. 15.)

§ 90-631.2. Authority to establish fees for massage and bodywork therapy school approval.

(a) The Board shall establish a schedule of fees for approvals and renewals granted and for inspections performed pursuant to this Article. The fees collected under this section are intended to cover the administrative costs of the approval programs. No fee for application approval or renewal of approval shall be refunded in the event the application is rejected or the approval suspended or revoked.

(b) Fees for Board approval of schools are as follows:

(1) Request for Application Approval Package	\$20.00
(2) Initial application for approval (one program)	2,000.00
(3) Initial application for approval of additional programs (same location)	750.00
(4) Inspection for initial approval or renewal (one program)	1,500.00
(5) Inspection for initial approval or renewal of additional programs (same location)	500.00
(6) Renewal of approval (one program)	1,000.00
(7) Renewal of approval (each additional program)	750.00

(c) Renewal inspections shall not occur more frequently than every three years, unless necessary.

(d) A school that is required to have more than one inspection in a fiscal year in order to investigate or verify areas of noncompliance with the standards for school approval shall pay a fee of one thousand five hundred dollars (\$1,500) for each additional inspection. (2008-224, s. 15.)

§ 90-631.3. Grounds for suspension, revocation, or refusal of massage and bodywork therapy school approval; notice and hearing; judicial review.

(a) The Board may deny, suspend, revoke, or refuse to approve a massage and bodywork therapy school 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 school.
- (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 students must complete the minimum standards in order to graduate.
- (4) Operating a massage and bodywork therapy school 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 school as approved by this Board.
- (8) Failure to allow authorized representatives of the Board to conduct inspections of the massage and bodywork therapy school or refusing to make available to the Board, following written notice to the massage and bodywork therapy school, 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 United States Department of Education Office of Postsecondary Education of a show cause action, probation action, or denial of accreditation.
- (10) The applicant for or holder of massage and bodywork therapy school approval has pleaded guilty, entered a plea of nolo contendere, or has been found guilty of a crime involving moral turpitude by a judge or jury in any state or federal court.

(b) A refusal to issue, refusal to renew, or suspension or revocation of massage and bodywork therapy school approval under this section shall be made in accordance with Chapter 150B of the General Statutes. (2008-224, s. 15.)

§ 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.)

§ 90-634. Enforcement; injunctive relief.

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

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

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

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

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

(c) The Board may make application to superior court for an order enjoining a violation of this Article. Upon a showing by the Board that a person, association, partnership, corporation, or other entity has violated or is about to violate this Article, the court may grant an injunction, restraining order, or take other appropriate action. (1998-230, s. 10; 2008-224, s. 18; 2009-570, s. 12.)

§ 90-634.1. Civil penalties; disciplinary costs.

(a) Authority to Assess Civil Penalties. - The Board may assess a civil penalty not in excess of one thousand dollars (\$1,000) for the violation of any section of this Article or the violation of any rules adopted by the Board. The continuation of the same act for which the penalty is imposed shall not be the basis for an additional penalty unless the penalty is imposed against the same party who has repeated the same act for which the discipline has previously been imposed. The clear proceeds of any civil penalty assessed under this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) Consideration Factors. - Before imposing and assessing a civil penalty, the Board shall consider the following factors:

- (1) The nature, gravity, and persistence of the particular violation.
- (2) The appropriateness of the imposition of a civil penalty when considered alone or in combination with other punishment.
- (3) Whether the violation was willful and malicious.
- (4) Any other factors that would tend to mitigate or aggravate the violations found to exist.

(c) Schedule of Civil Penalties. - The Board shall establish a schedule of civil penalties for violations of this Article and rules adopted by the Board.

(d) Transcriptions Costs. - The Board may assess the costs of transcriptions of a disciplinary hearing held by the Board or the Office of Administrative Hearings to include the recording of the hearing by a court reporter and transcription of the proceeding against a person found to be in violation of this Article or rules adopted by the Board. (2003-348, s. 4; 2008-224, s. 19.)

§ 90-635. Third-party reimbursement.

Nothing in this Article shall be construed to require direct third-party reimbursement to persons licensed under this Article. (1998-230, s. 10.)

§ 90-636. Regulation by county or municipality.

Nothing in this Article shall be construed to prohibit a county or municipality from regulating persons covered by this Article, however, a county or municipality may not impose regulations that are inconsistent with this Article. (1998-230, s. 10.)

§§ 90-637 through 90-639. Reserved for future codification purposes.

Chapter 132.

Public Records.

§ 132-1. "Public records" defined.

(a) "Public record" or "public records" shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions. Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government.

(b) The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law. As used herein, "minimal cost" shall mean the actual cost of reproducing the public record or public information. (1935, c. 265, s. 1; 1975, c. 787, s. 1; 1995, c. 388, s. 1.)

§ 132-1.4. Criminal investigations; intelligence information records; Innocence Inquiry Commission records.

(a) Records of criminal investigations conducted by public law enforcement agencies, records of criminal intelligence information compiled by public law enforcement agencies, and records of investigations conducted by the North Carolina Innocence Inquiry Commission, are not public records as defined by G.S. 132-1. Records of criminal investigations conducted by public law enforcement agencies or records of criminal intelligence information may be released by order of a court of competent jurisdiction.

(b) As used in this section:

- (1) "Records of criminal investigations" means all records or any information that pertains to a person or group of persons that is compiled by public law enforcement agencies for the purpose of attempting to prevent or solve violations of the law, including information derived from witnesses, laboratory tests, surveillance, investigators, confidential informants, photographs, and measurements. The term also includes any records, worksheets, reports, or analyses prepared or conducted by the North Carolina State Crime Laboratory at the request of any public law enforcement agency in connection with a criminal investigation.
- (2) "Records of criminal intelligence information" means records or information that pertain to a person or group of persons that is compiled by a public law enforcement agency in an effort to anticipate, prevent, or monitor possible violations of the law.
- (3) "Public law enforcement agency" means a municipal police department, a county police department, a sheriff's department, a company police agency commissioned by the Attorney General pursuant to G.S. 74E-1, et seq., and any State or local agency, force, department, or unit responsible for investigating, preventing, or solving violations of the law.
- (4) "Violations of the law" means crimes and offenses that are prosecutable in the criminal courts in this State or the United States and infractions as defined in G.S. 14-3.1.
- (5) "Complaining witness" means an alleged victim or other person who reports a violation or apparent violation of the law to a public law enforcement agency.

(c) Notwithstanding the provisions of this section, and unless otherwise prohibited by law, the following information shall be public records within the meaning of G.S. 132-1.

- (1) The time, date, location, and nature of a violation or apparent violation of the law reported to a public law enforcement agency.
- (2) The name, sex, age, address, employment, and alleged violation of law of a person arrested, charged, or indicted.
- (3) The circumstances surrounding an arrest, including the time and place of the arrest, whether the arrest involved resistance, possession or use of weapons, or pursuit, and a description of any items seized in connection with the arrest.
- (4) The contents of "911" and other emergency telephone calls received by or on behalf of public law enforcement agencies, except for such contents that reveal the natural voice, name, address, telephone number, or other information that may identify the caller, victim, or witness. In order to protect the identity of the complaining witness, the contents of "911" and other emergency telephone calls may be released pursuant to this section in

the form of a written transcript or altered voice reproduction; provided that the original shall be provided under process to be used as evidence in any relevant civil or criminal proceeding.

(5) The contents of communications between or among employees of public law enforcement agencies that are broadcast over the public airways.

(6) The name, sex, age, and address of a complaining witness.

(d) A public law enforcement agency shall temporarily withhold the name or address of a complaining witness if release of the information is reasonably likely to pose a threat to the mental health, physical health, or personal safety of the complaining witness or materially compromise a continuing or future criminal investigation or criminal intelligence operation. Information temporarily withheld under this subsection shall be made available for release to the public in accordance with G.S. 132-6 as soon as the circumstances that justify withholding it cease to exist. Any person denied access to information withheld under this subsection may apply to a court of competent jurisdiction for an order compelling disclosure of the information. In such action, the court shall balance the interests of the public in disclosure against the interests of the law enforcement agency and the alleged victim in withholding the information. Actions brought pursuant to this subsection shall be set down for immediate hearing, and subsequent proceedings in such actions shall be accorded priority by the trial and appellate courts.

(e) If a public law enforcement agency believes that release of information that is a public record under subdivisions (c)(1) through (c)(5) of this section will jeopardize the right of the State to prosecute a defendant or the right of a defendant to receive a fair trial or will undermine an ongoing or future investigation, it may seek an order from a court of competent jurisdiction to prevent disclosure of the information. In such action the law enforcement agency shall have the burden of showing by a preponderance of the evidence that disclosure of the information in question will jeopardize the right of the State to prosecute a defendant or the right of a defendant to receive a fair trial or will undermine an ongoing or future investigation. Actions brought pursuant to this subsection shall be set down for immediate hearing, and subsequent proceedings in such actions shall be accorded priority by the trial and appellate courts.

(f) Nothing in this section shall be construed as authorizing any public law enforcement agency to prohibit or prevent another public agency having custody of a public record from permitting the inspection, examination, or copying of such public record in compliance with G.S. 132-6. The use of a public record in connection with a criminal investigation or the gathering of criminal intelligence shall not affect its status as a public record.

(g) Disclosure of records of criminal investigations and criminal intelligence information that have been transmitted to a district attorney or other attorney authorized to prosecute a violation of law shall be governed by this section and Chapter 15A of the General Statutes.

(h) Nothing in this section shall be construed as requiring law enforcement agencies to disclose the following:

(1) Information that would not be required to be disclosed under Chapter 15A of the General Statutes; or

(2) Information that is reasonably likely to identify a confidential informant.

(i) Law enforcement agencies shall not be required to maintain any tape recordings of "911" or other communications for more than 30 days from the time of the call, unless a court of competent jurisdiction orders a portion sealed.

(j) When information that is not a public record under the provisions of this section is deleted from a document, tape recording, or other record, the law enforcement agency shall

make clear that a deletion has been made. Nothing in this subsection shall authorize the destruction of the original record.

(k) The following court records are public records and may be withheld only when sealed by court order: arrest and search warrants that have been returned by law enforcement agencies, indictments, criminal summons, and nontestimonial identification orders.

(l) Records of investigations of alleged child abuse shall be governed by Article 29 of Chapter 7B of the General Statutes. (1993, c. 461, s. 1; 1998-202, s. 13(jj); 2006-184, s. 7; 2010-171, s. 5; 2011-321, s. 1; 2013-360, s. 17.6(o).)

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

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

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

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

(d) Repealed by Session Laws 2016-117, s. 2(o), effective October 1, 2016.

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

(e1) When the Board receives a complaint regarding the care of a patient, the Board shall provide the licensee with a copy of the complaint as soon as practical and inform the complainant of the disposition of the Board's inquiry into the complaint and the Board's basis for that disposition. If providing a copy of the complaint identifies an anonymous complainant or compromises the integrity of an investigation, the Board shall provide the licensee with a summary of all substantial elements of the complaint. Upon written request of a patient, the Board may provide the patient a licensee's written response to a complaint filed by the patient with the Board regarding the patient's care. Upon written request of a complainant, who is not the patient but is authorized by State and federal law to receive protected health information about the patient, the Board may provide the complainant a licensee's written response to a complaint filed with the Board regarding the patient's care. Any information furnished to the patient or complainant pursuant to this subsection shall be inadmissible in evidence in any civil proceeding. However, information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were included in the Board's review or were the subject of information furnished to the patient or complainant pursuant to this subsection.

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

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

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

agency or district attorney of the district in which the offense was committed.

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

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

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

(k) The Board, its members and staff, may release confidential or nonpublic information to any health care licensure board in this State or another state or authorized Department of Health and Human Services personnel with enforcement or investigative responsibilities about the issuance, denial, annulment, suspension, or revocation of a license, or the voluntary surrender of a license by a licensee of the Board, including the reasons for the action, or an investigative report made by the Board. The Board shall notify the licensee within 60 days after the information is transmitted. A summary of the information that is being transmitted shall be furnished to the licensee. If the licensee requests in writing within 30 days after being notified that the information has been transmitted, the licensee shall be furnished a copy of all information so transmitted. The notice or copies of the information shall not be provided if the information relates to an ongoing criminal investigation by any law enforcement agency or authorized Department of Health and Human Services personnel with enforcement or investigative responsibilities. (1858-9, c. 258, s. 12; Code, s. 3129; Rev., s. 4500; C.S., s. 6620; 1921, c. 47, s. 6; 1977, c. 838, s. 5; 1993 (Reg. Sess., 1994), c. 570, s. 6; 1995, c. 94, s. 17; 1997-481, s. 4; 2006-144, s. 7; 2007-346, s. 22; 2009-363, s. 4; 2009-558, s. 6; 2016-117, s. 2(o).)

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2017

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1

SENATE BILL 73*

Short Title: Modernize Nursing Practice Act. (Public)

Sponsors: Senators Hise, Pate, Krawiec (Primary Sponsors); Cook, Daniel, J. Davis, Rabin, Randleman, and Sanderson.

Referred to: Rules and Operations of the Senate

February 14, 2017

A BILL TO BE ENTITLED
AN ACT UPDATING AND MODERNIZING THE NURSING PRACTICE ACT.
The General Assembly of North Carolina enacts:

SECTION 1. G.S. 90-171.20 reads as rewritten:

"§ 90-171.20. Definitions.

As used in this Article, unless the context requires otherwise:

(1) Advanced assessment. – The taking by an advanced practice registered nurse of the history, physical, and psychological assessment of a patient's signs, symptoms, pathophysiologic status, and psychosocial variations in the determination of differential diagnoses and treatment.

(1a) Advanced practice registered nurse or APRN. – An individual licensed by the Board as an advanced practice registered nurse within one of the following four roles:

a. Nurse practitioner or NP.

b. Certified nurse midwife or CNM.

c. Clinical nurse specialist or CNS.

d. Certified registered nurse anesthetist or CRNA.

(1b) ~~"Board"~~ means the Board. – The North Carolina Board of Nursing.

(2) ~~"Health care provider"~~ means any Health care provider. – Any licensed health care professional and any agent or employee of any health care institution, health care insurer, health care professional school, or a member of any allied health profession. For purposes of this Article, a person enrolled in a program that prepares the person to be a licensed health care professional or an allied health professional shall be deemed a health care provider.

(3) ~~"License"~~ means a License. – A permit issued by the Board to practice nursing as an advanced practice registered nurse, as a registered nurse-nurse, or as a licensed practical nurse, including a renewal or reinstatement thereof.

(3a) Nurse anesthesia activities. – Consist of the following activities, including clinical activities:

a. Preanesthesia preparation and evaluation of the client, including the following:

1. Performing a preoperative health assessment.

2. Recommending, requesting, and evaluating pertinent diagnostic studies.

3. Selecting and administering preanesthetic medications.



The Board may reinstate a revoked license, revoke censure or probative terms, or remove other licensure restrictions when it finds that the reasons for revocation, censure or probative terms, or other licensure restrictions no longer exist and that the nurse or applicant can reasonably be expected to safely and properly practice nursing."

SECTION 18. G.S. 90-171.37A(a) reads as rewritten:

"§ 90-171.37A. Use of hearing committee and depositions.

(a) The Board, in its discretion, may designate in writing three or more of its members to conduct hearings as a hearing committee to ~~take~~receive evidence. A majority of the hearing committee shall be licensed nurses."

SECTION 19. Article 9A of Chapter 90 of the General Statutes is amended by adding new sections to read:

"§ 90-171.37B. Board to keep public records.

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

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

(1) A Board investigative report.

(2) The identity of a nontestifying complainant.

(3) Attorney-client communications, attorney work product, or other materials covered by a privilege recognized by the Rules of Civil Procedure or the Rules of Evidence.

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

(d) If investigative information in the possession of the Board, its employees, or agents indicates that a crime may have been committed, the Board may report the information to the appropriate law enforcement agency or district attorney of the district in which the offense was committed. Such information shall be confidential under G.S. 132-1.4.

(e) The Board shall cooperate with and assist a law enforcement agency or district attorney conducting a criminal investigation or prosecution of a licensee by providing information that is relevant to the criminal investigation or prosecution to the investigating agency or district

attorney. Information disclosed by the Board to an investigative agency or district attorney remains confidential and may not be disclosed by the investigating agency except as necessary to further the investigation.

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

(1) Any felony arrest or indictment.

(2) Any arrest for driving while impaired or driving under the influence.

(3) Any arrest or indictment for the possession, use, or sale of any controlled substance.

(g) The Board, its members, and staff may release confidential or nonpublic information to any health care licensure board in this State or another state or authorized Department of Health and Human Services personnel with enforcement or investigative responsibilities about the issuance, denial, annulment, suspension, or revocation of a license, or the voluntary surrender of a license by a licensee of the Board, including the reasons for the action, or an investigative report made by the Board. The Board shall notify the licensee within 60 days after the information is transmitted. A summary of the information that is being transmitted shall be furnished to the licensee. If the licensee requests in writing within 30 days after being notified that the information has been transmitted, the licensee shall be furnished a copy of all information so transmitted. The notice or copies of the information shall not be provided if the information relates to an ongoing criminal investigation by any law enforcement agency or authorized Department of Health and Human Services personnel with enforcement or investigative responsibilities.

"§ 90-171.37C. Service of notices.

Any notice required by this Article may be served either personally by an employee of the Board or by an officer authorized by law to serve process, or by registered or certified mail, return receipt requested, directed to the licensee or applicant at his or her last known address as shown by the records of the Board. If notice is served personally, it shall be deemed to have been served at the time when the officer or employee of the Board delivers the notice to the person addressed or delivers the notice at the licensee's or applicant's last known address as shown by records of the Board with a person of suitable age and discretion then residing therein. Where notice is served in a manner authorized by Rule 4(j) of the N.C. Rules of Civil Procedure, it shall be deemed to have been served on the date borne by the return receipt showing delivery of the notice to the licensee's or applicant's last known address as shown by the records of the Board, regardless of whether the notice was actually received or whether the notice was unclaimed or undeliverable for any reason."

SECTION 20. G.S. 90-171.39 reads as rewritten:

"§ 90-171.39. Approval.

The Board shall designate persons to ~~survey~~ review proposed nursing programs, including the ~~clinical facilities programs~~. The persons designated by the Board shall submit a ~~written~~ report of the ~~survey~~ review to the ~~Board~~ Board in the manner prescribed by the Board. If in the opinion of the Board the standards for approved nursing education are met, the program shall be given approval."

SECTION 21. G.S. 90-171.40 reads as rewritten:

"§ 90-171.40. Ongoing approval.

The Board shall review all nursing programs in the State at least every ~~eight~~ 10 years or more often as considered necessary. If the Board determines that any approved nursing program does not meet or maintain the standards required by the Board, the Board shall give written notice specifying the deficiencies to the institution responsible for the program. The Board shall ~~withdraw~~ evaluate and take appropriate action, up to and including withdrawing approval from a program that fails to correct deficiencies within a reasonable time. The Board shall publish ~~annually~~ a list of nursing programs in this State showing their approval status."

SECTION 22. G.S. 90-171.42(a) reads as rewritten:

1 **SECTION 28.** Article 9A of Chapter 90 of the General Statutes is amended by adding
2 a new section to read:

3 **"§ 90-171.49. Disasters and emergencies.**

4 In the event of an occurrence that the Governor of the State of North Carolina has declared a
5 state of emergency, or in the event of an occurrence for which a county or municipality has
6 enacted an ordinance to deal with states of emergency under G.S. 166A-19.31, or to protect the
7 public health, safety, or welfare of its citizens under Article 22 of Chapter 130A of the General
8 Statutes, G.S. 160A-174(a) or G.S. 153A-121(a), as applicable, the Board may waive the
9 requirements of this Article in order to permit the provision of emergency health services to the
10 public."

11 **SECTION 29.** G.S. 90-171.28 and Article 10A of Chapter 90 of the General Statutes
12 are repealed.

13 **SECTION 30.** This act becomes effective January 1, 2018.

REQUEST FOR TECHNICAL CHANGE

AGENCY: Board of Massage and Bodywork Therapy

RULE CITATION: 21 NCAC 30 .0903

DEADLINE FOR RECEIPT: Thursday, March 9, 2017

PLEASE NOTE: 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.

Line 5, add a comma after "file"

Line 15, replace "must" with "shall"

Lines 22 thru 28, please clarify the Board's statutory authority to make this information confidential, or to justify redactions when released. The Board does not qualify as a "public law enforcement agency" as set forth in [G.S. 132-1.4](#), and there is no exception to G.S. 132 set forth in [G.S. 93B](#) or [150B](#) for the collection of investigative information. Please review and supplement with appropriate statutory authority.

Lines 33, 34, and 36, replace "will" with "shall"

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

Abigail M. Hammond
Commission Counsel
Date submitted to agency: Thursday, February 23, 2017

21 NCAC 30 .0903 is proposed for amendment as published in 31:10 NCR 979-980 with changes as follows:

21 NCAC 30 .0903 ACTION ON A COMPLAINT

Action on a complaint consists of the following:

- (1) The Board shall receive and acknowledge complaints, open a file and initiate complaint tracking.
- (2) Complaints shall be screened to determine jurisdiction and the type of response appropriate for the complaint.
- (3) Investigation:
 - (a) If the facts indicate a Practice Act violation that cannot be verified and the complaint can be handled without an investigation, the Board may request that the licensee or school cease conduct that could result in a Practice Act violation.
 - (b) If the facts indicate a Practice Act violation, the Board shall commence an investigation. The Board may utilize additional personnel such as licensees, law enforcement officials, or other technical personnel that may be required in a particular case. If a Board member is utilized in the investigation, due process must be observed by separating
 - (i) investigation;
 - (ii) prosecution; and
 - (iii) hearings and final decision-making.No Board member shall participate in more than one of these three steps in the enforcement process.
 - (c) A confidential report of each investigation shall be prepared for the Board's review.
 - (d) Prior to a decision rendered by the Board, any materials generated or obtained by the Board in conducting an investigation shall be considered confidential investigation records not subject to the Public Records Act (Chapter 132 of the General Statutes); however, copies of such materials may be provided to a licensee subject to disciplinary action, or to the licensee's attorney, so long as identifying information concerning the treatment or delivery of professional services to a patient who has not consented to its public disclosure is deleted or redacted.
- (4) Formal and Informal Hearings:
 - (a) The Board, after review of an investigative file, may schedule an informal meeting.
 - (b) If the matter cannot be resolved informally, then a formal hearing shall be held.
 - (c) Members of the Board shall not make ex parte communication with parties to a hearing.
- (5) Final Orders: Within 60 days, the Board will issue its final decision in writing specifying the date on which it will take effect. The Board will serve one copy of the decision on each party to the hearing.
- (6) Compliance: The Board Chair will cause a follow-up inquiry to determine that the orders of the Board are being obeyed.

38

39 *History Note:* Authority G.S. 90-626(5), (6), (7), (13);

40 Temporary Adoption Eff. February 15, 2000;

41 Eff. April 1, 2001;

42 Amended Eff. April 1, 2017; September 2, 2005;

43 Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. November

44 12, 2014.

Hammond, Abigail M

From: E. Ann Christian <e.ann.christian@gmail.com>
Sent: Wednesday, March 08, 2017 9:07 AM
To: rrc.comments; Charles Wilkins
Subject: Fwd: Proposed Rule 21 NCAC 30 .0906
Attachments: RESOLUTION-NCBMBT-17.doc

All,

This is being re-sent to comply with the simultaneous sending requirement stating that the comments must be sent to the agency's rule-making coordinator, Mr. Charles Wilkins, Legal Counsel to the NCBMBT (Rule 26 NCAC 05 .0103[c]).

Ann Christian

----- Forwarded message -----

From: **E. Ann Christian** <e.ann.christian@gmail.com>
Date: Tue, Mar 7, 2017 at 4:58 PM
Subject: Fwd: Proposed Rule 21 NCAC 30 .0906
To: rrc.comments@oah.nc.gov

----- Forwarded message -----

From: **E. Ann Christian** <e.ann.christian@gmail.com>
Date: Tue, Mar 7, 2017 at 4:54 PM
Subject: Proposed Rule 21 NCAC 30 .0906
To: rrc.comments@oah.gov

Date: March 7, 2017

To: Members and Staff
NC Rules Review Commission

From: E. Ann Christian
Legal Counsel
NC Chapter of the American Massage Therapy Association

Re: Proposed Rule 21 NCAC 30 .0906 (SUMMARY SUSPENSION)

Please find attached a Resolution adopted by the AMTA-NC Board on January 22, 2017 in opposition to proposed Rule 21 NCAC 30 .0906 (SUMMARY SUSPENSION) that was filed by the NC Board of Massage and Bodywork Therapy and is scheduled for review by the Rules Review Commission during its upcoming March meeting.

The proposed Rule fails to fall within the authority delegated to the NC Board of Massage and Bodywork Therapy. The authority cited for this proposed Rule is simply the Board's general authority to "(i)ssue, renew, deny, suspend, or revoke licenses under this Article()" (G.S. 90-626[3]), recognizing the Board's authority to take action in the ordinary course of business of the Board. Nowhere does the Board cite authority for this extraordinary, expedited action without a due process right to hearing for a extended period of time (sixty [60] days), thus depriving a licensee the opportunity to provide services to clients and the opportunity to earn his or her livelihood.

Furthermore, the proposed Rule is not reasonably necessary to implement or interpret the Board's ability to protect the public as set forth in its general authority to deny, suspend, or revoke licenses. This method of implementation is unnecessary in that the Board clearly possesses the means to take immediate action via its power to make application to superior court for an order enjoining a violation of the Massage and Bodywork Therapy Practice Act and, in addition, it may impose civil penalties.

Finally, the requirement that the Board proceed down the avenue of injunctive action is consistent with the recently decided North Carolina Board of Dental Examiners v Federal Trade Commission case. This case requires occupational licensing boards that seek state-action immunity to be governed by the active supervision of the State. Requiring the Board of Massage and Bodywork Therapy to take this avenue of action insures that this Board composed of a controlling number of participants in the occupation that the Board regulates receive adequate oversight by the courts.

Please contact me if I can be of further assistance with the review of this proposed Rule by the Staff or Members of the Rules Review Commission.

Cc: CWilkins@bws-law.com

**RESOLUTION: CONCERNING THE AMERICAN MASSAGE
THERAPY ASSOCIATION--NORTH CAROLINA CHAPTER
OPPOSITION TO PROPOSED RULE 21 NCAC 30 .0906,
CAPTIONED “SUMMARY SUSPENSION”**

WHEREAS, the North Carolina Chapter of the American Massage Therapy Association has reviewed proposed Rule 21 NCAC 30 .0906, captioned “SUMMARY SUSPENSION” governing the authority of the North Carolina Board of Massage and Bodywork Therapy that reads as follows:

The Board may impose an immediate suspension of licensure in cases where the continued practice of a massage and bodywork therapist poses an imminent and continuing threat to public health, welfare or safety so long as the Board schedules a hearing to occur within 60 days of the effective date of the suspension order.

WHEREAS, the authority cited for this proposed Rule is insufficient due to the fact that it is only general authority granting the North Carolina Board of Massage and Bodywork Therapy the power to “[i]ssue, renew, deny, suspend, or revoke licenses under this Article[]” (N.C.G.S. 90-626[3]) as opposed to specific authority required for the promulgation of a Rule to shortcut due process with immediate and summary suspension;

WHEREAS, this authority for summary suspension would grant the North Carolina Board of Massage and Bodywork Therapy sweeping powers that may be imposed in an arbitrary and capricious manner due to the absence of clear and concisely-defined precedent specific conditions;

WHEREAS, the livelihood of a massage therapist would be threatened by granting the North Carolina Board of Massage and Bodywork Therapy the authority to impose an immediate suspension of a license without providing the Respondent massage therapist the opportunity to provide a defense as provided by the Constitutional guarantee of due process of law;

WHEREAS, the United States Supreme Court judgment handed down on March 30, 2015 after hearing the North Carolina State Board of Dental Examiners v Federal Trade Commission case, clearly mandates to North Carolina that all occupational licensing boards must be governed by active supervision by the State;

WHEREAS, this authority for summary suspension is unnecessary because the North Carolina Board of Massage and Bodywork Therapy may exercise the power to suspend a license in the face of an imminent and continuing threat to public health, welfare or safety with active State supervision in place pursuant to the authority granted it by N.C.G.S. 90-634 authorizing it to

make application to superior court for an order enjoining a violation of Article 36 of the North Carolina General Statutes governing massage and bodywork practice.

WHEREAS, currently additional enforcement authority exists whereby the North Carolina Board of Massage and Bodywork Therapy may impose civil penalties pursuant to Section 90-634.1 of the North Carolina General Statutes where the practice of a massage and bodywork therapist could result in harm or injury to the public (N.C.G.S. 90-631.3[a][5]).

THEREFORE, BE IT RESOLVED that the North Carolina Chapter of the American Massage Therapy Association requests that the North Carolina Board of Massage and Bodywork Therapy vote not to adopt the proposed Rule 21 NCAC 30 .0906, captioned “SUMMARY SUSPENSION” to the end that this Rule will not be adopted into the North Carolina Administrative Code as the law of this State.

1 21 NCAC 30 .0906 is proposed with changes as published in 31:10 NCR 980 as follows:

2
3 **21 NCAC 30 .0906 SUMMARY SUSPENSION**

4 The Board may impose an immediate suspension of licensure in cases where the continued practice of a massage
5 and bodywork therapist poses an imminent and continuing threat to public health, ~~welfare~~ welfare, or safety so long
6 as the Board schedules a hearing to occur within 60 days of the effective date of the suspension order.

7
8 History Note: Authority G.S. 150B-3; 90-626(3)

9 Eff. April 1, 2017.

§ 150B-3. Special provisions on licensing.

(a) When an applicant or a licensee makes a timely and sufficient application for issuance or renewal of a license or occupational license, including the payment of any required license fee, the existing license or occupational license does not expire until a decision on the application is finally made by the agency, and if the application is denied or the terms of the new license or occupational license are limited, until the last day for applying for judicial review of the agency order. This subsection does not affect agency action summarily suspending a license or occupational license under subsections (b) and (c) of this section.

(b) Before the commencement of proceedings for the suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of any license other than an occupational license, the agency shall give notice to the licensee, pursuant to the provisions of G.S. 150B-23. Before the commencement of such proceedings involving an occupational license, the agency shall give notice pursuant to the provisions of G.S. 150B-38. In either case, the licensee shall be given an opportunity to show compliance with all lawful requirements for retention of the license or occupational license.

(c) If the agency finds that the public health, safety, or welfare requires emergency action and incorporates this finding in its order, summary suspension of a license or occupational license may be ordered effective on the date specified in the order or on service of the certified copy of the order at the last known address of the licensee, whichever is later, and effective during the proceedings. The proceedings shall be promptly commenced and determined.

Nothing in this subsection shall be construed as amending or repealing any special statutes, in effect prior to February 1, 1976, which provide for the summary suspension of a license.

(d) This section does not apply to the following:

- (1) Revocations of occupational licenses based solely on a court order of child support delinquency or a Department of Health and Human Services determination of child support delinquency issued pursuant to G.S. 110-142, 110-142.1, or 110-142.2.
- (2) Refusal to renew an occupational license pursuant to G.S. 87-10.1, 87-22.2, 87-44.2, or 89C-18.1, based solely on a Department of Revenue determination that the licensee owes a delinquent income tax debt. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1995, c. 538, s. 2(i); 1997-443, s. 11A.118(a); 1998-162, s. 8.)

§ 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.)

REQUEST FOR TECHNICAL CHANGE

AGENCY: Board of Massage and Bodywork Therapy

RULE CITATION: 21 NCAC 30 .0906

DEADLINE FOR RECEIPT: Thursday, March 9, 2017

PLEASE NOTE: 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.

Line 5, add a comma after "welfare"

Line 6, in light of [G.S. 150B-23\(b\)](#), is the Board within their statutory authority to set a hearing day almost 60 days outside the issuance of the suspension order when G.S. [150B-3\(c\)](#) requires that "proceedings shall be promptly commenced and determined." Furthermore, is this Rule necessary in light of the content of G.S. 150B-3(c). Please review and clarify.

Line 8, correct the history note to include the "History Note:" and "Eff.", along with the date

Line 8, add 150B-3 to the statutory authority

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

Abigail M. Hammond
Commission Counsel
Date submitted to agency: Thursday, February 23, 2017

1 21 NCAC 30 .0906 is proposed for adoption as published in 31:10 NCR 980 as follows:

2
3 **21 NCAC 30 .0906 SUMMARY SUSPENSION**

4 The Board may impose an immediate suspension of licensure in cases where the continued practice of a massage
5 and bodywork therapist poses an imminent and continuing threat to public health, welfare or safety so long as the
6 Board schedules a hearing to occur within 60 days of the effective date of the suspension order.

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