



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

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September 25, 2017

Ms. Denise Baker  
3004 Mail Service Center  
Raleigh, NC 27699-3004

Sent via electronic mail to: [denise.baker@dhhs.nc.gov](mailto:denise.baker@dhhs.nc.gov)

Re: Rules 10A NCAC 27H .0205 and .0206

Dear Ms. Baker:

At the September 21, 2017 Rules Review Commission Meeting, the Rules Review Commission reviewed rewritten Rules in response to June 15, 2017 objections. At that time, the Commission continued their objections to .0205 and .0206 in accordance with G.S. 150B-21.10.

Please note that the Rules Review Commission approved Rules 10A NCAC 27H .0202, .0203, and .0204 at the September 21, 2017 meeting. In accordance with 26 NCAC 05 .0114, The Rules Review Commission made their approval of .0203 contingent upon a technical change to Item (5). On Friday, September 22, 2017, the agency submitted a revised Rule to satisfy the contingency.

The Rules Review Commission objected to 10A NCAC 27H .0205, finding that the Commission for MH/DD/SAS lacked the statutory authority regarding (a), (e), (f), and (g).

The Rules Review Commission also objected to 10A NCAC 27H .0206, finding that (b) was ambiguous as written.

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

Sincerely,

Amber C. May  
Commission Counsel

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

### 10A NCAC 27H .0202 DEFINITIONS

For the purposes of Rules .0201 through .0207 of this ~~Section~~ Section, when a capacity evaluation is ordered by a Court to be conducted through the Local Management Entity-Managed Care Organization LME-MCO, the following terms shall have the meanings indicated:

- (1) "Forensic Evaluation" means an ~~a local~~ examination ordered by the court through the LME-MCO to determine ~~if the defendant's current mental state and whether the defendant has the capacity to proceed to trial, trial. [does not have the capacity to proceed to trial, or] needs further treatment at an inpatient facility or further evaluation at the Pre-Trial Evaluation Center.~~
- (2) ~~"Pre-Trial Evaluation Center" means the forensic unit at Dorothea Dix Hospital.~~ "Licensed Clinician" means the same as defined in Rule 10A NCAC 27G .0104.
- (3) ~~"Qualified Mental Health Professional" means the same as defined in 10A NCAC 27G .0104(e) contained in Division publication, Rules for Mental Health, Developmental Disabilities and Substance Abuse Facilities and Services, APSM 40-2.~~ "Local Certified Forensic Evaluator" means a Licensed Clinician who:
  - (a) has completed the training for certification and annual training seminars described in Rule .0204 of this Section; [and]
  - (b) is employed [by,] by an LME-MCO, if permitted pursuant to 122C-141(a), or under contract with, an LME-MCO as a [Certified] Forensic [Evaluator,]  
Evaluator; and
  - (c) is paid by the LME-MCO with public funds.
- (4) ~~"Qualified Substance Abuse Professional" means the same as defined in 10A NCAC 27G .0104(e) contained in Division publication, Rules for Mental Health, Developmental Disabilities and Substance Abuse Facilities and Services, APSM 40-2.~~ "Pre-Trial Evaluation Center" means the Forensic Services Unit located at Central Regional Hospital. [so designated by the Secretary of the North Carolina Department of Health and Human Services.]

*History Note:* Authority G.S. 15A-1002; ~~143B-147; 122C-54; 122C-115.4(a); 122C-191(b); 143B-147;~~  
Eff. July 1, 1982;  
Amended Eff. October 1, 2017; January 1, 1996; May 1, 1990.

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

### 10A NCAC 27H .0203 ELIGIBILITY FOR TRAINING

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

(1) be a qualified mental health professional or a qualified substance abuse professional; Licensed Clinician;

(2) be an employee ~~of,~~ of the LME-MCO, if permitted pursuant to 122C-141(a), or work under contract with, an ~~area program; LME-MCO; and~~

(3) provide documentation of current licensure status to the LME-MCO;

(4) provide documentation of training and expertise with the mental health, developmental disabilities, or substance abuse (mh/dd/sa) services population; and

(3)(5) have his or her name submitted as an applicant to the Pre-Trial Evaluation Center for the training and ~~registration~~ certification program by the ~~area~~ LME-MCO director.

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

*History Note:* Authority G.S. 15A-1002; ~~143B-147;~~ 122C-114; 122C-115.4(a); 122C-141; 122C-191(b); 143B-147;

*Eff. July 1, 1982;*

*Amended Eff. October 1, 2017; January 1, 1996; May 1, 1990.*

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

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

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

- (1) current laws and practices including the role of the local certified forensic evaluator in the capacity to proceed evaluation process;
- (2) procedures for conducting interviews including evaluation for the presence of mh/dd/sa disorders, or other relevant conditions;
- (3) [components of reports to be submitted to the court;] procedures for completing reports required by Rule .0207 of this Section;
- (4) process for reporting findings to the court; and
- (5) an examination at the conclusion of the training which assesses comprehension of the training material and an understanding of the duties of a local certified forensic evaluator.

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

~~(c) [Local certified forensic evaluators shall be exempt from the continuing education requirement in the calendar year in which they are first certified and shall complete the annual continuing education requirement by December 31 of the following year and each calendar year thereafter.]~~ Continuing education seminar topics may include:

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

(d) Local certified forensic evaluators shall be exempt from the continuing education requirement in the calendar year in which they are first certified. ~~[Continuing education module topics may include:~~

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

*History Note:* Authority G.S. 15A-1002; ~~143B-147; 122C-54; 122C-115.4(a); 122C-191; 143B-147;~~  
 Eff. July 1, 1982;  
 Amended Eff. October 1, 2017; May 1, 1990.

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

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

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

(a) The LME-MCO shall ensure there ~~[is a sufficient number of]~~ are local certified forensic evaluators to conduct forensic evaluations to meet the demand for forensic evaluations, based in part upon population served and the number of forensic evaluations ordered by the Court, in its catchment area.

(b) Each LME-MCO shall maintain a list of local certified forensic evaluators who are ~~[currently]~~ employed by or contracted by the LME-MCO that includes the mh/dd/sa populations for which each evaluator has reported having ~~[expertise]~~ expertise, based upon their knowledge, skills, and abilities, to conduct forensic evaluations.

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

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

(e) The LME-MCO shall maintain a ~~[log]~~ list, including the number of local forensic evaluations done in each county within its catchment area, the forensic evaluator's name and capacity opinion, the date of the evaluation, the defendant's name, gender, and criminal charge, and provide that ~~[log]~~ list to the Pre-Trial Evaluation Center on a monthly basis.

(f) The LME-MCO shall identify ~~[potentially qualified]~~ eligible individuals to enroll in training for certification to replace any evaluator whose certification has been terminated or to increase the number of evaluators in its catchment area due to increased numbers of evaluations ~~[logged]~~ ordered by the court.

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

- (1) identifying an individual who is a local certified forensic evaluator who will monitor the overall quality and outcomes of the reports of forensic evaluations completed by other local forensic evaluators; and
- (2) establishing a procedure for responding to questions or concerns related to the quality of reports of forensic evaluations completed by local certified forensic evaluators in its catchment area.

*History Note:* Authority G.S. 15A-1002; ~~143B-147;~~ 122C-114; 122C-115.4(a); 122C-141; 122C-191(b); 143B-147;

*Eff. July 1, 1982;*

*Amended Eff. October 1, 2017; May 1, 1990.*

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

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

(a) A Forensic Evaluator Registration will be declared void when: The LME-MCO shall declare a forensic evaluator certification void when: notify the Division in the following circumstances:

(1) the evaluator notifies the LME-MCO in writing that he or she no longer ~~desires~~ wishes to be registered certified; and perform the duties required by an evaluator;

~~(2) the evaluator is no longer employed by, or under contract with, an area program; or [LME MCO];~~

~~(3)~~(2) the evaluator no longer meets the ~~registration requirements~~. eligibility requirements set forth in Rule [.0203] .0203(a) of this Section;

~~((4))~~(3) the Pre-Trial Evaluation Center has notified the LME-MCO the evaluator ~~[fails]~~ failed to complete annual continuing education ~~[modules]~~ seminars as set forth in Rule .0204 of this Section; ~~[or]~~

~~((5))~~(4) the evaluator fails to perform any of the duties described in Rule .0207 of this ~~[Section.]~~ Section:  
or

(5) the Forensic Evaluator notifies the LME-MCO that he or she is no longer a Licensed Clinician.

(b) The Division shall declare a forensic evaluator certification void upon receipt of the information contained in Paragraph (a) of this Rule.

*History Note:* Authority G.S. 15A-1002; ~~143B-147;~~ 122C-114; 122C-115.4(a); 122C-141; 122C-191(b); 143B-147;

*Eff. July 1, 1982;*

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June 19, 2017

Ms. Denise Baker  
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Sent via electronic mail to: [denise.baker@dhhs.nc.gov](mailto:denise.baker@dhhs.nc.gov)

Re: Rules 10A NCAC 27H .0202, .0203, .0204, .0205, and .0206

Dear Ms. Baker:

At its meeting on March 16, 2017, the Rules Review Commission objected to Rules 10A NCAC 27H .0202, .0203, .0204, .0205, .0206, and .0207. At its meeting on June 15, 2017, the Rules Review Commission reviewed the rewritten Rules submitted by the Commission for MH/DD/SAS in response to the March 16, 2017 objections. At that time, they continued their objections to the above-referenced rules in accordance with G.S. 150B-21.9.

Please note that the Rules Review Commission approved Rule 10A NCAC 27H .0207 at the June 15, 2017 meeting.

The Rules Review Commission found that the Commission for MH/DD/SAS lacked the statutory authority to require that forensic evaluators be employed by an LME-MCO and objected to any such reference contained within Rules 10A NCAC 27H .0202 through .0206.

The Rules Review Commission objected to 10A NCAC 27H .0202, finding that the Commission for MH/DD/SAS lacked the statutory authority to require that forensic evaluators be employed by LME/MCOs.

The Rules Review Commission objected to 10A NCAC 27H .0203, finding that the Commission for MH/DD/SAS lacked the statutory authority to require LME-MCOs to submit and verify information required by this Rule, nor delegate this responsibility to the LME-MCOs. Further, the Rules Review Commission found that it was unclear how the

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LME-MCO will determine whether the evaluator has expertise as set forth in Paragraph (b).

The Rules Review Commission objected to 10A NCAC 27H .0204, specifically Subparagraph (a)(3), finding that it was unclear because it does not state what is meant by “required by law.”

The Rules Review Commission objected to 10A NCAC 27H .0205, finding that the Commission for MH/DD/SAS lacked the statutory authority to promulgate rules regarding LME-MCO oversight of forensic evaluators. Further, the Rules Review Commission found that it was unclear how the expertise of an evaluator is to be conveyed to the LME-MCO, as Rule .0205 indicates that it will be self-reporting by the evaluator, while .0203 indicates that the LME-MCO is required to determine the expertise of the evaluator. The Rules Review Commission found that as written, the Rules were unclear whether these provisions conflict with each other or whether they are different processes.

The Rules Review Commission found that while the Commission for MH/DD/SAS has shifted the actual termination of the certification to the Division in the rewritten version of Rule .0206, much of the termination responsibilities remain with the LME-MCO. As such, the Rules Review Commission objected to .0206, finding that the Commission for MH/DD/SAS lacked the authority to delegate the responsibilities related to the termination of certifications to LME-MCOs. Further, the Rules Review Commission found that it was unclear as to how the LME-MCO will know whether an individual is no longer a “licensed clinician” and whether a forensic evaluator has completed the required training.

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

Sincerely,

*Amber C. May*

Amber C. May  
Commission Counsel





**North Carolina Department of Health and Human Services  
Division of Mental Health, Developmental Disabilities and Substance Abuse Services**

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GOVERNOR

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SECRETARY

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June 13, 2017

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Sent via electronic mail to: [amber.may@oah.nc.gov](mailto:amber.may@oah.nc.gov)

Re: June 9, 2017 Letter from Richard P. Leissner, Jr., General Counsel, Trillium Health Resources

Dear Ms. May:

I have reviewed the letter, dated June 9, 2017, submitted by Mr. Richard P. Leissner, Jr., General Counsel, Trillium Health Resources, objecting to Rules 10A NCAC 27H Section .0200 as proposed for adoption by the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services (Commission). Please consider the following response to his submission.

All Directors of the Local Management Entities-Managed Care Organizations (LME-MCOs) in North Carolina, including Ms. Leza Wainwright, CEO, Trillium Health Resources, received notice of the proposed amendment to Rules 10A NCAC 27G .6702, Operations, and 10A NCAC 27H Sec. .0200, *Training and Registration of Forensic Evaluators*, (referred to collectively below as forensic evaluator rules) via email notification July 1, 2016. The notice to Ms. Wainwright was submitted to [Leza.Wainwright@trilliumnc.org](mailto:Leza.Wainwright@trilliumnc.org); this remains her current email address. In addition, Ms. Wainwright was Executive Director of East Carolina Behavioral Health, now d/b/a Trillium Health Resources, at the time the temporary forensic evaluator rules were proposed for adoption by the Commission in 2013 as described below. Mr. Leissner attributes the LME-MCO's failure to review the rules as noticed to "an apparent communication breakdown" for which the Commission is not responsible.

Per G.S. 150B-21.2(g), prior to adopting a proposed rule, the agency must "review any fiscal note that has been prepared for the proposed rule and consider any public comments received in connection with the proposed rule or the fiscal note". The Commission reviewed and considered all public comments received in response to the published forensic evaluator rules and the accompanying fiscal note. There were no comments which objected to the rules as proposed for adoption. In addition, despite having received notice of the proposed amendment of the forensic evaluator rules, none of the LME-MCO Directors, nor anyone identifying themselves as staff/employees of an LME-MCO, submitted comments to the proposed rules changes. Consequently, the Commission adopted the rules as published, with minor changes, during its November 2017 meeting. G.S. 150B-21.2(g) prohibits an agency's adoption of a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless

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the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the same for the time specified. The Commission adopted rules that were virtually identical to those published. As such, the Commission made no substantial changes to the rules that would warrant republication thereof. By his own admission, via a telephone call March 1, 2017, Mr. Leissner was not employed as Trillium's General Counsel at the time the rules were published and the notice thereof distributed. In fact, at the time Mr. Leissner contacted the agency about the proposed rules, the Commission was simply responding to requests for technical corrections and the Staff Opinion provided by the Rule Review Commission's (RRC) Counsel.

Upon learning of the proposed amendments to the forensic evaluator rules, Mr. Leissner did not submit objections to the proposed rule changes. Rather, via email March 1, 2017, he submitted what he described as "comments" which noted what he referred to as "concerns" regarding the proposed rules. These comments were provided to all members of the Commission and read aloud, in their entirety, during the March 1, 2017 meeting of the Commission. At no point did Mr. Leissner reflect or indicate that he was objecting to the rules as proposed for amendment. In addition, Mr. Leissner had been informed the Commission was amending the rules further solely in response to the requests and Staff Opinion provided by the RRC's Counsel. The Commission noted Mr. Leissner's written "concerns" yet approved the additional amendments made in response to the RRC's Counsel's request and opinion.

G.S. 150B-21.12(c) requires that "when an agency changes a rule in response to an objection by the [Rules Review] Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the Commission's continued objection and the reason for the continued objection. The Commission must also determine whether the change is substantial. In making this determination, the Commission shall use the standards set forth in G.S. 150B-21.2(g). If the change is substantial, the revised rule shall be published and reviewed in accordance with the procedure set forth in G.S. 150B-21.1(a3) and (b).

G.S. 150B-21.2(g) states "an adopted rule differs substantially from a proposed rule if it does one or more of the following:

- (1) Affects the interests of persons who, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.
- (2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.
- (3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule".

The adopted rules do not differ substantially from the rules as proposed for adoption. Rather, the language of the rules has been refined in response to requests for technical corrections made by the RRC's Counsel and the statutory authority has been further clarified in response to the objections raised by the RRC. Despite those changes, the rules as adopted do not differ substantially from those published for the reasons set forth below.

1. The scope of persons affected by the rules as adopted remains the same as that provided in the rules as published. Specifically, the rules as published and as adopted deal with licensed clinicians who conduct capacity evaluations pursuant to a contract, or employment, with the LME-MCO and submit written reports to the court regarding the evaluated individual's capacity to proceed to trial. Both the published and adopted rules identify the duties of the forensic

evaluators and those of the LME-MCO. Therefore, the interests of those persons impacted by the rules as published and as adopted remains unchanged. As such, the impact to those persons (i.e., forensic evaluators) and entities (i.e., LME-MCO) could not only be reasonably determined during publication but also remains constant.

2. The subject matter of the rules as published and as adopted remains unchanged. Both deal with capacity evaluations, submission of written reports regarding capacity to the court, eligibility criteria, training and certification requirements, LME-MCO oversight of the forensic evaluator process, criteria for terminating an evaluator's certification, the duties of the forensic evaluator, and report requirements. No new subject matter has been introduced.
3. The effect of the adopted rules is identical to that provided in the rules as published. The only significant difference in the rules is that the language of the rules has been refined in response to requests for technical corrections made by the RRC's Counsel and the statutory authority for the language of the rules has been further clarified. Otherwise, the overall requirements of the rules remain unchanged.

Given that there are no substantial differences between the published and adopted rules, republication is not required.

Mr. Leissner further alleges that the rules are not reasonably necessary to implement or interpret an enactment of the General Assembly namely S.L. 2013-18, Section 9. He then cites to the applicable portion of the session law and to the timeframe it set forth for adoption of the rules. S.L. 2013-18 was effective April 3, 2013 and required adoption of the criteria mandated therein by December 1, 2013. At the time the session law became effective, existing rules already set forth the criteria for conducting forensic evaluations, required that the evaluator be employed by or contract with an LME-MCO, and provided the process for becoming registered as a forensic evaluator. Instead of a registration process, rules to be adopted per S.L. 2013-18 required certification as well as a continuing education processes. In an effort to comply with the December 1, 2013 date imposed by the session law, and to avoid potential contradictions with its existing forensic evaluator rules, the Commission chose to amend its existing rules via the temporary rulemaking process. For the most part, the forensic evaluator rules proposed for adoption as temporary rules mirror the permanent rules now pending review by the RRC. The Commission took final action on the proposed temporary rules November 27, 2013. However, subsequent to objections raised by the RRC, the Commission chose to withdraw the temporary rules from consideration by the RRC via letter dated March 7, 2014 and pursue, instead, adoption of the proposed changes as permanent rules. Please note, however, that had the Commission been successful in adopting the temporary rules, it would have had to implement the changes via permanent rulemaking procedures as temporary rules expire as set forth in G.S. 150B-21.1(d). Mr. Leissner also opines the adopted rules, exceed the requirements imposed by S.L. 2013-18. However, in choosing to amend its existing forensic evaluator rules, nothing prohibited the Commission from exercising additional authority within its purview.

The proposed rules are consistent with the Commission's authority to write rule as cited in the history note provided for each rule. Mr. Leissner challenges the Commission's authority to require that the forensic evaluators be employees or contractors of the LME-MCO as set forth in Rule 27H .0202. His challenge appears based upon the mistaken belief that the Commission is attempting to define the LME-MCO as a facility. The Commission is by no means asserting that the LME-MCO is a "facility" as that term is defined in G.S. 122C-3(14). Rather, the Commission cites G.S. 122C-54 as a source of the requirements of the capacity report the forensic evaluator is required to submit to the court. In addition,

the Commission cites to G.S. 122C-115.4(a) as one source of the LME-MCO's responsibility for management and oversight of the public system of mental health, developmental disabilities, and substance abuse services at the community level as well as its responsibility for planning, developing, implementing, and monitoring services within its designated catchment area. However, Mr. Leissner is likely aware that each LME-MCO is mandated to contract with other qualified public or private providers, agencies, institutions, or resources for the provision of services, and, subject to the approval of the Secretary, is authorized to provide services directly. [G.S. 122C-141(a)] Mr. Leissner is likely also aware that each area program is already required to provide or contract for the provision of forensic screening and evaluations for individuals of all disability groups per Rule 10A NCAC 27G .0501(12). Per G.S. 122C-191(a), the area authority and the Secretary are jointly responsible for assuring that services provided to consumers are of the highest possible quality within available resources. None of the rules proposed for amendment as 10A NCAC 27H Section .0200 impose a requirement that the LME-MCO provide services or conduct forensic evaluations directly. Instead, as they relate to the LME-MCO, the rules focus upon the monitoring and oversight responsibilities the LME-MCO has regarding the public mental health, developmental disabilities and substance abuse service delivery system.

The Commission has clarified the location of the Pre-Trial Evaluation Center in Rule 27H .0202. The addition of the phrase "through the [LME-MCO]" is used to denote how forensic evaluations are ordered within the system as it currently operates. Specifically, the court orders the conduct of the capacity evaluation through the LME-MCO. The phrase is also intended to reflect the LME-MCO's responsibility for oversight, management, and monitoring of services conducted by the providers with whom the LME-MCO enters into contract. G.S. 122C-141(a) requires the area authority or county program to contract with other qualified public or private providers, agencies, institutions, or resources for the provision of services.

The term "applicant" has been replaced with "individual" in Rule 27H .0203 to clarify that this is not a formal application process per se. The Commission has been informed that, consistent with the requirements of G.S. 122C-141(a), the LME-MCO contracts with individuals within its catchment area to conduct court-ordered capacity evaluations. The language of Rule 27H .0203 neither implies nor mandates that a given LME-MCO assign a court-ordered capacity evaluation to an individual with whom it does not contract. The term "local forensic evaluator" is defined in Rule 27H .0203.

Mr. Leissner asserts that G.S. 122C-54 and G.S. 122C-115.4 are not germane to the content of Rule 27H .0204. G.S. 122C-115.4 was added to the history note in response to a question posed by the RRC's Counsel. However, G.S. 143B-147, also cited in the history note of the rule, is not only germane to the language of the rule but is the primary basis of the Commission's authority to adopt the rules as proposed for amendment.

The Commission recognizes that its rulemaking authority is limited to that provided in statute or in session law. Therefore the phrase "to meet the demand", found in Rule 27H .0205, is not intended to exceed the Commission's authority or to expand the responsibility of the LME-MCO as set forth in law. Furthermore, the phrase "regardless of funding available" is not included in any part of the rule. Per G.S. 122C-2, screening, assessment, and referral are core services which must be made available within available resources; this statute defines "within available resources" as "State funds appropriated and non-State funds and other resources appropriated, allocated or otherwise made available for mental health, developmental disabilities, and substance abuse services". G.S. 122C-3(35e) defines State resources as "State and federal funds and other receipts administered by the Division". However, while these statutes reference funding availability and State resources, they do not absolve the LME-MCO of its responsibility to contract with other qualified public or private providers for the provision of services in

its catchment area per G. S. 122C-141(a) or for core services listed in G.S. 122C-2. Forensic evaluations involve screening for and assessment of a defendant's capacity to proceed to trial. As a screening and assessment service, it is among the core services the LME-MCO is required to provide per G.S. 122C-2. In addition Rule 10A NCAC 27G .0501 identifies forensic screenings and evaluations as a service the LME-MCO is required to provide or contract to provide. Contrary to Mr. Leissner's assertion, the requirements the LME-MCO has to provide or contract to provide forensic evaluations is no more stringent than that already required in rule and in statute. Similarly, it is no more stringent than the requirements imposed for other services the LME-MCO is required to provide or contract to provide including outpatient, emergency, consultation, and education services for individuals of all disability groups; inpatient hospital treatment for individuals who have mental illness or substance abuse disorders; psychosocial rehabilitation services for individuals with severe and persistent mental illness; partial hospitalization services for individuals who are acutely mentally ill, etc. [Rule 10A NCAC 27G .0501] As further example, G.S. 122C-115.4(b)(8) requires each LME-MCO to develop a waiting list of persons with intellectual or developmental disorders that are waiting for specific services. Despite the requirement of this waiting list, G.S. 112.1(a)(35) makes clear that the waiting list does not create an entitlement to services.

Rule 27H .0206 speaks to both the eligibility requirements for training as a forensic evaluator as well as the initial and continuing education requirements the forensic evaluator must meet. Both are pertinent to the subject matter of the rule.

The deletion of the word "court" in Rule 27H .0207, line 4, was in error. The term has since been restored. The rules do not address the evaluations conducted by the Pre-Trial Evaluation Center. Rather, the rules address the forensic evaluations completed by local certified forensic evaluators who contract with the LME-MCO for the provision of this required, core service.

Finally, the Commission believes it has acted within its statutory authority in adopting the forensic evaluator rules and is working diligently to address the objections raised by the RRC. Please do not hesitate to contact me should you have questions regarding this correspondence.

Sincerely,



W. Denise Baker  
Rulemaking Coordinator  
Commission for MH/DD/SAS

c: Scott Stroud  
Lisa Corbett  
William Walton  
Richard P. Leissner, Jr.  
Commission for MH/DD/SAS

## **Amendment to RRC Staff Opinion filed on June 12, 2017**

Please Note: This communication is either 1) only the recommendation of an RRC staff attorney as to action that the attorney believes the Commission should take on the cited rule at its next meeting, or 2) an opinion of that attorney as to some matter concerning that rule. The agency and members of the public are invited to submit their own comments and recommendations (according to RRC rules) to the Commission.

AGENCY: Commission for MH/DD/SAS

RULE CITATION: Rules 10A NCAC 27H .0202

RECOMMENDED ACTION: Object

COMMENT:

In the June 12, 2017 Staff Opinion issued, staff recommended approval of 10A NCAC 27H .0202; however, after some additional research, staff is now recommending that the Rules Review Commission object to 10A NCAC 27H .0202 and to any other requirement that a forensic evaluator be employed by an LME-MCO contained within Rules 10A NCAC .0202 through .0207.

Pursuant to Session Law 2001-437, which amended 122C-141, it appears to staff that LME-MCOs are unable to provide direct services without the approval of the Secretary. The pertinent language of S.L. 2001-437 is as follows:

**SECTION 1.15.** G.S. 122C-141 reads as rewritten:  
**"§ 122C-141. Provision of services.**

(a) ~~The area authority may provide services directly and may contract with other public or private agencies, institutions, or resources for the provision of services.~~ or county program shall contract with other qualified public or private providers, agencies, institutions, or resources for the provision of services, and, subject to the approval of the Secretary, is authorized to provide services directly. The area authority or county program shall indicate in its local business plan how services will be provided and how the provision of services will address issues of access, availability of qualified public or private providers, consumer choice, and fair competition. The Secretary shall take into account these issues when reviewing the local business plan and considering approval of the direct provision of services. The Secretary shall develop criteria for the approval of direct service provision by area authorities and county programs in accordance with this section and as evidenced by compliance with the local business plan. For the purposes of this section, a qualified public or private provider is a provider that meets the provider qualifications as defined by rules adopted by the Secretary.

Further, in a 1915b(b) waiver request, the Department indicated that “the 2001 legislation required [county programs and area authorities] to divest of direct services provision, contract with public and private providers for service delivery and change their focus to system management and oversight.”

Based upon S.L. 2001-437, LME-MCOs are not able to provide direct services without approval by the Secretary. As such, it is staff’s opinion that the requirement that forensic evaluators be employed by an LME-MCO is beyond their statutory authority and staff is recommending a continued objection.

Amber May  
Commission Counsel  
June 15, 2017

**§ 122C-141. Provision of services.**

(a) The area authority or county program shall contract with other qualified public or private providers, agencies, institutions, or resources for the provision of services, and, subject to the approval of the Secretary, is authorized to provide services directly. The area authority or county program shall indicate in its local business plan how services will be provided and how the provision of services will address issues of access, availability of qualified public or private providers, consumer choice, and fair competition. The Secretary shall take into account these issues when reviewing the local business plan and considering approval of the direct provision of services. Unless an area authority or county program requests a shorter time, any approval granted by the Secretary shall be for not less than one year. The Secretary shall develop criteria for the approval of direct service provision by area authorities and county programs in accordance with this section and as evidenced by compliance with the local business plan. For the purposes of this section, a qualified public or private provider is a provider that meets the provider qualifications as defined by rules adopted by the Secretary.

(b) All area authority or county program services provided directly or under contract shall meet the requirements of applicable State statutes and the rules of the Commission and the Secretary. The Secretary may delay payments and, with written notification of cause, may reduce or deny payment of funds if an area authority or county program fails to meet these requirements.

(c) The area authority or board of county commissioners of a county program may contract with a health maintenance organization, certified and operating in accordance with the provisions of Article 67 of Chapter 58 of the General Statutes for the area authority or county program, to provide mental health, developmental disabilities, or substance abuse services to enrollees in a health care plan provided by the health maintenance organization. The terms of the contract must meet the requirements of all applicable State statutes and rules of the Commission and Secretary governing both the provision of services by an area authority or county program and the general and fiscal operation of an area authority or county program and the reimbursement rate for services rendered shall be based on the usual and customary charges paid by the health maintenance organization to similar providers. Any provision in conflict with a State statute or rule of the Commission or the Secretary shall be void; however, the presence of any void provision in that contract does not render void any other provision in that contract which is not in conflict with a State statute or rule of the Commission or the Secretary. Subject to approval by the Secretary and pending the timely reimbursement of the contractual charges, the area authority or county program may expend funds for costs which may be incurred by the area authority or county program as a result of providing the additional services under a contractual agreement with a health maintenance organization.

(d) If two or more counties enter into an interlocal agreement under Article 20 of Chapter 160A of the General Statutes to be a public provider of mental health, developmental disabilities, or substance abuse services ("public provider"), before an LME may enter into a contract with the public provider, all of the following must apply:

- (1) The public provider must meet all the provider qualifications as defined by rules adopted by the Commission. A county that satisfies its duties under G.S. 122C-115(a) through a consolidated human services agency may not be considered a qualified provider for purposes of this subdivision.
- (2) The LME must adopt a conflict of interest policy that applies to all provider contracts.
- (3) The interlocal agreement must provide that any liabilities of the public provider shall be paid from its unobligated surplus funds and that if those G.

## **RRC Staff Opinion**

Please Note: This communication is either 1) only the recommendation of an RRC staff attorney as to action that the attorney believes the Commission should take on the cited rule at its next meeting, or 2) an opinion of that attorney as to some matter concerning that rule. The agency and members of the public are invited to submit their own comments and recommendations (according to RRC rules) to the Commission.

AGENCY: Commission for MH/DD/SAS

RULE CITATION: Rules 10A NCAC 27H .0202, .0203, .0204, .0205, .0206, and .0207

RECOMMENDED ACTION: Approve .0202 and .0207  
Object to .0203, .0204, .0205, and .0206

COMMENT:

### **History**

In January of 2014, the Commission for Mental Health, Developmental Disabilities and Substance Abuse Services (Commission for MH/DD/SAS) submitted eight temporary Rules pursuant to Session Law 2013-18. This Session Law amended N.C.G.S. 15A-1002 and gave the Commission for MH/DD/SAS the authority to require completion of training requirements necessary to be certified as a forensic evaluator and also required completion of continuing education. On January 31, 2014, the RRC reviewed the filed temporary Rules at a special meeting. At that time, the RRC objected to several of the Rules for lack of statutory authority. In response, the Commission for MH/DD/SAS requested that the Rules be returned to them.

On December 16, 2016, the Commission for MH/DD/SAS submitted the same eight Rules for review by the RRC at their January 2017 meeting. The period of review was extended on these Rules, and they were ultimately reviewed at the March 16, 2017 RRC meeting. At that time, the RRC objected to Rules .0202, .0203, .0204, .0205, .0206, and .0207 for several reasons, including lack of statutory authority and ambiguity.

In an attempt to cure the objections, the agency has provided rewritten Rules pursuant to G.S. 150B-21.12. In addition to the rewritten Rules, the agency has provided a response to the objections that appears to make further arguments against the objections. It is noted within the rules below where the agency chose not to make changes based upon the objections. Based upon the rewritten Rules and the responses, staff is recommending approval of .0202 and objection to .0203, .0204, .0205, .0206, and .0207 for the reasons set forth below.

### **General**

In an attempt to meet the objections of the RRC, the Commission has narrowed the scope of the Rules to apply only to forensic evaluators that are being paid through public funds. The rewritten Rules leave much of the oversight and enforcement of these Rules with the LME-MCO. While



staff agrees that the Commission for MH/DD/SAS has the authority to promulgate Rules regarding LME-MCOs pursuant to 122C-191(b), it is unclear to staff how the approval of forensic evaluators pursuant to 15A-1002 falls within the statutory mandates contained therein.

#### **10A NCAC 27H .0202**

At its March 16, 2017 meeting, the RRC objected to this Rule, finding that the Commission for MH/DD/SAS lacked the authority to set employment requirements for forensic evaluators. In the rewritten Rule, the agency has narrowed the scope of Rules .0201 through .0207 to only be applicable when a capacity evaluation is ordered through the LME-MCO. Despite the specific mandate contained within 15A-1002 to approve forensic evaluators, it appears as though the Commission for MH/DD/SAS is relying upon their general grant of authority contained within 143B-147 to narrow the scope of their charge to approving only those forensic evaluators that are paid through the public system. Although staff does believe that the Commission has the authority to promulgate Rules regarding all forensic evaluators due to the specific mandate contained within 15A-1002, it is staff's opinion that includes rules dealing exclusively with forensic evaluators paid through public funds.

At the March meeting, the RRC also objected to the Rule as being unclear or ambiguous as it was unclear what the Pre-Trial Evaluation Center was. In its rewritten Rule, the agency has indicated that the Pre-Trial Evaluation Center will be located at Central Regional Hospital in Butner.

Staff is recommending approval of 10A NCAC 27H .0202 as it is staff's opinion that the objections have been met.

#### **10A NCAC 27H .0203**

At its March 16, 2017 meeting, the RRC objected to this Rule finding that the Commission for MH/DD/SAS lacked the authority to set employment requirements. As additional language has been added that narrows the scope of these Rules in Rule .0202, staff believes that this objection has been met.

The RRC also objected to this Rule finding that it was unclear or ambiguous. Specifically, the Rules Review Commission objected as Paragraph (a) contained a reference to an "applicant," but there was no information to say what the "applicant" will need to do to apply to be certified as a forensic evaluator, to whom the applicant will apply, what the application process is, and the timing of the training requirements. In response to the objection, the Commission for MH/DD/SAS has changed the word "applicant" to "individual." Staff believes that this specific objection has been met as it no longer appears to be an "approval" process that requires the forensic evaluator to do anything.

However, the issue now is this Rule seems to create a process whereby the LME-MCO is required to submit the information on behalf of the individual. Specifically, .0203(a)(3), requires that the individual have his or her name submitted by the LME-MCO. It is staff's understanding that this essentially puts the LME-MCO into the shoes of the Commission in determining

whether an individual is suitable for approval to be a forensic evaluator. As such, staff is recommending objection.

It is staff's opinion that requiring the LME-MCO to collect, submit, and verify the information required by the Commission is an improper delegation of authority. Not only does 15A-1002 require the Commission to approve forensic evaluators, 143B-147(d) states that the Secretary shall enforce the Rules of the Commission. If the Commission for MH/DD/SAS wishes to delegate the authority over forensic evaluators, it appears that it would be proper to delegate this authority to the Secretary, not an LME-MCO. As written, this provision appears to be inconsistent with and contradictory to 143B-147(d) and outside of the authority of the Commission for MH/DD/SAS. If it is found that this is a proper delegation of authority, the Rule is still ambiguous as written as it is unclear as to how and where the LME-MCO is to provide this information.

In its March 16, 2017 meeting, the RRC also found that it is unclear how the LME-MCO will determine whether the evaluator has expertise as set forth in Paragraph (b). No additional language has been added to provide clarity; therefore, staff is recommending a continued objection to this provision.

#### **10A NCAC 27H .0204**

At its March 16, 2017 meeting, the RRC objected to this Rule finding that the Commission for MH/DD/SAS lacked the authority to promulgate rules regarding the content of the forensic evaluator's report. The Commission for MH/DD/SAS has provided a rewritten Rule that staff believes has met the objection set forth in the March 17, 2017 objection letter. However, in doing so, it is staff's opinion that there is now a clarity issue in (a)(3). As there are multiple statutes and Rules setting forth the "procedures for completing reports", it is unclear what this "law" is. As such, staff is recommending objection to the rewritten Rule for lack of clarity.

#### **10A NCAC 27H .0205**

At its March 16, 2017 meeting, the RRC found that the Commission for MH/DD/SAS lacked the statutory authority to promulgate rules regarding LME-MCOs oversight of forensic evaluators. The rewritten Rule as submitted by the Commission still requires oversight by the LME-MCO. The Commission has provided some additional statutory authority; however, for the same reasons set forth above for Rule .0203, it is staff's opinion that this is an improper delegation of authority. As no change was made to this Rule regarding the required oversight by the LME-MCO and because it is staff's opinion that this delegation is contradictory to the statute, staff is recommending a continued objection to the rewritten Rule.

The RRC also objected to the word "sufficient" in (a) finding that the meaning was unclear. In response to the objection, the Commission has changed the wording to "meet the demand." It is staff's opinion that this phrase is still ambiguous as it is unclear what demand is to be met. Staff is recommending a continued objection.

At its March meeting, the RRC also found that (b) was unclear as to how expertise of an evaluator is to be conveyed to the LME-MCO. Rule .0205 indicates that it will be self-reporting by the evaluator; however, Rule .0203 indicates that the LME-MCO is required to determine the expertise of the evaluator. It is unclear whether these two provisions conflict with each other or whether they are different processes. As no changes have been made to this provision in the rewritten Rule, staff is recommending a continued objection.

The RRC also objected to the requirements of a log in (b), finding that this was unclear as written. This issue has been addressed by the Commission; therefore, staff believes that this objection has been met.

### **10A NCAC 27H .0206**

At its March 16, 2017 meeting, the RRC objected to this Rule finding that the Commission for MH/DD/SAS lacked the authority to delegate the termination of certifications to LME-MCOs. In its rewritten Rule, the Commission has shifted the actual termination of the certification to the Division; however, much of the termination responsibilities remain with the LME-MCO. Staff does not believe that this objection has been met and is recommending a continued objection.

In addition, the RRC found that it is unclear what the responsibilities and duties of the LME-MCOs would be in accordance with this Rule. In its rewritten Rule, the Commission for MH/DD/SAS has indicated that the LME-MCO is to notify the Division of offenses for which a certification may be terminated. As such, staff believes that this objection has been met; however, staff believes that a clarity issue now exists with regard to Items (2) and (3) of the rewritten Rule. It is unclear to staff how the LME-MCO is to know whether an individual is no longer a “licensed clinician,” as required by 10A NCAC 27H .0203(a)(1). It is also unclear to staff how the LME-MCO is to know whether a forensic evaluator has completed the required training set forth in 10A NCAC 27H .0204 as the Division is responsible for conducting this training. Staff is recommending objection to the rewritten Rule as being ambiguous.

### **10A NCAC 27H .0207**

At its March 16, 2017 meeting, the RRC objected to this Rule finding that the Commission for MH/DD/SAS lacked the statutory authority to specify the requirements of the evaluation report. In its rewritten Rule, the agency has addressed this issue by setting forth the requirements contained within the 15A-1002 and 122C-54. The RRC also found that the Commission for MH/DD/SAS lacked the statutory authority to limit a recommendation by a forensic evaluator for a full evaluation at the Pre-Trial Evaluation Center only if the defendant is charged with a felony. The language has been removed from the Rule; therefore, staff believes that this objection has been met.

As it is staff’s opinion that both objections have been met, staff is recommending approval of this Rule.

## **Cited Statutory Authority**

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

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

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

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

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

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

(4) A presiding district or superior court judge of this State who orders an examination pursuant to subdivision (1a) or (2) of this subsection shall order the release of relevant confidential information to the examiner, including, but not limited to, the warrant or indictment, arrest records, the law enforcement incident report, the defendant's criminal record, jail records, any prior medical and mental health records of the defendant, and any school records of the defendant after providing the defendant with reasonable notice and an opportunity to be heard and then determining that the information is relevant and necessary to the hearing of the matter before the court and unavailable from any other source. This subdivision shall not be construed to relieve any court of its duty to conduct hearings and make findings required under relevant federal law before ordering the release of any private medical or mental health

information or records related to substance abuse or HIV status or treatment. The records may be surrendered to the court for in camera review if surrender is necessary to make the required determinations. The records shall be withheld from public inspection and, except as provided in this subdivision, may be examined only by order of the court.

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

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

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

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

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

(d) Any report made to the court pursuant to this section shall be forwarded to the clerk of superior court in a sealed envelope addressed to the attention of a presiding judge, with a covering statement to the clerk of the fact of the examination of the defendant and any conclusion as to whether the defendant has or lacks capacity to proceed. If the defendant is being held in the custody of the sheriff, the clerk shall send a copy of the covering statement to the sheriff. The sheriff and any persons employed by the sheriff shall maintain the copy of the covering statement as a confidential record. A copy of the full report shall be forwarded to defense counsel, or to the defendant if he is not represented by counsel. If the question of the defendant's capacity to proceed is raised at any time, a copy of the full report must be forwarded to the district attorney, as provided in G.S. 122C-54(b). Until such report becomes a public record, the full report to the court shall be kept under such conditions as are directed by the court, and its contents shall not be revealed except

as directed by the court. Any report made to the court pursuant to this section shall not be a public record unless introduced into evidence. (1973, c. 1286, s. 1; 1975, c. 166, ss. 20, 27; 1977, cc. 25, 860; 1979, 2nd Sess., c. 1313; 1985, c. 588; c. 589, s. 9; 1989, c. 486, s. 1; 1991, c. 636, s. 19(b); 1995, c. 299, s. 1; 1995 (Reg. Sess., 1996), c. 742, ss. 13, 14; 2013-18, s. 1.)

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

**§ 122C-54. Exceptions; abuse reports and court proceedings.**

(a) A facility shall disclose confidential information if a court of competent jurisdiction issues an order compelling disclosure.

(a1) Upon a determination by the facility director or his designee that disclosure is in the best interests of the client, a facility may disclose confidential information for purposes of filing a petition for involuntary commitment of a client pursuant to Article 5 of this Chapter or for purposes of filing a petition for the adjudication of incompetency of the client and the appointment of a guardian or an interim guardian under Chapter 35A of the General Statutes.

(b) If an individual is a defendant in a criminal case and a mental examination of the defendant has been ordered by the court as provided in G.S. 15A-1002, the facility shall send the results or the report of the mental examination to the clerk of court, to the district attorney or prosecuting officer, and to the attorney of record for the defendant as provided in G.S. 15A-1002(d). The report shall contain a treatment recommendation, if any, and an opinion as to whether there is a likelihood that the defendant will gain the capacity to proceed.

(c) Certified copies of written results of examinations by physicians and records in the cases of clients voluntarily admitted or involuntarily committed and facing district court hearings and rehearings pursuant to Article 5 of this Chapter shall be furnished by the facility to the client's counsel, the attorney representing the State's interest, and the court. The confidentiality of client information shall be preserved in all matters except those pertaining to the necessity for admission or continued stay in the facility or commitment under review. The relevance of confidential information for which disclosure is sought in a particular case shall be determined by the court with jurisdiction over the matter.

(d) Any individual seeking confidential information contained in the court files or the court records of a proceeding made pursuant to Article 5 of this Chapter may file a written motion in the cause setting out why the information is needed. A district court judge may issue an order to disclose the confidential information sought if he finds the order is appropriate under the circumstances and if he finds that it is in the best interest of the individual admitted or committed or of the public to have the information disclosed.

(d1) Repealed by Session Laws 2015-195, s. 11(a), effective January 1, 2016.

(d2) The record of involuntary commitment for inpatient or outpatient mental health treatment or for substance abuse treatment required to be reported to the National Instant Criminal Background Check System (NICS) by G.S. 14-409.43 shall be accessible only by the sheriff or the sheriff's designee for the purposes of conducting background checks under G.S. 14-404 and shall remain otherwise confidential as provided by this Article.

(e) Upon the request of the legally responsible person or the minor admitted or committed, and after that minor has both been released and reached adulthood, the court records of that minor made in proceedings pursuant to Article 5 of this Chapter may be expunged from the files of the court. The minor and his legally responsible person shall be informed in writing by the court of

the right provided by this subsection at the time that the application for admission is filed with the court.

(f) A State facility and the psychiatric service of the University of North Carolina Hospitals at Chapel Hill may disclose confidential information to staff attorneys of the Attorney General's office whenever the information is necessary to the performance of the statutory responsibilities of the Attorney General's office or to its performance when acting as attorney for a State facility or the psychiatric service of the University of North Carolina Hospitals at Chapel Hill.

(g) A facility may disclose confidential information to an attorney who represents either the facility or an employee of the facility, if such information is relevant to litigation, to the operations of the facility, or to the provision of services by the facility. An employee may discuss confidential information with his attorney or with an attorney representing the facility in which he is employed.

(h) A facility shall disclose confidential information for purposes of complying with Article 3 of Chapter 7B of the General Statutes and Article 6 of Chapter 108A of the General Statutes, or as required by other State or federal law.

(i) G.S. 132-1.4 shall apply to the records of criminal investigations conducted by any law enforcement unit of a State facility, and information described in G.S. 132-1.4(c) that is collected by the State facility law enforcement unit shall be public records within the meaning of G.S. 132-1.

(j) Notwithstanding any other provision of this Chapter, the Secretary may inform any person of any incident or event involving the welfare of a client or former client when the Secretary determines that the release of the information is essential to maintaining the integrity of the Department. However, the release shall not include information that identifies the client directly, or information for which disclosure is prohibited by State or federal law or requirements, or information for which, in the Secretary's judgment, by reference to publicly known or available information, there is a reasonable basis to believe the client will be identified. (1955, c. 887, s. 12; 1963, c. 1166, s. 10; 1973, c. 47, s. 2; c. 476, s. 133; c. 673, s. 5; c. 1408, s. 2; 1977, c. 696, s. 1; 1979, c. 147; c. 915, s. 20; 1983, c. 383, s. 10; c. 491; c. 638, s. 22; c. 864, s. 4; 1985, c. 589, s. 2; 1987, c. 638, ss. 1, 3.1; 1989, c. 141, s. 9; 1993, c. 516, s. 12; 1998-202, s. 13(dd); 2003-313, s. 2; 2008-210, s. 1; 2009-299, s. 6; 2013-18, s. 7; 2013-369, ss. 7, 8; 2015-195, ss. 11(a), (e).)

#### **§ 122C-115.4. Functions of local management entities.**

(a) Local management entities are responsible for the management and oversight of the public system of mental health, developmental disabilities, and substance abuse services at the community level. An LME shall plan, develop, implement, and monitor services within a specified geographic area to ensure expected outcomes for consumers within available resources.

(b) The primary functions of an LME are designated in this subsection and shall not be conducted by any other entity unless an LME voluntarily enters into a contract with that entity under subsection (c) of this section. The primary functions include all of the following:

- (1) Access for all citizens to the core services and administrative functions described in G.S. 122C-2. In particular, this shall include the implementation of a 24-hour a day, seven-day a week screening, triage, and referral process and a uniform portal of entry into care.
- (2) Provider monitoring, technical assistance, capacity development, and quality control. If at anytime the LME has reasonable cause to believe a violation of

licensure rules has occurred, the LME shall make a referral to the Division of Health Service Regulation. If at anytime the LME has reasonable cause to believe the abuse, neglect, or exploitation of a client has occurred, the LME shall make a referral to the local Department of Social Services, Child Protective Services Program, or Adult Protective Services Program.

- (3) Utilization management, utilization review, and determination of the appropriate level and intensity of services. An LME may participate in the development of person centered plans for any consumer and shall monitor the implementation of person centered plans. An LME shall review and approve person centered plans for consumers who receive State-funded services and shall conduct concurrent reviews of person centered plans for consumers in the LME's catchment area who receive Medicaid funded services.
- (4) Authorization of the utilization of State psychiatric hospitals and other State facilities. Authorization of eligibility determination requests for recipients under a CAP-MR/DD waiver.
- (5) Care coordination and quality management. This function involves individual client care decisions at critical treatment junctures to assure clients' care is coordinated, received when needed, likely to produce good outcomes, and is neither too little nor too much service to achieve the desired results. Care coordination is sometimes referred to as "care management." Care coordination shall be provided by clinically trained professionals with the authority and skills necessary to determine appropriate diagnosis and treatment, approve treatment and service plans, when necessary to link clients to higher levels of care quickly and efficiently, to facilitate the resolution of disagreements between providers and clinicians, and to consult with providers, clinicians, case managers, and utilization reviewers. Care coordination activities for high-risk/high-cost consumers or consumers at a critical treatment juncture include the following:
  - a. Assisting with the development of a single care plan for individual clients, including participating in child and family teams around the development of plans for children and adolescents.
  - b. Addressing difficult situations for clients or providers.
  - c. Consulting with providers regarding difficult or unusual care situations.
  - d. Ensuring that consumers are linked to primary care providers to address the consumer's physical health needs.
  - e. Coordinating client transitions from one service to another.
  - f. Conducting customer service interventions.
  - g. Assuring clients are given additional, fewer, or different services as client needs increase, lessen, or change.
  - h. Interfacing with utilization reviewers and case managers.
  - i. Providing leadership on the development and use of communication protocols.
  - j. Participating in the development of discharge plans for consumers being discharged from a State facility or other inpatient setting who have not been previously served in the community.



- (6) Community collaboration and consumer affairs including a process to protect consumer rights, an appeals process, and support of an effective consumer and family advisory committee.
- (7) Financial management and accountability for the use of State and local funds and information management for the delivery of publicly funded services.
- (8) Each LME shall develop a waiting list of persons with intellectual or developmental disabilities that are waiting for specific services. The LME shall develop the list in accordance with rules adopted by the Secretary to ensure that waiting list data are collected consistently across LMEs. Each LME shall report this data annually to the Department. The data collected should include numbers of persons who are:
  - a. Waiting for residential services.
  - b. Potentially eligible for CAP-MRDD.
  - c. In need of other services and supports funded from State appropriations to or allocations from the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, including CAP-MRDD.

Subject to all applicable State and federal laws and rules established by the Secretary and the Commission, nothing in this subsection shall be construed to preempt or supersede the regulatory or licensing authority of other State or local departments or divisions.

(c) Subject to subsection (b) of this section and all applicable State and federal laws and rules established by the Secretary, an LME may contract with a public or private entity for the implementation of LME functions designated under subsection (b) of this section.

(d) Except as provided in G.S. 122C-124.1 and G.S. 122C-125, the Secretary may neither remove from an LME nor designate another entity as eligible to implement any function enumerated under subsection (b) of this section unless all of the following applies:

- (1) The LME fails during the previous consecutive three months to achieve a satisfactory outcome on any of the critical performance measures developed by the Secretary under G.S. 122C-112.1(33).
- (2) The Secretary provides focused technical assistance to the LME in the implementation of the function. The assistance shall continue for at least three months or until the LME achieves a satisfactory outcome on the performance measure, whichever occurs first.
- (3) If, after three months of receiving technical assistance from the Secretary, the LME still fails to achieve or maintain a satisfactory outcome on the critical performance measure, the Secretary shall enter into a contract with another LME or agency to implement the function on behalf of the LME from which the function has been removed.

(e) Notwithstanding subsection (d) of this section, in the case of serious financial mismanagement or serious regulatory noncompliance, the Secretary may temporarily remove an LME function after consultation with the Joint Legislative Oversight Committee on Health and Human Services.

(f) The Commission shall adopt rules regarding the following matters:

- (1) The definition of a high risk consumer. Until such time as the Commission adopts a rule under this subdivision, a high risk consumer means a person who has been assessed as needing emergent crisis services three or more times in the previous 12 months.

- (2) The definition of a high cost consumer. Until such time as the Commission adopts a rule under this subdivision, a high cost consumer means a person whose treatment plan is expected to incur costs in the top twenty percent (20%) of expenditures for all consumers in a disability group.
  - (3) The notice and procedural requirements for removing one or more LME functions under subsection (d) of this section.
- (g) The Commission shall adopt rules to ensure that the needs of members of the active and reserve components of the Armed Forces of the United States, veterans, and their family members are met by requiring:
- (1) Each LME to have at least one trained care coordination person on staff to serve as the point of contact for TRICARE, the North Carolina National Guard's Integrated Behavioral Health System, the Army Reserve Department of Psychological Health, the United States Department of Veterans Affairs, the Division of Adult Correction, and related organizations to ensure that members of the active and reserve components of the Armed Forces of the United States, veterans, and their family members have access to State-funded services when they are not eligible for federally funded mental health or substance abuse services.
  - (2) LME staff members who provide screening, triage, or referral services to receive training to enhance the services provided to members of the active or reserve components of the Armed Forces of the United States, veterans, and their families. The training required by this subdivision shall include training on at least all of the following:
    - a. The number of persons who serve or who have served in the active or reserve components of the Armed Forces of the United States in the LME's catchment area.
    - b. The types of mental health and substance abuse disorders that these service personnel and their families may have experienced, including traumatic brain injury, posttraumatic stress disorder, depression, substance use disorders, potential suicide risks, military sexual trauma, and domestic violence.
    - c. Appropriate resources to which these service personnel and their families may be referred as needed. (2006-142, s. 4(d); 2007-323, ss. 10.49(l), (hh); 2007-484, ss. 18, 43.7(a)-(c); 2007-504, s. 1.2; 2008-107, s. 10.15(cc); 2009-186, s. 1; 2009-189, s. 1; 2011-145, s. 19.1(h); 2011-185, s. 6; 2011-291, s. 2.45; 2012-66, s. 2; 2012-83, s. 43.)

**§ 122C-191. Quality of services.**

(a) The assurance that services provided are of the highest possible quality within available resources is an obligation of the area authority and the Secretary.

(b) Each area authority and State facility shall comply with the rules of the Commission regarding quality assurance activities, including: program evaluation; utilization and peer review; and staff qualifications, privileging, supervision, education, and training. These rules may not nullify compliance otherwise required by Chapter 126 of the General Statutes.

(c) Each area authority and State facility shall develop internal processes to monitor and evaluate the level of quality obtained by all its programs and services including the activities prescribed in the rules of the Commission.

(d) The Secretary shall develop rules for a review process to monitor area facilities and State facilities for compliance with the required quality assurance activities as well as other rules of the Commission and the Secretary. The rules may provide that the Secretary has the authority to determine whether applicable standards of practice have been met.

(e) For purposes of peer review functions only:

- (1) A member of a duly appointed quality assurance committee who acts without malice or fraud shall not be subject to liability for damages in any civil action on account of any act, statement, or proceeding undertaken, made, or performed within the scope of the functions of the committee.
- (2) The proceedings of a quality assurance committee, the records and materials it produces, and the material it considers shall be confidential and not considered public records within the meaning of G.S. 132-1, " 'Public records' defined," and shall not be subject to discovery or introduction into evidence in any civil action against a facility or a provider of professional health services that results from matters which are the subject of evaluation and review by the committee. No person who was in attendance at a meeting of the committee shall be required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee or as to any findings, recommendations, evaluations, opinions, or other actions of the committee or its members. However, information, documents or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee, and nothing herein shall prevent a provider of professional health services from using such otherwise available information, documents or records in connection with an administrative hearing or civil suit relating to the medical staff membership, clinical privileges or employment of the provider. Documents otherwise available as public records within the meaning of G.S. 132-1 do not lose their status as public records merely because they were presented or considered during proceedings of the committee. A member of the committee or a person who testifies before the committee may be subpoenaed and be required to testify in a civil action as to events of which the person has knowledge independent of the peer review process, but cannot be asked about the person's testimony before the committee for impeachment or other purposes or about any opinions formed as a result of the committee hearings.
- (3) Peer review information that is confidential and is not subject to discovery or use in civil actions under this section may be released to a professional

standards review organization that contracts with an agency of this State or the federal government to perform any accreditation or certification function, including the Joint Commission on Accreditation of Healthcare Organizations. Information released under this subdivision shall be limited to that which is reasonably necessary and relevant to the standards review organization's determination to grant or continue accreditation or certification. Information released under this subdivision retains its confidentiality and is not subject to discovery or use in any civil actions as provided under this subsection, and the standards review organization shall keep the information confidential subject to this section. (1977, c. 568, s. 1; 1979, c. 358, s. 1; 1983, c. 383, s. 1; 1985, c. 589, s. 2; 1989 (Reg. Sess., 1990), c. 1053, s. 1; 1998-212, s. 12.35C(d); 1999-222, s. 1; 2004-149, s. 2.7.)

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

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

- (1) To adopt rules regarding the
  - a. Admission, including the designation of regions, treatment, and professional care of individuals admitted to a facility operated under the authority of G.S. 122C-181(a), that is now or may be established;
  - b. Operation of education, prevention, intervention, treatment, rehabilitation and other related services as provided by area mental health, developmental disabilities, and substance abuse authorities, county programs, and all providers of public services under Part 4 of Article 4 of Chapter 122C of the General Statutes;
  - c. Hearings and appeals of area mental health, developmental disabilities, and substance abuse authorities as provided for in Part 4 of Article 4 of Chapter 122C of the General Statutes; and
  - d and e. Repealed by Session Laws 2001-437, s. 1.21(a), effective July 1, 2002.
  - f. Standards of public services for mental health, developmental disabilities, and substance abuse services.

- (2) To adopt rules for the licensing of facilities for the mentally ill, developmentally disabled, and substance abusers, under Article 2 of Chapter 122C of the General Statutes. These rules shall include all of the following:
  - a. Standards for the use of electronic supervision devices during client sleep hours for facilities licensed under 10A NCAC 27G. 1700 or any related or subsequent regulations setting licensing standards for such facilities.
  - b. Personnel requirements for facilities licensed under 10A NCAC 27G. 1700, or any related or subsequent regulations setting licensing standards for such facilities, when continuous electronic supervision that meets the standards established under sub-subdivision a. of this subdivision is present.
- (3) To advise the Secretary of the Department of Health and Human Services regarding the need for, provision and coordination of education, prevention, intervention, treatment, rehabilitation and other related services in the areas of:
  - a. Mental illness and mental health,
  - b. Developmental disabilities,
  - c. Substance abuse.
  - d. Repealed by Session Laws 2001-437, s. 1.21(a), effective July 1, 2002.
- (4) To review and advise the Secretary of the Department of Health and Human Services regarding all State plans required by federal or State law and to recommend to the Secretary any changes it thinks necessary in those plans; provided, however, for the purposes of meeting State plan requirements under federal or State law, the Department of Health and Human Services is designated as the single State agency responsible for administration of plans involving mental health, developmental disabilities, and substance abuse services.
- (5) To adopt rules relating to the registration and control of the manufacture, distribution, security, and dispensing of controlled substances as provided by G.S. 90-100.
- (6) To adopt rules to establish the professional requirements for staff of licensed facilities for the mentally ill, developmentally disabled, and substance abusers. Such rules may require that one or more, but not all staff of a facility be either licensed or certified. If a facility has only one professional staff, such rules may require that that individual be licensed or certified. Such rules may include the recognition of professional certification boards for those professions not licensed or certified under other provisions of the General Statutes provided that the professional certification board evaluates applicants on a basis which protects the public health, safety or welfare.
- (7) Except where rule making authority is assigned under that Article to the Secretary of the Department of Health and Human Services, to adopt rules to implement Article 3 of Chapter 122C of the General Statutes.
- (8) To adopt rules specifying procedures for waiver of rules adopted by the Commission.
- (9) To adopt rules establishing a process for non-Medicaid eligible clients to appeal to the Division of Mental Health, Developmental Disabilities, and Substance

Abuse Services of the Department of Health and Human Services decisions made by an area authority or county program affecting the client. The purpose of the appeal process is to ensure that mental health, developmental disabilities, and substance abuse services are delivered within available resources, to provide an additional level of review independent of the area authority or county program to ensure appropriate application of and compliance with applicable statutes and rules, and to provide additional opportunities for the area authority or county program to resolve the underlying complaint. Upon receipt of a written request by the non-Medicaid eligible client, the Division shall review the decision of the area authority or county program and shall advise the requesting client and the area authority or county program as to the Division's findings and the bases therefor. Notwithstanding Chapter 150B of the General Statutes, the Division's findings are not a final agency decision for purposes of that Chapter. Upon receipt of the Division's findings, the area authority or county program shall issue a final decision based on those findings. Nothing in this subdivision shall be construed to create an entitlement to mental health, developmental disabilities, and substance abuse services.

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

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

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

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

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

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

309, s. 1; 1993, c. 396, s. 6; 1997-443, s. 11A.118(a); 2001-437, s. 1.21(a); 2005-276, s. 10.35(a); 2009-187, s. 1; 2009-490, s. 6; 2013-18, ss. 9, 10.)



June 9, 2017

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

Re: Forensic Evaluator Proposed Rules

Dear Ms. May:

I am General Counsel for Trillium Health Resources ("Trillium"), the Local Management Entity/Managed Care Organization managing the provision of State and Medicaid reimbursable MH/DD/SAS services in a 24 county catchment in Eastern North Carolina. As I am sure you are aware, on February 27, 2017, the NC Commission for MH/DD/SAS ("Commission") called an emergency meeting for March 1 "to resolve outstanding issues regarding the proposed amendment of the Forensic Evaluator Rules, [and] to issue a final vote regarding the proposed amendments to the same..." Trillium learned of the meeting on February 28, 2017 and, for the first time reviewed the proposed amendments to 10A NCAC 27G.6702 and 10 NCAC 27H, Section 200. Due to an apparent communication breakdown, the LME/MCOs did not review the proposed rules when they were posted for public comment in July, 2016. On Friday, March 1, 2017, Trillium submitted objections to the proposed rules, which are attached hereto as Exhibit "A."

I am informed the Rules Review Commission ("RCC") approved proposed rules 10A NCAC 27G.6702 and 10 NCAC 27H.201, which became "final" on or about March 17, 2017, but the remaining proposed rules in 10A NCAC 27H Section 200 are still the subject of RCC objections. I have reviewed the RCC's objections dated March 27, 2017, the Commission's proposed revisions dated May 26, 2017, the Commission's letter dated June 5, 2017 and hereby submit the following objections on behalf of Trillium.

Pursuant to G.S. §150B-21.9, the RCC must determine whether a rule meets all of the following criteria:



- (1) The rule is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of Article 2A of Chapter 150B of the General Statutes of North Carolina.

Trillium submits to the RCC that the revisions made by the Commission to the proposed rules 10A NCAC 27H.0202-.0207, since posting them for public comment in July, 2016, constitute a substantial change pursuant to G.S. §150B-21.12(c) and §150B-21.2(g) and so must be republished and subjected to additional public comment. Additionally, Trillium does not believe the proposed rules, as drafted, are reasonably necessary to implement or interpret an enactment of the General Assembly - in this case Session Law 2013-18, Section 9, which states in pertinent part:

The Commission for [MH/DD/SAS] shall develop and adopt rules **by December 1, 2013**, to require forensic evaluators appointed pursuant to G.S. 15A-1002(b) to meet the following requirements: (1) Complete all training requirements necessary to be credentialed as a certified forensic evaluator [and] (2) Attend annual continuing education seminars that provide continuing education and training in conducting forensic evaluations and screening examinations of defendants to determine capacity to proceed and in preparing written reports required by law.<sup>1</sup>

The Commission did not submit the current proposed rules for public comment until July, 2016, approximately 30 months after the deadline imposed by the General Assembly. Moreover, as is more clearly articulated below, the proposed rules go well beyond the mandate of the Session Law 2013-18, Section 9. In particular, the proposed 10A NCAC 27H.0205, 0206 and 0207 have little to no bearing on the training and continuing education requirements for court appointed forensic evaluators.

Trillium objects to 10A NCAC 27H.0202 on the grounds that the revisions made in response to the RCC's March 17 objections still do not demonstrate that the Commission has the authority to require that forensic evaluators be employed with the LME/MCO. Of the authority cited:

- (a) The relevant section of G.S. 122C-54 refers to the release of confidential information by a facility; the LME/MCOs are not facilities (see G.S. §122C-

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<sup>1</sup> This language has also been incorporated into GS 143B-147(a)(10)

- 3(14)), they are area authorities and Local Management Entities and do not provide direct services.
- (b) G.S. 122C-115.4(a) explicitly states “an LME shall plan, develop, implement, and monitor services.” It does not state the LME/MCO provides services.
  - (c) G.S. 122C-191 pertains to the monitoring of facilities and providers with whom the LME/MCO contracts and does not speak to the provision of services by an LME/MCO.
  - (d) By Session Law 2001-437, the General Assembly required LME/MCOs participating in the 1915b/c Waiver to divest themselves of direct services and contract with public and private providers for service delivery. Trillium participates in the 1915 b/c Medicaid Waiver, as is conceded in the Commission’s letter of June 5, 2017. See also State of North Carolina NC MHD/IDD/SAS Health Plan Renewal, April 1, 2013, p. 10-12 (available at: [https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/Downloads/NC\\_Cardinal-Innovations\\_NC-02.pdf](https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/Downloads/NC_Cardinal-Innovations_NC-02.pdf))

Furthermore, the Commission has not adequately addressed the RCC’s concern regarding the “Pre-Trial Evaluation Center.” Moreover, the addition of the phrase “through the Local Management Entity-Managed Care Organization,” while well-intentioned, appears to unnecessarily subject the LMEs to the subpoena and contempt powers of the courts when the LME/MCO is unable to arrange for a forensic evaluation due to budgetary constraints or other matters outside of the LME/MCO’s control. This clearly was not the mandate of Session Law 2013-18, Section 9 and is outside the purview of the Commission’s authority.

Trillium objects to 10A NCAC 27H.0203, on the following grounds. The phrase “local certified forensic evaluator” is vague and ambiguous; while Trillium believes a local certified forensic evaluator is one that is eligible to provide evaluations because he or she has a contract with the specific LME/MCO through which an evaluation is ordered, this is not clear in the rule as drafted. The continued reference to the forensic evaluator possibly being an employee of the LME/MCO is objectionable for the reasons set forth hereinabove. It appears the Commission addressed the RCC’s objection to the term “applicant” by replacing it with “individual.” Trillium does not believe this addresses the objection. Likewise, the Commission did not address the RCC’s finding concerning Paragraph (b).

Trillium objects to 10A NCAC 27H.0204, as follows. The phrase “local certified forensic evaluator” is vague and ambiguous. The citations to 122C-54 and 122C-115.4 do not address the RCC’s concerns about statutory authority. As set forth above, those two statutes pertain to disclosures of confidential information and obligations of the LME/MCOs, neither of which is germane to .0204.

Trillium objects to 10A NCAC 27H.0205. Currently, the LME/MCO is required in its contract with the Division of MH/DD/SAS, to contract with a network of providers (that would presumably include forensic evaluators) but only within available resources, as

stated in 122C-2. .0205(a) puts an affirmative obligation on the LME/MCOs to “ensure there are local certified forensic evaluators to conduct forensic evaluations to meet the demand for forensic evaluations in its catchment area,” regardless of available resources. Additionally, the provision “to meet the demand” is even more ambiguous than “sufficient” and there is nothing in the rule to suggest the LME/MCOs’ performance is contingent on funding from the Division for maintaining a network of forensic evaluators. At its heart, .0205 attempts to set network adequacy standards for forensic evaluators that simply do not exist anywhere in contract, statute, rule or regulation and that are more stringent than standards applied to providers of other types of services. Implementing .0205 is going to require an amendment to the contracts between the Division and the LME/MCOs and appropriate funding. Trillium renews its objection to any reference that a forensic evaluator may be an employee of an LME-MCO. Trillium also does not believe the revisions to .0205 adequately address the RCC’s objections of March 27, 2017.

Trillium objects to NCAC 27H.0206, as follows. The Commission revised .0206(2) to reference .0203(a); however, .0203(a) sets forth the criteria a forensic evaluator must be to be eligible for training. To the extent such criteria exist at all, .0204, and not .0203, sets forth the criteria a forensic evaluator must meet to perform evaluations pursuant to a court order.

Trillium objects to 10A NCAC 27H.0207, as follows. Trillium is uncertain why “court” was deleted from the first sentence. Furthermore, the phrase “further evaluation at the Pre-Trial Evaluation Center” is vague and ambiguous. The rules simply do not provide any detail about the evaluations that may or shall be performed at a Pre-Trial Evaluation Center.

Thank you for your time and attention to this matter. You may contact me via telephone (866-998-2597) or via email ([richard.leissner@trilliumnc.org](mailto:richard.leissner@trilliumnc.org)) with any questions you may have.

Sincerely,

Richard P. Leissner, Jr.

Richard P. Leissner, Jr.  
General Counsel  
Trillium Health Resources

## **Richard Leissner**

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**From:** Richard Leissner  
**Sent:** Wednesday, March 1, 2017 3:14 PM  
**To:** Baker, Denise  
**Subject:** RE: Proposed Amendments re Forensic Evaluations/Evaluators

On your last question, in my experience the judge holds evaluator responsible to do evaluation. We do help line them up when orders are received. I'm not aware that trillium or its predecessors have been threatened with contempt in connection with a forensic evaluation order. On first question, I'd have ask our network folks about the number we have. On second question, that goes to my concern. Could the court take the position that evaluation didn't get done because we didn't, in the courts opinion, develop a sufficient network of evaluators.

Richard P. Leissner, Jr.  
General Counsel  
Trillium Health Resources

On Mar 1, 2017 2:40 PM, "Baker, Denise" <Denise.Baker@dhhs.nc.gov> wrote:

Follow-up questions – has Trillium had difficulty meeting the demand for forensic evaluators in its catchment area? If there were a contempt order, would it not stem from failure to complete an evaluation ordered by the court not from the number of evaluators available? Since the court issues the order to the LME-MCO, is the LME-MCO not already responsible for making sure the evaluation gets done?

**W. Denise Baker, M.A., L.P.A., Esq.**

Team Leader, Division Affairs Team

Division of MH/DD/SAS

North Carolina Department of Health and Human Services

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**From:** Richard Leissner [mailto:Richard.Leissner@trilliumnc.org]  
**Sent:** Wednesday, March 01, 2017 2:37 PM  
**To:** Baker, Denise <Denise.Baker@dhhs.nc.gov>  
**Subject:** RE: Proposed Amendments re Forensic Evaluations/Evaluators

Please do. Thank you!

Richard P. Leissner, Jr.  
General Counsel  
Trillium Health Resources

On Mar 1, 2017 2:19 PM, "Baker, Denise" <[Denise.Baker@dhhs.nc.gov](mailto:Denise.Baker@dhhs.nc.gov)> wrote:

Hi Mr. Leissner –

Thank you for your comments; I will not only read your comments during the meeting but will also provide the Commission members a copy thereof. In addition, the language about “through the LME-MCO” stems from the language of this form: <http://www.nccourts.org/Forms/Documents/1411.pdf>

I’ll let you know the outcome of the meeting if you’d like.

**W. Denise Baker, M.A., L.P.A., Esq.**

Team Leader, Division Affairs Team

Division of MH/DD/SAS

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**From:** Richard Leissner [<mailto:Richard.Leissner@trilliumnc.org>]  
**Sent:** Wednesday, March 01, 2017 1:45 PM  
**To:** Baker, Denise <[Denise.Baker@dhhs.nc.gov](mailto:Denise.Baker@dhhs.nc.gov)>  
**Subject:** Proposed Amendments re Forensic Evaluations/Evaluators  
**Importance:** High

Dear Ms. Baker:

Thank you for the opportunity to express the concerns of Trillium Health Resources, an LME/MCO serving twenty-four counties in eastern North Carolina.

Broadly, Trillium is concerned that the rules are adding significant responsibilities to the LME/MCO that are not contemplated in GS 122C-1 et seq, the set of statutes that governs LME/MCOs, or in the LME/MCO contracts with DMH (the Division of Mental Health). That such a burden would fall to the LME/MCOs was in no way apparent from Session Law 2013-18. Trillium is also concerned that these additional responsibilities will not be funded through the LME/MCO contracts with DMH and may conflict with Trillium's existing statutory and contractual functions. This is particularly the case with the proposed 10A NCAC 27H.0205, which essentially requires the LME/MCOs to stand up and credential a network of forensic evaluators, all of which will require significant staff resources, as well as additional funding from the General Assembly. It may also require revisions to GS 122C-1 et seq.

Trillium is concerned that the proposed addition of "through the LME-MCO" in 10A NCAC 27H.0202 and other places will subject the LME/MCOs to the contempt power of the court ordering the evaluation and I do not believe that to be the intention of GS 15A-1002.

As to the proposed 10A NCAC 27H.0204, Trillium is concerned because, in previous years, the LME/MCOs have not been able to get a sufficient number of participants trained due to limited training availability and slots, and yet, the onus is now being placed upon the LME/MCO to ensure we have an adequate supply of evaluators that have received such training.

As to the proposed 10A NCAC 27H.0205, it will require, in addition to significant staff resources, additional funding from DMH and potential revisions to 122C-1 et seq., that the LME/MCO create a new quality management process for oversight of forensic evaluators, which will take significant time develop. Yet the implementation date for the rule appears to be February 1, 2017. Trillium is concerned that a court may interpret the proposed rule as allowing the court to hold Trillium in contempt for failing to implement the requirements of 10A NCAC 27H.0205. Trillium also believes the proposed rule will require an amendment of the LME/MCO contract with DMH and that DMH will also need to develop a system to evaluation the LME/MCOs' adherence to the proposed rules. For instance, what standards will be used to determine if the LME/MCO's forensic evaluation network is sufficient? Trillium believes these standards would have to come from DMH.

Trillium is concerned that there does not appear to be a grandfather period for implementing the proposed rules. It is unclear that the LME/MCOs will have sufficient time in which to implement these rules and get forensic evaluators certified. In addition, Trillium has significant concerns that the rules may be in conflict with the terms of the existing contracts LME/MCOs have with forensic evaluators.

Again, thank you for the opportunity to submit these comments; I regret that I did not have more time to devote to this very important matter. As I indicated to you on the telephone, these proposed rules simply were not on our radar until the evening of February 28, 2017. I have consulted other LME/MCOs today and they were not aware of the proposed rules either. I do not state this to make an excuse, but merely to state the facts. As you know, Trillium has taken steps to ensure proposed rules affecting our operations do not slip through the cracks in the future.

Sincerely,

Richard P. Leissner, Jr.

Richard P. Leissner, Jr., Esq.

*General Counsel*

Trillium Health Resources

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**North Carolina Department of Health and Human Services  
Division of Mental Health, Developmental Disabilities and Substance Abuse Services**

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GOVERNOR

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June 5, 2017

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Re: Rules 10A NCAC 27H .0202, .0203, .0204, .0205, .0206, .0207

Dear Ms. May:

The Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services (Commission) has reviewed the Rule Review Commission's (RRC's) objections, adopted during its March 16, 2017 meeting, to the aforementioned rules. As noted below, and as reflected in the attached rules, the rules have been further amended in response to the objections raised. However, the Commission believes it has authority to adopt the proposed amendments and submits this response to the RRC's objections.

G.S. 143B-147(a)(10) grants express authority for the Commission to adopt rules requiring forensic evaluators appointed pursuant to G.S. 15A-1002(b) to complete training requirements to be credentialed as a certified forensic evaluator and to attend annual continuing education seminars that provide continuing education and training in conducting forensic evaluations and screening examinations of defendants to determine capacity to proceed and in preparing written reports required by law.

G.S. 15A-1002(b)(1a) states "in the case of a defendant charged with a misdemeanor or felony, the court may appoint one or more impartial medical experts, including forensic evaluators approved under rules of the Commission, to examine the defendant and return a written report describing the present state of the defendant's mental health". G.S. 15A-1002(b)(1a) does not require the Commission to approve forensic evaluators directly. Rather, the Commission is granted authority to write rules under which forensic evaluators may be approved.

G.S. 143B-147(a)(1)f grants the Commission authority to adopt rules "regarding the Standards of public services for mental health, developmental disabilities, and substance abuse services". Forensic evaluators are providing public services regarding mental health, developmental disability, and substance abuse (mh/dd/sa) services. G.S. 122C-3(30b) defines "public services" as "publicly funded mental health, developmental disabilities, and substance abuse services, whether provided by public or private providers". Therefore, whether the mh/dd/sa services are rendered by public or private providers, the Commission's authority is limited to those provided with public funds. Consequently, 15A-1002(b)(1a)

does not expand the authority granted the Commission in G.S. 143B-147 or authorize the Commission to write rules under which forensic evaluators conducting evaluations paid with private funds may be certified.

## **Rule 10A NCAC 27H .0202**

The Commission relies upon the existing mental health, developmental disabilities, and substance abuse (mh/dd/sa) services delivery system to serve as the vehicle through which these proposed rule amendments are implemented. The mh/dd/sa service system must comply with relevant mandates regarding the delivery of quality services, contracting for services within the Local Management Entity-Managed Care Organization's (LME-MCO) catchment area, and monitoring of services provided. Per G.S. 122C-191(a), the area authority and the Secretary are jointly responsible for assuring that services provided to consumers are of the highest possible quality within available resources. G.S.122C-191(b) states each area authority and State facility shall comply with the rules of the Commission regarding quality assurance activities, including: program evaluation; utilization and peer review; and staff qualifications, privileging, supervision, education, and training. Per G.S. 122C-3(20b), "Local management entity" or "LME" means an area authority, county program, or consolidated human services agency. It is a collective term that refers to functional responsibilities rather than governance structure". G.S. 122C-3(20c) fines LME-MCO as an LME "that is under contract with the Department to operate the combined Medicaid Waiver program authorized under Section 1915(b) and Section 1915(c) of the Social Security Act".

The law requires the area authority or county program to contract with provider agencies for the provision of public mh/dd/sa services as reflected below. The Commission is simply providing in rule what is required by law.

1. The area authority or county program shall contract with other qualified public or private providers, agencies, institutions, or resources for the provision of services, and, subject to the approval of the Secretary, is authorized to provide services directly. [G.S. 122C-141(a)]
2. All area authority or county program services provided directly or under contract shall meet the requirements of applicable State statutes and the rules of the Commission and the Secretary. [G.S. 122C-141(b)]
3. When the area authority contracts with persons for the provision of services, it shall use the standard contract adopted by the Secretary and shall assure that these contracted services meet the requirements of applicable State statutes and the rules of both the Commission and the Secretary; monitor the contract to assure that rules and State statutes are met; and require that the provider agency with whom it contracts provide timely data to the LME-MCO regarding the clients being served, the services provided, and the client outcomes. [G.S. 122C-142(a)]

As it relates to the issue of ambiguity, the rule has been further amended to reflect that these rules govern those evaluations ordered via the Local Management Entity-Managed Care Organization (LME-MCO) and are paid for using public funds. The rule also makes clear the location of the Pre-Trial Evaluation Center. The statutory authority has also been further clarified.

## **Rule 10A NCAC 27H .0203**

The Commission for MH/DD/SAS is not responsible for approving forensic evaluators. Rather, the Commission is granted authority to write rules under which forensic evaluators must be approved. For example, G.S. 15A-1002(b)(1a) references forensic evaluators approved under rules of the Commission. The law requires the area authority or county program to contract with provider agencies for the provision of public mh/dd/sa services. Please see the explanation for Rule .0202 as it relates to employment and contract requirements.

As it relates to ambiguity, the term "applicant" has been replaced with "individual" to make clear this does not involve an application process per se; the rule already notes the eligibility criteria for an individual seeking training and certification as a forensic evaluator. In addition, each area authority is required to

develop internal processes to monitor and evaluate the level of quality obtained by all its programs and services including the activities prescribed in the rules of the Commission. [122C-191(c)] Verification of the contractor's ability to perform under the terms of the contract is a mechanism through which quality of services delivered can be assured.

#### **Rule 10A NCAC 27H .0204**

The following statutes make clear that the evaluations and screenings are completed for purposes of determining capacity to proceed as well as in preparing reports describing the present state of the defendant's mental health and that the reports shall also address the likelihood that the defendant will gain the capacity to proceed. G.S. 143B-147(a)(10) requires that the annual continuing education seminars provide training in conducting forensic evaluations and screening examinations of defendants to determine capacity to proceed and in preparing written reports required by law. The laws below make clear what the written report is to include.

1. G.S. 15A-1002(b)(1a) states "in the case of a defendant charged with a misdemeanor or felony, the court may appoint one or more impartial medical experts, including forensic evaluators approved under rules of the Commission, to examine the defendant and return a written report describing the present state of the defendant's mental health."
2. G.S. 122C-54(b) states "If an individual is a defendant in a criminal case and a mental examination of the defendant has been ordered by the court as provided in G.S. 15A-1002, the facility shall send the results or the report of the mental examination to the clerk of court, to the district attorney or prosecuting officer, and to the attorney of record for the defendant as provided in G.S. 15A-1002(d). The report shall contain a treatment recommendation, if any, and an opinion as to whether there is a likelihood that the defendant will gain the capacity to proceed."

Additional questions raised by RRC counsel have been addressed via further amendments to the rules.

#### **Rule 10A NCAC 27H .0205**

Existing laws govern the LME-MCO oversight of public mh/dd/sa services. Forensic evaluations are a public service.

1. Per State policy, the area authority or county program is the locus of coordination among public services for clients of its catchment area. [G.S. 122C-101]
2. Ultimately, the LME-MCO is responsible for the management and oversight of the public system of mental health, developmental disabilities, and substance abuse services at the community level and is mandated to plan, develop, implement, and monitor services within a specified geographic area to ensure expected outcomes for consumers within available resources. [G.S. 122C-115.4(a)]
3. Similar obligations are likewise noted in G.S. 122C-117 which requires the area authority to monitor community-based mental health, developmental disabilities, and substance abuse services; ensure the provision of services to clients in its catchment area; and assure that services provided by the county through the area authority meet the rules of the Commission and the Secretary. [G.S. 122C-117(a)(1), (a)(2), (a)(5)]
4. G.S. 122C-111 states "An area director or program director shall (i) manage the public mental health, developmental disabilities, and substance abuse system for the area authority or county program according to the local business plan, and (ii) enforce applicable State laws, rules of the Commission, and rules of the Secretary". It further states "the area authority or county program shall monitor the provision of mental health, developmental disabilities, and substance abuse

services for compliance with the law, which monitoring and management shall not supersede or duplicate the regulatory authority or functions of agencies of the Department.”

5. Each area authority is required to develop internal processes to monitor and evaluate the level of quality obtained by all its programs and services including the activities prescribed in the rules of the Commission. [122C-191(c)]

The rule has been further amended to address the issues raised regarding ambiguity. Please see the explanation for Rule .0202 as it relates to employment and contract requirements.

#### **Rule 10A NCAC 27H .0206**

As noted above, the Commission is granted authority to write rules under which forensic evaluators may be approved. It is not mandated to approve the evaluators itself. As such, the rule has been further amended to make clear the Division is responsible for declaring the certification void. Because the law, as noted above, requires the LME-MCO to contract with providers for the delivery of public mh/dd/sa services, the LME-MCO is better positioned to know when the forensic evaluator with whom it contracts no longer complies with the terms of the standard contract each is required to use.


#### **Rule 10A NCAC 27H .0207**

G.S. 143B-147(a)(10) requires that the annual continuing education seminars provide training in conducting forensic evaluations and screening examinations of defendants to determine capacity to proceed and in preparing written reports required by law. The laws below make clear what the written report is to include.

1. G.S. 15A-1002(b)(1a) states “in the case of a defendant charged with a misdemeanor or felony, the court may appoint one or more impartial medical experts, including forensic evaluators approved under rules of the Commission, to examine the defendant and return a written report describing the present state of the defendant’s mental health.”
2. G.S. 122C-54(b) states “If an individual is a defendant in a criminal case and a mental examination of the defendant has been ordered by the court as provided in G.S. 15A-1002, the facility shall send the results or the report of the mental examination to the clerk of court, to the district attorney or prosecuting officer, and to the attorney of record for the defendant as provided in G.S. 15A-1002(d). The report shall contain a treatment recommendation, if any, and an opinion as to whether there is a likelihood that the defendant will gain the capacity to proceed.

Please let me know if you have questions regarding this response and the additional amendments reflected in the attached rules.

Sincerely,



W. Denise Baker  
Rulemaking Coordinator  
Commission for MH/DD/SAS

Attachments

c: Scott Stroud  
Lisa Corbett

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

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

For the purposes of Rules .0201 through .0207 of this ~~Section~~ Section, when a capacity evaluation is ordered by a Court to be conducted through the Local Management Entity-Managed Care Organization LME-MCO, the following terms shall have the meanings indicated:

- (1) "Forensic Evaluation" means an ~~a local~~ examination ordered by the court through the LME-MCO to determine ~~if the defendant's current mental state and whether the defendant has the capacity to proceed to trial, trial. [does not have the capacity to proceed to trial, or] needs further treatment at an inpatient facility or further evaluation at the Pre-Trial Evaluation Center.~~
- (2) ~~"Pre-Trial Evaluation Center" means the forensic unit at Dorothea Dix Hospital.~~ "Licensed Clinician" means the same as defined in Rule 10A NCAC 27G .0104.
- (3) ~~"Qualified Mental Health Professional" means the same as defined in 10A NCAC 27G .0104(e) contained in Division publication, Rules for Mental Health, Developmental Disabilities and Substance Abuse Facilities and Services, APSM 40-2.~~ "Local Certified Forensic Evaluator" means a Licensed Clinician who:
  - (a) has completed the training for certification and annual training seminars described in Rule .0204 of this Section; [and]
  - (b) is employed by, or under contract with, an LME-MCO as a [Certified] Forensic [Evaluator.] Evaluator; and
  - (c) is paid by the LME-MCO with public funds.
- (4) ~~"Qualified Substance Abuse Professional" means the same as defined in 10A NCAC 27G .0104(e) contained in Division publication, Rules for Mental Health, Developmental Disabilities and Substance Abuse Facilities and Services, APSM 40-2.~~ "Pre-Trial Evaluation Center" means the Forensic Services Unit located at Central Regional Hospital. [so designated by the Secretary of the North Carolina Department of Health and Human Services.]

*History Note:* Authority G.S. 15A-1002; ~~143B-147;~~ 122C-54; 122C-115.4(a); 122C-191(b); 143B-147;  
*Eff. July 1, 1982;*  
*Amended Eff. July 1, 2017; January 1, 1996; May 1, 1990*

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

2  
3 **10A NCAC 27H .0203 ELIGIBILITY FOR TRAINING**

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

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

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

15  
16 *History Note:* Authority G.S. 15A-1002; 143B-147; 122C-115.4(a); 122C-141; 122C-191(b); 143B-147;

17 *Eff. July 1, 1982;*

18 *Amended Eff. July 1, 2017; January 1, 1996; May 1, 1990.*

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

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

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

- (1) current laws and practices including the role of the local certified forensic evaluator in the capacity to proceed evaluation process;
- (2) procedures for conducting interviews including evaluation for the presence of mh/dd/sa disorders, or other relevant conditions;
- (3) ~~[components of reports to be submitted to the court;]~~ procedures for completing reports required by law;
- (4) process for reporting findings to the court; and
- (5) an examination at the conclusion of the training which assesses comprehension of the training material and an understanding of the duties of a local certified forensic evaluator.

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

~~(c) [Local certified forensic evaluators shall be exempt from the continuing education requirement in the calendar year in which they are first certified and shall complete the annual continuing education requirement by December 31 of the following year and each calendar year thereafter.]~~ Continuing education seminar topics may include:

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

~~(d) Local certified forensic evaluators shall be exempt from the continuing education requirement in the calendar year in which they are first certified. [Continuing education module topics may include:~~

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

*History Note:* Authority G.S. 15A-1002; 143B-147; 122C-54; 122C-115.4(a); 122C-191; 143B-147;  
Eff. July 1, 1982;  
Amended Eff. July 1, 2017; May 1, 1990.



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

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

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

(a) The LME-MCO shall ensure there ~~[is a sufficient number of]~~ are local certified forensic evaluators to conduct forensic evaluations to meet the demand for forensic evaluations in its catchment area.

(b) Each LME-MCO shall maintain a list of local certified forensic evaluators who are ~~[currently]~~ employed or contracted by the LME-MCO that includes the mh/dd/sa populations for which each evaluator has reported having ~~[expertise]~~ expertise, based upon their knowledge, skills, and abilities, to conduct forensic evaluations.

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

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

(e) The LME-MCO shall maintain a ~~[log]~~ list, including the number of local forensic evaluations done in each county within its catchment area, the forensic evaluator's name and capacity opinion, the date of the evaluation, the defendant's name, gender, and criminal charge, and provide that ~~[log]~~ list to the Pre-Trial Evaluation Center on a monthly basis.

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

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

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

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

*History Note:*    Authority G.S. 15A-1002; ~~143B-147; 122C-115.4(a); 122C-141; 122C-191(b); 143B-147;~~  
Eff. July 1, 1982;  
Amended Eff. July 1, 2017; May 1, 1990.

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

2  
3 **10A NCAC 27H .0206 TERMINATION OF ~~REGISTRATION~~ CERTIFICATION**

4 A Forensic Evaluator Registration will be declared The [LME-MCO] Division shall declare a forensic evaluator  
5 certification void ~~when:~~ when the LME-MCO notifies the Division of the following:

6 (1) the evaluator notifies the LME-MCO in writing that he or she no longer desires wishes to be  
7 registered certified; and perform the duties required by an evaluator;

8 ~~(2) the evaluator is no longer employed by, or under contract with, an area program; or [LME-MCO];~~

9 ~~(3)(2)~~ (2) the evaluator no longer meets the ~~registration requirements.~~ eligibility requirements set forth in  
10 Rule [.0203] .0203(a) of this Section;

11 ~~[(4)](3)~~ (3) the evaluator fails to complete annual continuing education [modules] seminars as set forth in Rule  
12 .0204 of this Section; or

13 ~~[(5)](4)~~ (4) the evaluator fails to perform any of the duties described in Rule .0207 of this Section.  
14

15 *History Note:* Authority G.S. 15A-1002; ~~143B-147; 122C-115.4(a); 122C-141; 122C-191(b); 143B-147;~~

16 *Eff. July 1, 1982;*

17 *Amended Eff. July 1, 2017; May 1, 1990.*



**STATE OF NORTH CAROLINA  
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March 17, 2017

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Sent via electronic mail to: [denise.baker@dhhs.nc.gov](mailto:denise.baker@dhhs.nc.gov)

Re: Rules 10A NCAC 27H .0202, .0203, .0204, .0205, .0206, and .0207

Dear Ms. Baker:

At its meeting on March 16, 2017, the Rules Review Commission objected to the above-captioned rules in accordance with G.S. 150B-21.9. Please note that the Rules Review Commission did approve Rules 10A NCAC 27G .6702 and 27H .0201.

The Rules Review Commission objected to 10A NCAC 27H .0202 finding that the Commission for MH/DD/SAS lacks the authority to set the employment requirements for individuals in requiring that forensic evaluators be employed or under contract with an LME-MCO. The Rules Review Commission also objected to this Rule as being unclear or ambiguous as it is unclear what the "Pre-Trial Evaluation Center" is, how the Secretary is to make the determination, and how the public will be made aware of what this is.

The Rules Review Commission objected to 10A NCAC 27H.0203 finding that the Commission for MH/DD/SAS lacks the authority to set the employment requirements for individuals in requiring that forensic evaluators be employed by or under contract with an LME-MCO. The Rules Review Commission also objected to this Rule finding that it is unclear or ambiguous. Specifically, the Rules Review Commission objected as Paragraph (a) contains a reference to an "applicant," but there is no information contained within the Rule as submitted to say what the "applicant" will need to do to apply to be certified as a forensic evaluator, to whom the applicant will apply, what the application process is, and the timing of the training requirements. The Rules Review Commission further found that it is unclear how the LME-MCO will determine whether the evaluator has expertise as set forth in Paragraph (b).

The Rules Review Commission objected to 10A NCAC 27H .0204 finding that the Commission for MH/DD/SAS lacks the statutory authority to promulgate rules regarding the contents of the report.

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The Rules Review Commission objected to 10A NCAC 27H .0205 for lack of statutory authority and as being unclear or ambiguous. In objecting to this Rule, the Rules Review Commission found that the Commission for MH/DD/SAS lacks the statutory authority to promulgate rules regarding LME-MCOs oversight of forensic evaluators. The Rules Review Commission also found the following were unclear or ambiguous:

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


It is noted that there is a specific reference to a forensic evaluator being employed by an LME-MCO in (b) of this Rule. Please note that this provision was specifically objected to as indicated above with regard to .0202 and .0203.

The Rules Review Commission objected to 10A NCAC 27H .0206 for lack of statutory authority and as being unclear or ambiguous. In objecting to this Rule, the Rules Review Commission found that the Commission for MH/DD/SAS lacks the authority to delegate the termination of certifications to LME-MCOs. The Rules Review Commission further found that it is unclear what the responsibilities and duties of the LME-MCOs would be in accordance with this Rule.

The Rules Review Commission also objected to 10A NCAC 27H .0207 finding that the Commission for MH/DD/SAS lacks the statutory authority to specify the requirements of the evaluation report. The Rules Review Commission also found that the Commission for MH/DD/SAS lacks the statutory authority to limit a recommendation by a forensic evaluator for a full evaluation at the Pre-Trial Evaluation Center only if the defendant is charged with a felony.

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

Sincerely,



Amber C. May  
Commission Counsel



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

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

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

January 19, 2017

Via Email Only: Denise.Baker@dhhs.nc.gov  
Denise Baker, Rulemaking Coordinator  
State Human Resources Commission  
3004 Mail Service Center  
Raleigh, NC 27608

Re: 10A NCAC 27G .670 2 and 27H .0201, .0202, .0203, .0204, .0205, .0206, and .0207

Dear Ms. Baker:

At its meeting this morning, the Rules Review Commission extended the period of review for the above-captioned rules in accordance with G.S. 150B-21.10. They did so in response to a request from the rulemaking coordinator to extend the period in order to allow the agency an opportunity to review and approve the technical changes, as well as address potential objections regarding the proposed rules.

Pursuant to G.S. 150B-21.13, when the Commission extends the period of review, it is required to approve or object to rules or call a public hearing on the same within 70 days after the date of the extension - in this case, within 70 days after January 19, 2017.

If you have any questions regarding the Commission's action, please let me know.

Sincerely,

Amber May  
Commission Counsel

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

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

Judges and  
Assistants  
919/431-3000  
fax: 919/431-3100

Clerk's Office  
919/431-3000  
fax: 919/431-3100

Rules Review  
Commission  
919/431-3000  
fax: 919/431-3104

Civil Rights  
Division  
919/431-3036  
fax: 919/431-3103

## Burgos, Alexander N

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**To:** May, Amber Cronk  
**Subject:** RE: Request for Extension of Review

**From:** Baker, Denise  
**Sent:** Friday, January 13, 2017 4:47 PM  
**To:** May, Amber Cronk <[amber.may@oah.nc.gov](mailto:amber.may@oah.nc.gov)>  
**Subject:** Request for Extension of Review

Hi Amber –

We are requesting an extension for the period of review regarding the following rules: 10A NCAC 27G .6702 and 10A NCAC 27H Section .0200 filed December 16, 2016 for review at the January 19, 2017 RRC meeting. This will allow the Commission for MH/DD/SAS opportunity to review and approve the technical changes as well as address potential objections regarding the proposed rules. The next regularly scheduled meeting of the Commission for MH/DD/SAS is February 23, 2017.

Thank you for your consideration of this request.

Denise

**W. Denise Baker, M.A., L.P.A., Esq.**  
Team Leader, Division Affairs Team  
Division of MH/DD/SAS  
North Carolina Department of Health and Human Services

919-733-7011 Office  
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3001 Mail Service Center  
Raleigh, NC 27699-3001



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## REQUEST FOR TECHNICAL CHANGE

**AGENCY:** Commission for Mental Health, Developmental Disabilities and Substance Abuse Services

**RULE CITATION:** All Rules

**DEADLINE FOR RECEIPT:** Friday, January 13, 2017

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

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

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

*On the individual forms for all of the Rules, please include the typed name and title in Box 11.*

*Please format all Rules in accordance with 26 NCAC 02C .0108, specifically, please ensure that the Rules have 1.5 line spacing.*

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

## **RRC Staff Opinion**

Please Note: This communication is either 1) only the recommendation of an RRC staff attorney as to action that the attorney believes the Commission should take on the cited rule at its next meeting, or 2) an opinion of that attorney as to some matter concerning that rule. The agency and members of the public are invited to submit their own comments and recommendations (according to RRC rules) to the Commission.

AGENCY: Commission for MH/DD/SAS

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

RECOMMENDED ACTION:

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

COMMENT:

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

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

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

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<sup>1</sup> Amanda Reeder to Dr. Greg Olley, January 31, 2014



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

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

#### Rule 10A NCAC 27H .0202

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

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

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

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

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

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| <u>procedures prior to December 1, 2013 but who do not meet the requirements in Subparagraph (a)(1) of this Rule continue to be eligible for certification provided they meet all other requirements.</u> |  |
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#### Rule 10A NCAC 27H .0204

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

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

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

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

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|  | <p>(b) <u>Each local forensic evaluator is required to complete a minimum of four hours of required annual continuing education modules provided by the Pre-Trial Evaluation Center by December 31 of each calendar year.</u></p> <p>(c) <u>Local forensic evaluators shall be exempt from the continuing education requirement in the calendar year in which they are first certified and shall complete the annual continuing education requirement by December 31 of the following year and each calendar year thereafter.</u></p> <p>(d) <u>Continuing education module topics may include:</u></p> <p style="padding-left: 40px;">(1) <u>evaluation skills training to enhance skills acquired through the initial local forensic evaluator training;</u></p> <p style="padding-left: 40px;">(2) <u>changes in existing laws and current practices; and</u></p> <p style="padding-left: 40px;">(3) <u>evaluation of mh/dd/sa populations.</u></p> |
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### Rule 10A NCAC 27H .0207

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) To adopt rules regarding the

- a. Admission, including the designation of regions, treatment, and professional care of individuals admitted to a facility operated under the authority of G.S. 122C-181(a), that is now or may be established;
- b. Operation of education, prevention, intervention, treatment, rehabilitation and other related services as provided by area mental health, developmental disabilities, and substance abuse authorities, county programs, and all providers of public services under Part 4 of Article 4 of Chapter 122C of the General Statutes;
- c. Hearings and appeals of area mental health, developmental disabilities, and substance abuse authorities as provided for in Part 4 of Article 4 of Chapter 122C of the General Statutes; and
- d and e. Repealed by Session Laws 2001-437, s. 1.21(a), effective July 1, 2002.
- f. Standards of public services for mental health, developmental disabilities, and substance abuse services.

(2) To adopt rules for the licensing of facilities for the mentally ill, developmentally disabled, and substance abusers, under Article 2 of Chapter 122C of the General Statutes. These rules shall include all of the following:

- a. Standards for the use of electronic supervision devices during client sleep hours for facilities licensed under 10A NCAC 27G. 1700 or any related or subsequent regulations setting licensing standards for such facilities.
- b. Personnel requirements for facilities licensed under 10A NCAC 27G. 1700, or any related or subsequent regulations setting licensing standards for such facilities, when continuous electronic supervision that meets the standards established under sub-subdivision a. of this of this subdivision is present.

(3) To advise the Secretary of the Department of Health and Human Services regarding the need for, provision and coordination of education, prevention, intervention, treatment, rehabilitation and other related services in the areas of:

- a. Mental illness and mental health,



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

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

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

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

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

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

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

## **RRC Staff Opinion**

Please Note: This communication is either 1) only the recommendation of an RRC staff attorney as to action that the attorney believes the Commission should take on the cited rule at its next meeting, or 2) an opinion of that attorney as to some matter concerning that rule. The agency and members of the public are invited to submit their own comments and recommendations (according to RRC rules) to the Commission.

AGENCY: Commission for MH/DD/SAS

RULE CITATION: 10A NCAC 27H .0202

RECOMMENDED ACTION:

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

COMMENT:

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

## REQUEST FOR TECHNICAL CHANGE

**AGENCY:** Commission for Mental Health, Developmental Disabilities and Substance Abuse Services

**RULE CITATION:** 10A NCAC 27H .0202

**DEADLINE FOR RECEIPT: Friday, January 13, 2017**

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:

*On line 5, what is a "local" examination? Please delete or define.*

*In Item (1), what is meant by "needs further evaluation at the Pre-Trial Evaluation Center"? Is this a recommendation by the evaluator that the court order this?*

*In (3)(b), as this is the first time that you have used "LME-MCO" in this Section, please say "Local Management Entity-Managed Care Organization (LME-MCO)" to indicate what the LME-MCO stands for.*

*In Item 4, how will people know which unit has been designated? Is this information available on your website? What is the process? Is there a cross-reference available?*

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

Amber Cronk May  
Commission Counsel

Date submitted to agency: January 5, 2017

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

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

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

5 indicated:

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

25  
26 *History Note:* *Authority G.S. 15A-1002; 143B-147;*

27 *Eff. July 1, 1982;*

28 *Amended Eff. [ ] February 1, 2017; January 1, 1996; May 1, 1990.*

29

## **RRC Staff Opinion**

Please Note: This communication is either 1) only the recommendation of an RRC staff attorney as to action that the attorney believes the Commission should take on the cited rule at its next meeting, or 2) an opinion of that attorney as to some matter concerning that rule. The agency and members of the public are invited to submit their own comments and recommendations (according to RRC rules) to the Commission.

AGENCY: Commission for MH/DD/SAS

RULE CITATION: 10A NCAC 27H .0203

RECOMMENDED ACTION:

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

COMMENT:

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

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

## REQUEST FOR TECHNICAL CHANGE

**AGENCY:** Commission for Mental Health, Developmental Disabilities and Substance Abuse Services

**RULE CITATION:** 10A NCAC 27H .0203

**DEADLINE FOR RECEIPT:** Friday, January 13, 2017

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:

*In (b), what is the population? Individuals facing criminal charges or is this based upon diagnosis?*

*In (b), is this really requiring that the LME-MCO verify that the applicant is a licensed clinician or otherwise meets the requirements, or is the intent actually that the applicant provide some proof that meets these qualifications?*

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

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

2  
3 **10A NCAC 27H .0203 ELIGIBILITY FOR TRAINING**

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

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

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

14  
15 *History Note:* Authority G.S. 15A-1002; 143B-147;  
16 Eff. July 1, 1982;  
17 Amended Eff. [ ] February 1, 2017; January 1, 1996; May 1, 1990.  
18  
19



## REQUEST FOR TECHNICAL CHANGE

**AGENCY:** Commission for Mental Health, Developmental Disabilities and Substance Abuse Services

**RULE CITATION:** 10A NCAC 27H .0204

**DEADLINE FOR RECEIPT:** Friday, January 13, 2017

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:

*In (a) and (b), please delete "at a minimum."*

*In (b), please delete the second "required"*

*In (b), please track the language of the statute and say "annual continuing education seminars", rather than "annual continuing education modules" for purposes of clarity.*

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

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

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

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

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

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

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

(d) Continuing education module topics may include:

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

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

## RRC Staff Opinion

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AGENCY: Commission for MH/DD/SAS

RULE CITATION: 10A NCAC 27H .0205

RECOMMENDED ACTION:

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

COMMENT:

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

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

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

## REQUEST FOR TECHNICAL CHANGE

**AGENCY:** Commission for Mental Health, Developmental Disabilities and Substance Abuse Services

**RULE CITATION:** 10A NCAC 27H .0205

**DEADLINE FOR RECEIPT:** Friday, January 13, 2017

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

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

*Please delete or define "local" throughout the Rule.*

*In (d), please change "which" to "that"*

*In (f), please delete or define "potentially"*

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

Amber Cronk May  
Commission Counsel

Date submitted to agency: January 5, 2017

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

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

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

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

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

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

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

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

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

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

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

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

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

## **RRC Staff Opinion**

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AGENCY: Commission for MH/DD/SAS

RULE CITATION: 10A NCAC 27H .0206

RECOMMENDED ACTION:

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

COMMENT:

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

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

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

## REQUEST FOR TECHNICAL CHANGE

**AGENCY:** Commission for Mental Health, Developmental Disabilities and Substance Abuse Services

**RULE CITATION:** 10A NCAC 27H .0206

**DEADLINE FOR RECEIPT: Friday, January 13, 2017**

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:

*In Item (1), please change "he" to "he or she"*

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

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

2  
3 **10A NCAC 27H .0206 TERMINATION OF REGISTRATION CERTIFICATION**

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

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

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



## RRC Staff Opinion

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AGENCY: Commission for MH/DD/SAS

RULE CITATION: 10A NCAC 27H .0207

RECOMMENDED ACTION:

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

COMMENT:

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

## REQUEST FOR TECHNICAL CHANGE

**AGENCY:** Commission for Mental Health, Developmental Disabilities and Substance Abuse Services

**RULE CITATION:** 10A NCAC 27H .0207

**DEADLINE FOR RECEIPT:** Friday, January 13, 2017

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:

*In Items (2), (3), and (4), please delete or define "clearly" and "clear"*

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

Amber Cronk May  
Commission Counsel

Date submitted to agency: January 5, 2017

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

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

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

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

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