



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

Pat McCrory  
Governor


Aldona Z. Wos, M.D.  
Ambassador (Ret.)  
Secretary DHHS

Dave Richard  
Division Director

March 7, 2014

**MEMORANDUM**

**TO:** Amanda J. Reeder, Commission Counsel  
Rules Review Commission

**FROM:** J. Gregory Olley, Chair   
Commission for MH/DD/SAS

**RE:** Withdrawal of Rules 10A NCAC 27G .6702, 27H .0201-.0207  
From Rules Review Commission

During its February 27, 2014, meeting, the Commission for Mental Health, Developmental Disabilities and Substance Abuse Services discussed the objection by the Rules Review Commission to the proposed adoption of the aforementioned temporary rules.

Pursuant to the procedure established by N.C.G.S. §150B-21.1(b2), the Commission hereby withdraws the following rules from consideration by the Rules Review Commission:

1. 10A NCAC 27G .6702, *Operations*
2. 10A NCAC 27H .0201, *Scope*
3. 10A NCAC 27H .0202, *Definitions*
4. 10A NCAC 27H .0203, *Eligibility for Training*
5. 10A NCAC 27H .0204, *Training and Registration*
6. 10A NCAC 27H .0205, *Period of Registration*
7. 10A NCAC 27H .0206, *Termination of Registration*
8. 10A NCAC 27H .0207, *Duties of Forensic Evaluator*

Thank you for your consideration of our request. Please do not hesitate to contact me with any questions or concerns you may have.

c: Dave Richard  
Steven E. Hairston  
W. Denise Baker

www.ncdhhs.gov • www.ncdhhs.gov/mhddsas/  
Tel 919-715-2780 • Fax 919-508-0973

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**From:** [Baker, Denise](#)  
**To:** [Reeder, Amanda J](#)  
**Subject:** RE: Commission for MH/DD/SAS response to the RRC letter dated January 31, 2014  
**Date:** Monday, February 10, 2014 11:26:55 AM

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Hi Amanda –  
That is correct.  
Thank you,  
Denise

W. Denise Baker, M.A., L.P.A., Esq.  
N.C. Department of Health and Human Services  
Team Leader, Division Affairs Team, Division of MH/DD/SAS  
3018 Mail Service Center  
Raleigh, NC 27699-3018  
Phone: 919-715-2780  
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DMH/DD/SAS Website: <http://www.ncdhhs.gov/mhddsas/>

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**From:** Reeder, Amanda J  
**Sent:** Monday, February 10, 2014 11:09 AM  
**To:** Baker, Denise  
**Cc:** Reeder, Amanda J  
**Subject:** Commission for MH/DD/SAS response to the RRC letter dated January 31, 2014

Denise,

The temporary rules that the RRC objected to on January 31, 2014 will be a follow up matter at the Commission's February 20, 2014 meeting. I assume that, since the Commission for MH/DD/SAS doesn't meet until February 27, 2014, there will not be an official response for the RRC's February meeting. Please respond to let me know if that is correct. If I am not correct, please tell me when the Commission may expect the response.

Please note that the matter will remain on the Commission's monthly agenda until the it receives the required response pursuant to G.S. 150B-21.1(b1) or (b2).

Thank you.

Amanda

*Amanda J. Reeder*  
*Counsel to the Rules Review Commission*  
*NC Office of Administrative Hearings*  
*919/ 431-3079*

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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 31, 2014

Dr. Greg Olley, Chair  
Commission for MH/DD/SAS  
CB#7255 UNC-CH  
Chapel Hill, NC 27599-7255

Sent via electronic mail to: greg.olley@cidd.unc.edu

Re: Rules 10A NCAC 27G .6702, 27H .0201 -.0207

Dr. Olley:

At its meeting this morning, the Rules Review Commission declined to approve the above-captioned temporary rules in accordance with G.S. 150B-21.1(b).

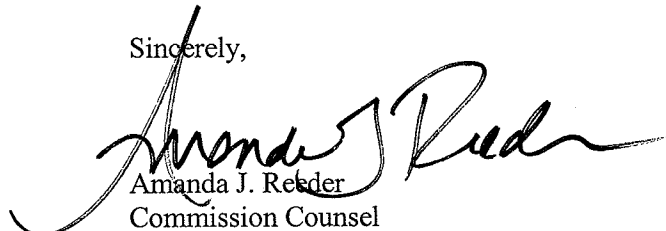
The Rules Review Commission found the Commission for MH/DD/SAS did not meet the requirements for temporary rules as set forth in G.S. 150B-21.1(a2). This is based upon the fact that the Commission for MH/DD/SAS took six weeks after adoption of the temporary rules to file them with the Office of Administrative Hearings for Rules Review Commission review.

In addition, the Rules Review Commission objected to Rules 10A NCAC 27H .0202, .0203, .0204 and .0207, finding the Commission for MH/DD/SAS lacks authority to set employment requirements for individuals and set the requirements of the evaluation report.

The Rules Review Commission further objected to Rule 10A NCAC 27H .0204 based upon ambiguity. The Rule does not give any guidance as to what body grants the certification, the initial training topics, that an examination will be required for the certification, the hours required for both initial certification, and the continuing education requirements.

Please respond to this letter in accordance with the provisions of G.S. 150B-21.1(b1) or (b2). If you have any questions regarding the Rule Review Commission's action, please let me know.

Sincerely,



Amanda J. Reeder  
Commission Counsel

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

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

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

cc: W. Denise Baker, Rulemaking Coordinator, DMH/DD/SAS



**TEMPORARY RULE-MAKING  
FINDINGS OF NEED**  
[Authority G.S. 150B-21.1]

Amended Filing Form  
Filed January 27, 2014

OAH  
VOL  
ISSUE:

<b>1. Rule-Making Agency:</b> Commission for MH/DD/SAS	
<b>2. Rule citation &amp; name:</b> 10A NCAC 27G .6702 - Operations	
<b>3. Action:</b> <input type="checkbox"/> Adoption <input checked="" type="checkbox"/> Amendment <input type="checkbox"/> Repeal	
<b>4. Was this an Emergency Rule:</b> <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <b>Effective date:</b>	
<b>5. Provide dates for the following actions as applicable:</b> a. Proposed Temporary Rule submitted to OAH: October 15, 2013 b. Proposed Temporary Rule published on the OAH website: October 21, 2013 c. Public Hearing date: October 30, 2013 d. Comment Period: October 24, 2013-November 15, 2013 e. Notice pursuant to G.S. 150B-21.1(a3)(2): October 15, 2013 f. Adoption by agency on: November 27, 2013 g. Proposed effective date of temporary rule [if other than effective date established by G.S. 150B- 21.1(b) and G.S. 150B-21.3]: December 1, 2013 h. Rule approved by RRC as a permanent rule:	
<b>6. Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review.</b> <input type="checkbox"/> A serious and unforeseen threat to the public health, safety or welfare. <input checked="" type="checkbox"/> The effective date of a recent act of the General Assembly or of the U.S. Congress. Cite: S.L. 2013-18, S.B. 45, Section 9 Effective date: April 3, 2013 <input type="checkbox"/> A recent change in federal or state budgetary policy. Effective date of change: <input type="checkbox"/> A recent federal regulation. Cite: Effective date: <input type="checkbox"/> A recent court order. Cite order: <input type="checkbox"/> State Medical Facilities Plan. <input type="checkbox"/> Other:	
<b>Explain:</b> S.L. 2013-18, S.B. 45, Section 9 required the Commission for MH/DD/SAS to adopt rules 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. (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. The rules are to be adopted by December 1, 2013.	

**ORIGINAL**

FILED  
2014 JAN 27 PM 1:13  
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HEARINGS

**7. Why is adherence to notice and hearing requirements contrary to the public interest and the immediate adoption of the rule is required?**

S.L. 2013-18, S.B. 45, Section 9 required the Commission for MH/DD/SAS to adopt rules 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.

(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. The rules are to be adopted by December 1, 2013. It seems likely that the General Assembly had the public interest in mind in requiring certification and annual continuing education requirements be imposed prior to the end of the calendar year. Adherence to the notice and public hearing requirement would have been contrary to the legislative intent, and, hence, the public interest as it would not have permitted adoption of the rule by the date specified in legislation..

**ORIGINAL**

**8. Rule establishes or increases a fee? (See G.S. 12-3.1)**

☐ Yes

Agency submitted request for consultation on:

Consultation not required. Cite authority:

☒ No

**9. Rule-making Coordinator:** W. Denise Baker

3018 MSC Raleigh, NC 27699-3018

Phone: 919-715-2780

E-Mail: denise.baker@dhhs.nc.gov

**10. Signature of Agency Head\*:**

*J. Gregory Olley*

\* If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.

Typed Name: J. Gregory Olley, Ph.D.

Title: Chair, NC Commission for MH/DD/SAS

**Agency contact, if any:**

Phone:

E-Mail:

**RULES REVIEW COMMISSION USE ONLY**

**Action taken:**

**Submitted for RRC Review:**

☐ Date returned to agency:

**Responses to Request for Technical Changes – Temporary Forensic Evaluator  
Commission for Mental Health, Developmental Disabilities and Substance Abuse**

Written Response from  
agency  
Submitted January 29,  
2014

**1. All Rules**

- a. The temporary rulemaking process is intended to ensure that agencies only adopt rules under these measures after finding that “notice and hearing requirements [required for permanent rulemaking] would be contrary to the public interest and that the immediate adoption of the rule is required.” [G.S. 150B-21.1(a)] The agency adopted these rules under the temporary rulemaking process on November 27, 2013, but did not file them with the Commission until January 9, 2014, six weeks after the adoption date. Please provide an explanation to justify this delay in filing the Rules for review, given the requirements of the statute and the intent of temporary rulemaking.
  - i. G.S. 150B-21.1, *Procedure for adopting a temporary rule*, does not provide a timeline by which the agency must submit a temporary rule to the RRC for review. However, in this case, we faced delays resulting, in part, from the intervening holidays.
  - ii. The forms and the rules have been modified to address the changes requested with the exception of item 5(e) on the forms; that area of the form only requests the date the notice was provided.

**2. Rule 10A NCAC 27G .6702**

- a. DMH/DD/SAS publication APSR 1003 is a document which contains the rules of the North Carolina Administrative Code related to the forensic evaluation process exactly as they existed at the time of the publication. Therefore, the reference to that publication is not needed and has been removed from the rule.
- b. The remaining changes requested have been made to the rule itself.

**3. Rule 10A NCAC 27H .0201**

- a. “Local” refers to the forensic evaluators who are employees of, or maintain a contract with, the Local Management Entities-Managed Care Organizations.
- b. The remaining changes requested have been made to the rule itself.

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

- a. What is “local” examination? One where the individual is not sent to a State operated facility? Is it still local if the examination takes place outside the county or if the examiner travels to conduct it?
  - i. Local means the evaluation is done in or near the county bringing the change; almost all are done in the actual charging county. Local refers more to the fact that the examination is done by the local evaluator (as distinguished from the evaluators at Central Regional Hospital). Yes, it is local even if it takes place outside the county or the examiner has to travel to conduct it.
- b. 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?
  - i. This is a recommendation made by the local certified forensic evaluator; it is typically done when the local evaluator is unable to form an opinion regarding the individual’s capacity.
- c. In Item 4, how will people know which unit has been so designated?
  - i. Currently, the Pre Trial Evaluation Center housed at Central Regional Hospital is the Forensics Unit designated to conduct forensic evaluations. This language was used to allow for a possibility that a different site may be designated to fulfill this purpose in the future. Any changes in this designation will be communicated to the regulated public via Communication Bulletins, and postings on the Division of MH/DD/SAS website as appropriate.
- d. The remaining changes have been made to the rule itself.

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

- a. The changes requested have been made to the rule itself.



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

- a. So, is the process that the individual must be eligible for training (Rule .0203), then complete the training (Rule .0204) and then – who issuing the certification? The Division? The Commission? This needs to be in Rule somewhere.
  - i. Yes
  - ii. The Division (via the Pre-Trial Center) issues the certification.
- b. In (a), to what “procedures, techniques, and reporting” are you referring? If you are referring to the guidelines set forth in S: 2013-18, Section 10, you need to state where these can be found and that they are guidelines adopted by the Commission. In not, then where is the Commission’s authority to set these requirements outside of rulemaking?
  - i. Procedures, techniques, and reporting refer to the basic/initial training that must be completed and would include procedures/techniques for conducting the evaluation and for submission of the reports.
- c. In (b), how many hours will be required? That information needs to be in Rule. And what is the statutory authority for the Secretary to determine the topics.
  - i. The intent is that the center, not the training content, is designated by the Secretary. The Commission didn’t designate the number of hours required. However, the current training program is between 2-8 hours duration.
- d. SL 2013-18, Section 9(2) requires that the seminars provide continuing education and training in conducting forensic evaluations and screening examinations of defendants to determine capacity to proceed in preparing written reports required by law. Are these requirements covered by the topics listed in (c)(1) through (3)?
  - i. Yes – this describes the initial training (i.e., “initial forensic evaluator training”) as the initial training consists of techniques relevant to determining capacity to proceed and applicable laws governing the process. The continuing education training would expand upon the training provided in the initial course and provide updates on laws governing the evaluation and reporting procedures as well as issues pertinent to evaluation of the population with a mh/dd/sa diagnosis.
- e. In (c)(1), what is the “initial Basic Forensic Evaluator Training” you are referring to? Is this the training in (a)?
  - i. Yes – we have amended the rule further to refer to it simply as the initial training to be certified as a forensic evaluator.
- f. The remaining changes requested have been made to the rule itself.

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

- a. What is the authority for this Rule? 15A-1002(b)(1) states the Commission has the authority to approve evaluators. The Session Law gave the Commission explicit authority to require training and continuing education requirements. This goes beyond that and instead governs LME-MCO management of these individuals. What is the authority cited for this?
  - i. The Commission has required that the Local Certified Forensic Evaluator be “employed by, or under contract with, [an LME-MCO].” [Rule .0202] This rule is intended to reflect the LME-MCO’s role in ensuring compliance with the Commission’s rule given this requirement.
  - ii. The PreTrial evaluation Center has a Memorandum of Understanding with each of the LME-MCOs regarding this process.
- b. I take it the regulated public knows what a “catchment area” is.
  - i. Yes, the regulated public has reason to understand what a ‘catchment area’ is. G.S. 122C-3(5) defines catchment area as “the geographic part of the State served by a specific area authority or county program”. As the mental health, developmental disabilities, and substance abuse services delivery system has evolved to provide for Local Management Entities-Managed Care

Organizations (LME-MCOs), the term has been used in reference to the geographic areas covered by the LME-MCOs. Maps depicting the catchment areas covered by the LME-MCOs are routinely updated and available on the Division of Mental Health, Developmental Disabilities and Substance Abuse Services website.

- c. The remaining changes requested have been made to the rule itself.
- d. What is the authority for paragraph (f)? Note, these reports are not automatically public records (15A-1002(d)), so it's interesting that someone else will apparently be reviewing them to monitor them for quality.
  - i. The intent of this paragraph is not to suggest that these reports are automatically public records but rather to ensure local oversight of the completed reports.

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

- a. Changes have been made to the rule itself to improve its clarity and to address the questions raised.

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

- a. Where's the Commission's authority to state what will be in the report? The rulemaking authority in the Session Law and G.S. 15A-1002 states the Commission can approve the evaluators, and set the certification and continuing education requirements of the individuals, which includes writing the reports. It does not speak to the Commission having authority over the contents of the report. It appears the statutes govern what will be in the report will describe the present state of the defendant's mental health. Paragraph (d) of that statute states the report shall include a statement with "any conclusion as to whether the defendant has or lacks capacity. In you are relying upon Section 7 of S.L. 2013-18, you need to cite to that specifically. But I note that really only speaks to individuals in a facility receiving treatment and requires an opinion as to whether there is a likelihood that the defendant will gain capacity to proceed. So please cite the specific authority relied upon for this language.
  - i. G.S. 15A-1002(b)(1a) speaks to the forensic evaluators, approved under the rules of the Commission for MH/DD/SAS, examining a defendant and returning a written report describing the present state of the defendant's mental health. As indicated above, paragraph (d) does speak to the report include a statement with "conclusion as to whether the defendant has or lacks capacity to proceed." S.L. 2013-18, Section 9(2), granted the Commission authority for rulemaking regarding "training in conducting forensic evaluations and screening examinations of defendants to determine capacity to proceed and in preparing written reports required by law." This rule is intended to reflect the fact that, as provided in the training, the report is to address the individual's capacity to proceed.

From: [Reeder, Amanda J](#)  
To: [Baker, Denise](#)  
Cc: [Borden, Andrea](#); [Reeder, Amanda J](#); [Hammond, Abigail M](#)  
Subject: RE: Rewritten Temporary Rules submitted for RRC review  
Date: Thursday, January 30, 2014 11:55:41 AM

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Denise,

Thank you for the document. There are still outstanding questions that have not been addressed that I was seeking answers to in the original Request for Technical Changes or that have come up in my review of the rewritten rule.

For all rules:

*In Item 5(e), you indicate you submitted notice to the interested persons on October 15, 2013. How did you submit this notice those individuals?*

Rule 27G .6702:

*In (b), ... what idea is this sentence supposed to convey?*

Rule 27H .0201:

*Since "licensed clinician" is defined in Rule 27G .0104(12), I assume that is the term you mean? Please note, there is no need to put the citation to the Subparagraph in this Rule, but I am confirming the intent.*

*Does the certification expire?*

Rule 27H .0202:

As I understand your response to this query:

*In Item 4, how will people know which unit has been so designated?*

The Secretary will designate and change it when the Secretary wishes to do so. What is the authority to change this outside of rulemaking?

Rule 27H .0204:

Your responses regarding the Division certifying and providing information on the procedures, techniques, etc. is not sufficient for rule language. It does not give guidance on what is included in the training or the hours required. Additionally, it is not clear from this Rule who will issue the certification. The response indicates that the Commission doesn't want to designate hours or set the training, but the place. However, I read the authorizing language to tell the Commission not to designate the place but the training itself. This rule does not do that. Of course, you are free to argue to the Commission that the language was intended to simply have the Commission state that training is required. Even under that interpretation, I do not think this Rule is clear and unambiguous and thus, suitable for inclusion in the Code.

**SECTION 9.** 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:

- (1) Complete all training requirements necessary to be credentialed as a certified forensic evaluator.
- (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.

Rule 27H .0205:

What is the Commission's statutory authority to state that all evaluators must be employed by an LME-MCO? Further, how does this qualify for temporary rulemaking under the Session Law? It does not touch upon training requirements that were mentioned above.

Further, I have not gotten a clear response on what the Pre-Trial Center is and how it is involved in this process. Is the Commission simply delegating to that Center the responsibility of training and providing continuing education to that place? What is its authority to do this?

In response to the question for Paragraph (f), you state the intention of the Paragraph is not to have these be public records. However, this report will be reviewed by someone at the LME, correct? How is confidentiality being preserved?

-

Rule 27H .0207:

I understand your response to my query, but I think your answer goes well beyond what is allowed in G.S. 15A-1002(b), which speaks to the Commissioners approving the evaluators. The Session Law does say that the Commission will require attending seminars on preparing written reports, but that is in continuing education. And the actual training rule, .0204, does not mention writing the report at all. I do not believe the Commission has this authority under the authority cited. Is there additional authority you wish to cite? Also, assuming the authority is there, I don't think this qualifies as a temporary rule, given that this goes beyond the scope of Section 9.

At this time, I plan to recommend to the Commission they not approve any of the Rules as temporary rules. While I understand your argument that there is no clear timeframe for submission in the statute, I disagree. G.S. 150B-21.1(a2) defines a recent act as "an act, changes, regulation, or order occurring made effective no more than 210 days *prior to the submission of a temporary rule to the Rules Review Commission.*" In the email you sent October 2, 2013, you cited to this and asked if a waiver would be necessary if the rules were adopted after the 210 days expired. The answer was that if the Commission adopted by December 1, 2013, a waiver would not necessary to implement the rules. That email did not mean that the Commission could take 6 weeks after the adoption of the Rules to file them here. Given the extra time taken to file the Rules, the Commission could have gone through the permanent rule process. As such, I do not believe these Rules should be approved by the Commission as temporary rules. In addition, there are several rules that are still unclear or lacking statutory authority, and I will recommend an objection on these grounds as well.

Please let me know if you have any questions or concerns or wish to give additional authority, or thoughts.

Amanda

*Amanda J. Reeder  
Counsel to the Rules Review Commission  
NC Office of Administrative Hearings  
919/ 431-3079*

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---

**From:** Baker, Denise  
**Sent:** Wednesday, January 29, 2014 3:14 PM  
**To:** Reeder, Amanda J  
**Cc:** Borden, Andrea  
**Subject:** RE: Rewritten Tempoary Rules submitted for RRC review

Hi Amanda -  
Please see attached.  
Thank you,  
Denise

**My email address has changed to the following:** [denise.baker@dhhs.nc.gov](mailto:denise.baker@dhhs.nc.gov)

W. Denise Baker, MA, LPA, JD  
Team Leader  
Division Affairs Team  
Operations Support Section  
NCDHHS DMH/DD/SAS  
Phone: (919) 715-2780  
Fax: (919) 508-0973

---

**From:** Reeder, Amanda J  
**Sent:** Tuesday, January 28, 2014 4:40 PM  
**To:** Baker, Denise  
**Cc:** Reeder, Amanda J  
**Subject:** RE: Rewritten Tempoary Rules submitted for RRC review

Thank you.

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**From:** Baker, Denise  
**Sent:** Tuesday, January 28, 2014 3:16 PM  
**To:** Reeder, Amanda J  
**Subject:** RE: Rewritten Temporary Rules submitted for RRC review

Please see attached Rules 10A NCAC 27H .0201, Scope, and .0204, Training and Certification. Both have been updated to reflect the additional technical changes requested.

W. Denise Baker, M.A., L.P.A., Esq.  
N.C. Department of Health and Human Services  
Team Leader, Division Affairs Team, Division of MH/DD/SAS  
3018 Mail Service Center  
Raleigh, NC 27699-3018  
Phone: 919-715-2780  
Fax: 919-508-0973  
Email: [denise.baker@dhhs.nc.gov](mailto:denise.baker@dhhs.nc.gov)  
DMH/DD/SAS Website: <http://www.ncdhhs.gov/mhddsas/>

---

**From:** Reeder, Amanda J  
**Sent:** Tuesday, January 28, 2014 3:05 PM  
**To:** Baker, Denise  
**Cc:** Reeder, Amanda J  
**Subject:** RE: Rewritten Temporary Rules submitted for RRC review

Yes, we need electronic copies and an email will suffice. You may send the rules directly to me. Please be sure to name all rule files individually as the rule citation.

Amanda

*Amanda J. Reeder  
Counsel to the Rules Review Commission  
NC Office of Administrative Hearings  
919/ 431-3079*

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**From:** Baker, Denise  
**Sent:** Tuesday, January 28, 2014 2:59 PM  
**To:** Reeder, Amanda J  
**Subject:** RE: Rewritten Temporary Rules submitted for RRC review

Thanks Amanda –

Do the re-written rules need to be filed electronically? Will via email suffice?

W. Denise Baker, M.A., L.P.A., Esq.  
N.C. Department of Health and Human Services  
Team Leader, Division Affairs Team, Division of MH/DD/SAS  
3018 Mail Service Center

Raleigh, NC 27699-3018  
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DMH/DD/SAS Website: <http://www.ncdhhs.gov/mhddsas/>

---

**From:** Reeder, Amanda J  
**Sent:** Tuesday, January 28, 2014 10:02 AM  
**To:** Baker, Denise  
**Cc:** Reeder, Amanda J  
**Subject:** RE: Rewritten Tempoary Rules submitted for RRC review

Denise,

The Commission is rescheduling the meeting for Friday morning at 9. There will be a formal announcement to follow.

Given the rescheduling, if you need until tomorrow afternoon to file the response and the rewritten rules, that's fine. However, as our Commissioners travel, I need it to distribute the information to them Thursday morning before they leave for the meeting.

Amanda

*Amanda J. Reeder*  
*Counsel to the Rules Review Commission*  
*NC Office of Administrative Hearings*  
*919/ 431-3079*

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---

**From:** Baker, Denise  
**Sent:** Tuesday, January 28, 2014 8:15 AM  
**To:** Reeder, Amanda J  
**Subject:** Re: Rewritten Tempoary Rules submitted for RRC review

Hi Amanda

I've asked for a review of my responses before submitting them. Given the weather forecast, is there a possibility tomorrow's meeting will be canceled or rescheduled? If that happens, how will we be notified?

Thanks,  
Denise

W. Denise Baker, M.A., L.P.A., Esq.  
N.C. DHHS  
Team Leader, Division Affairs Team, Division of MH/DD/SAS  
3018 Mail Service Center  
Raleigh, NC 27699-3018  
Phone: 919-715-2780

Fax: 919-508-0973

Email: [denise.baker@dhhs.nc.gov](mailto:denise.baker@dhhs.nc.gov)

DMH/DD/SAS Website: <http://www.ncdhhs.gov/mhddsas/>

On Jan 27, 2014, at 5:49 PM, "Reeder, Amanda J" <[amanda.reeder@oah.nc.gov](mailto:amanda.reeder@oah.nc.gov)> wrote:

Denise,

We received the rewritten rules this afternoon. Thank you for the submission. I appreciate all of your work on this matter.

There are several outstanding issues that have not been addressed from the Requests for Technical Changes. I am specifically referring to questions clarifying the process, the rationale for the delay in filing, and where I asked for specific statutory authority for some rules. Some of these will just be answered in writing, but others do actually require changes to the Rules or their History Notes. All of these responses need to be submitted before the meeting in time for the Commission to review them. Please submit them by noon tomorrow to give the Commissioners adequate time to review the responses.

There other minor changes that need to be made:

1. In Rule 27H .0201, you will need to change the reference in Paragraph (c) from "prior to December 1, 2013" to "prior to the effective date of this Section." While the Commission for MH/DD/SAS adopted the rules before December 1, 2013, the rules are not effective until approved by the Rules Review Commission and placed into the Code.
2. For Rule 27H .0204, the language in the Code is this:

The applicant shall successfully complete training covering procedure, techniques, and reporting that is provided by the Mental Health Section of the Division in order to be registered as a forensic evaluator.

You currently have:

(a) The applicant shall ~~successfully~~ complete ~~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; ~~[and]~~

The highlighted semicolon after "evaluator" was added during publication, it appears. You do not need it, but instead need to end the sentence with a period. Please make that change.

You can bring the physical copies of the Rules to the meeting, but I need the electronic versions by noon tomorrow.



Please let me know if you have any questions or concerns.

Amanda

*Amanda J. Reeder*  
*Counsel to the Rules Review Commission*  
*NC Office of Administrative Hearings*  
*919/ 431-3079*

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Email from the agency  
regarding the temporary rule  
filing deadline  
October 2, 2013

**From:** [Baker, Denise](#)  
**To:** [Reeder, Amanda J](#); [Deluca, Joe](#); [Masich, Molly](#)  
**Subject:** RE: Potential Waiver for Adoption of a Temporary Rule  
**Date:** Wednesday, October 02, 2013 3:00:19 PM

---

Hi Amanda,

Thanks so much for your reply. We will be able to meet the requirements of G.S. 150B-21.1(a3); I was worried about the timing of the submission to RRC.

Denise

---

**From:** Reeder, Amanda J  
**Sent:** Wednesday, October 02, 2013 2:48 PM  
**To:** Baker, Denise; Deluca, Joe; Masich, Molly  
**Cc:** Reeder, Amanda J  
**Subject:** RE: Potential Waiver for Adoption of a Temporary Rule

Denise,

We discussed this issue and believe that so long as the Commission adopts the rules by December 1, 2013, a waiver will not be needed to implement temporary rules.

Please note, if the Commission intends to adopt temporary rules pursuant to G.S. 15B-21.1(a3), the Commission must begin the process by approving the proposed language, (which can be done through a specially called meeting) and then following the statutory timeframe in order to adopt the same.

Please let us know if you have any questions or concerns.

Amanda

*Amanda J. Reeder*  
*NC OAH – Counsel to the Rules Review Commission*  
*919/ 431-3079*

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**From:** Baker, Denise  
**Sent:** Wednesday, October 02, 2013 12:49 PM  
**To:** Reeder, Amanda J; Deluca, Joe  
**Subject:** Potential Waiver for Adoption of a Temporary Rule

Good afternoon -

Session Law 2013-18, S.B. 45, *An Act to Amend the Laws Governing Incapacity to Proceed*, required the Commission for Mental Health, Developmental Disabilities and Substance Abuse Services ("Commission") to adopt rules to require that forensic evaluators appointed pursuant to N.C.G.S. § 15A-1002(b):

(1) Complete all training requirements necessary to be credentialed as a certified forensic evaluator. (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. [S.L. 2013-18, S.B. 45, Section 9]

The rules must be adopted by December 1, 2013. Originally, the Commission proposed to adopt new rules governing this subject matter. However, to accommodate this short suspense, the Commission proposes to amend existing rules governing forensic evaluators and to adopt the amendments as temporary rules.

As you know, G.S. § 150B-21.1 permits the adoption of a temporary rule when compliance with the notice and hearing requirements set forth in 150-21.2 "would be contrary to the public interest and that the immediate adoption of the rule is required by" at least one of the circumstances set forth therein. Among the options is "the effective date of a recent act of the General Assembly" which is defined as "occurring or made effective no more than 210 days prior to the submission of a temporary rule to the Rules Review Commission". [G.S. § 150B-21.1 (a2)]

S.L. 2013-18, S.B. 45 became effective April 3, 2013. As a result, the Commission will not have adopted the rule and submitted it to the Rules Review Commission in time to comply with the 210 day deadline. Given that, will the Commission need to request a waiver (as referenced in G.S. § 150B-21.1 (a2))? If so, what is the process for submitting this request? Will it need to be submitted when the rule is submitted to the RRC for consideration?

Thank you assistance in this matter. Please contact me at 919-715-2780 or [denise.baker@dhhs.nc.gov](mailto:denise.baker@dhhs.nc.gov) should you have any questions.

Denise

W. Denise Baker, M.A., L.P.A., Esq.  
N.C. Department of Health and Human Services  
Team Leader, Division Affairs Team, Division of MH/DD/SAS  
3018 Mail Service Center  
Raleigh, NC 27699-3018  
Phone: 919-715-2780  
Fax: 919-508-0973  
Email: [denise.baker@dhhs.nc.gov](mailto:denise.baker@dhhs.nc.gov)  
DMH/DD/SAS Website: <http://www.ncdhhs.gov/mhddsas/>

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# TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

**COPY**

OAH USE ONLY

VOLUME:

ISSUE:

**1. Rule-Making Agency:**

Commission for MH/DD/SAS

**2. Rule citation & name:**

10A NCAC 27G .6702 - Operations

**3. Action:**

☐ Adoption

☒ Amendment

☐ Repeal

**4. Was this an Emergency Rule:** ☐ Yes  
☒ No

Effective date: December 1, 2013

**5. Provide dates for the following actions as applicable:**

a. Proposed Temporary Rule submitted to OAH: October 15, 2013

b. Proposed Temporary Rule published on the OAH website: October 21, 2013

c. Public Hearing date: October 30, 2013

d. Comment Period: October 24, 2013-November 15, 2013

e. Notice pursuant to G.S. 150B-21.1(a3)(2): October 15, 2013

f. Adoption by agency on: November 27, 2013

g. Proposed effective date of temporary rule [if other than effective date established by G.S. 150B- 21.1(b) and G.S. 150B-21.3]: December 1, 2013

h. Rule approved by RRC as a permanent rule:

**6. Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review.**

- ☐ A serious and unforeseen threat to the public health, safety or welfare.
- ☒ The effective date of a recent act of the General Assembly or of the U.S. Congress.  
Cite: S.L. 2013-18, S.B. 45, Section 9  
Effective date: April 3, 2013
- ☐ A recent change in federal or state budgetary policy.  
Effective date of change:
- ☐ A recent federal regulation.  
Cite:  
Effective date:
- ☐ A recent court order.  
Cite order:
- ☐ State Medical Facilities Plan.
- ☐ Other:

**Explain:**

S.L. 2013-18, S.B. 45, Section 9 required the Commission for MH/DD/SAS to adopt rules 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.
- (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. The rules are to be adopted by December 1, 2013.

2014 JAN -9 PM 4:29  
OFFICE OF  
ADMIN HEARINGS

FILED

**7. Why is adherence to notice and hearing requirements contrary to the public interest and the immediate adoption of the rule is required?**

S.L. 2013-18, S.B. 45, Section 9 required the Commission for MH/DD/SAS to adopt rules 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.
- (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. The rules are to be adopted by December 1, 2013.

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ADMIN HEARINGS

**8. Rule establishes or increases a fee? (See G.S. 12-3.1)**

☐ Yes

Agency submitted request for consultation on:

Consultation not required. Cite authority:

☒ No

**9. Rule-making Coordinator:** W. Denise Baker

3018 MSC Raleigh, NC 27699-3018

**Phone:** 919-715-2780

**E-Mail:** denise.baker@dhhs.nc.gov

**Agency contact, if any:**

**Phone:**

**E-Mail:**

**10. Signature of Agency Head\*:**

*J. Gregory Olley*

\* If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.

**Typed Name:** J. Gregory Olley, Ph.D.

**Title:** Chair, NC Commission for MH/DD/SAS

**RULES REVIEW COMMISSION USE ONLY**

**Action taken:**

**Submitted for RRC Review:**

☐ Date returned to agency:

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2013

SESSION LAW 2013-18  
SENATE BILL 45

AN ACT TO AMEND THE LAWS GOVERNING INCAPACITY TO PROCEED.

The General Assembly of North Carolina enacts:

**SECTION 1.** G.S. 15A-1002 reads as rewritten:

**"§ 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) 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 (1) 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. ~~The court:~~

- (1) ~~May~~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~~health. Reports so prepared are admissible at the ~~hearing and the hearing.~~ hearing. The court may call any expert so appointed to testify at the ~~hearing; any expert so appointed may be called to testify at the hearing by the court at~~ hearing with or without the request of either party; ~~or party.~~
- (2) ~~In the case of a defendant charged with a misdemeanor only after the examination pursuant to subsection (b)(1) of this section or at~~ 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; in the case of a defendant charged with a felony, if proceed.~~ proceed. If a defendant is ordered to a State facility without first having an examination pursuant to subsection (b)(1) 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 capacity.~~ capacity. The sheriff shall return the defendant to the county when notified that the evaluation has been ~~completed; the completed.~~ 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 court.~~ 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 (1) 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) If the report pursuant to subdivision (1) or (2) of subsection (b) of this section indicates~~ 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 provided, if 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-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."

**SECTION 2.** G.S. 15A-1004(c) reads as rewritten:

"(c) If the defendant is placed in the custody of a hospital or other institution in a proceeding for involuntary civil commitment, the orders must provide for reporting to the clerk if the defendant is to be released from the custody of the hospital or institution. The original or supplemental orders may make provisions as in subsection (b) in the event that the defendant is released. The court shall also order that the defendant shall be examined to determine whether the defendant has the capacity to proceed prior to release from custody. A report of the examination shall be provided pursuant to G.S. 15A-1002. If the defendant was charged with a violent crime, including a crime involving assault with a deadly weapon, and that charge has not been dismissed, the order must require that if the defendant is to be released from the custody of the hospital or other institution, he is to be released only to the custody of a specified law enforcement agency. If the original or supplemental orders do not specify to whom the respondent shall be released, the hospital or other institution may release the defendant to whomever it thinks appropriate."

**SECTION 3.** G.S. 15A-1006 reads as rewritten:

**"§ 15A-1006. Return of defendant for trial upon gaining capacity.**

If a defendant who has been determined to be incapable of proceeding, and who is in the custody of an institution or an individual, ~~gains~~ has been determined by the institution or individual having custody to have gained capacity to proceed, the individual or institution must ~~notify~~ shall provide written notification to the clerk in the county in which the criminal proceeding is pending. The clerk must notify the sheriff to ~~shall~~ provide written notification to the district attorney, the defendant's attorney, and the sheriff. The sheriff shall return the defendant to the county for a supplemental hearing pursuant to G.S. 15A-1007, if conducted, and trial, trial and to hold him the defendant for a supplemental hearing and trial, subject to the orders of the court entered pursuant to G.S. 15A-1004."

**SECTION 4.** G.S. 15A-1007 reads as rewritten:

**"§ 15A-1007. Supplemental hearings.**

(a) When it has been reported to the court that a defendant has gained capacity to proceed, or when the defendant has been determined by the individual or institution having custody of him to have gained capacity and has been returned for ~~trial, the trial,~~ in accordance with G.S. 15A-1004(e) and G.S. 15A-1006, the clerk shall notify the district attorney. Upon receiving the notification, the district attorney shall calendar the matter for hearing at the next available term of court but no later than 30 days after receiving the notification. The court may hold a supplemental hearing to determine whether the defendant has capacity to proceed. The court may take any action at the supplemental hearing that it could have taken at an original hearing to determine the capacity of the defendant to proceed.

(b) The court may hold a supplemental hearing any time upon its own determination that a hearing is appropriate or necessary to inquire into the condition of the defendant.

(c) The court must hold a supplemental hearing if it appears that any of the conditions for dismissal of the charges have been met.

(d) If the court determines in a supplemental hearing that a defendant has gained the capacity to proceed, the case shall be calendared for trial at the earliest practicable time. Continuances that extend beyond 60 days after initial calendaring of the trial shall be granted only in extraordinary circumstances when necessary for the proper administration of justice, and the court shall issue a written order stating the grounds for granting the continuance."

**SECTION 5.** G.S. 15A-1008 reads as rewritten:

**"§ 15A-1008. Dismissal of charges.**

(a) When a defendant lacks capacity to proceed, the court ~~may~~ shall dismiss the ~~charges; charges upon the earliest of the following occurrences:~~

- (1) When it appears to the satisfaction of the court that the defendant will not gain capacity to ~~proceed; or proceed.~~
- (2) When as a result of incarceration, involuntary commitment to an inpatient facility, or other court-ordered confinement, the defendant has been substantially deprived of his liberty for a period of time equal to or in excess of the maximum permissible period of confinement for the crime or crimes charged; or maximum term of imprisonment permissible for prior record Level VI for felonies or prior conviction Level III for misdemeanors for the most serious offense charged.



- (3) Upon the expiration of a period of five years from the date of determination of incapacity to proceed in the case of misdemeanor charges and a period of 10 years in the case of felony charges.

(b) A dismissal entered pursuant to subdivision (2) of subsection (a) of this section shall be without leave.

(c) A dismissal entered pursuant to subdivision (1) or (3) of subsection (a) of this section shall be issued without prejudice to the refile of the charges. Upon the defendant becoming capable of proceeding, the prosecutor may reinstitute proceedings dismissed pursuant to subdivision (1) or (3) of subsection (a) of this section by filing written notice with the clerk, with the defendant, and with the defendant's attorney of record.

(d) Dismissal of criminal charges pursuant to this section shall be upon motion of the prosecutor or the defendant or upon the court's own motion."

**SECTION 6.** G.S. 15A-1009 is repealed.

**SECTION 7.** G.S. 122C-54(b) reads as rewritten:

"(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."

**SECTION 8.** Part 7 of Article 5 of Chapter 122C of the General Statutes is amended by adding a new section to read:

**"§ 122C-278. Reexamination for capacity to proceed prior to discharge.**

Whenever a respondent has been committed to either inpatient or outpatient treatment pursuant to this Chapter after having been found incapable of proceeding and referred by the court for civil commitment proceedings, the respondent shall not be discharged from the custody of the hospital or institution or the outpatient commitment case terminated until the respondent has been examined for capacity to proceed and a report filed with the clerk of court pursuant to G.S. 15A-1002."

**SECTION 9.** 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:

- (1) Complete all training requirements necessary to be credentialed as a certified forensic evaluator.
- (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.

**SECTION 10.** 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.

**SECTION 11.** Sections 1 through 8 of this act become effective December 1, 2013, and apply to offenses committed on or after that date. The remainder of this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 27<sup>th</sup> day of March, 2013.

s/ Daniel J. Forest  
President of the Senate

s/ Thom Tillis  
Speaker of the House of Representatives

s/ Pat McCrory  
Governor

Approved 4:42 p.m. this 3<sup>rd</sup> day of April, 2013

TEMPORARY RULE  
REQUEST FOR TECHNICAL CHANGE

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

**RULE CITATION:** All Rules

**DEADLINE FOR RECEIPT:** Friday, January 24, 2014

***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:

*The temporary rulemaking process is intended to ensure that agencies only adopt rules under these measures after finding that "notice and hearing requirements [required for permanent rulemaking] would be contrary to the public interest and that the immediate adoption of the rule is required." [G.S. 150B-21.1(a)]*

*The agency adopted these rules under the temporary rulemaking process on November 27, 2013, but did not file them with the Commission until January 9, 2014, six weeks after the adoption date. Please provide a written explanation to justify this delay in filing the Rules for review, given the requirements of the statute and intent of temporary rulemaking.*

*On the individual forms for all of the Rules, make the following changes:*

*In Item 4, since this Rule was not an emergency rule, do not complete the "Effective Date" request.*

*In Item 5(e), you indicate you submitted notice to the interested persons on October 15, 2013. How did you submit this notice those individuals?*

*Please note that the Rules cannot be effective until approval by the RRC, and will not be effective December 1, 2013.*

*The answer to Item 7 is not responsive to the question. Why would adherence to the notice and hearing requirements be contrary to the public interest?*

*For every History Note, please make the following changes:*

*Make sure you properly insert a semicolon after the last date of any rule action taken.*

*The proper indication is "Temporary Amendment Eff."*

*You can leave the date blank, if you so desire.*

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

TEMPORARY RULE  
REQUEST FOR TECHNICAL CHANGE

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

**RULE CITATION:** 10A NCAC 27G .6702

**DEADLINE FOR RECEIPT: Friday, January 24, 2014**

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:

*Do you really wish to retain the language in lines 6-7? You don't need the Section name.*

*What is DMH/DD/SAS publication APSR 100-3? Where is this found? Are you intending to incorporate it by reference? If so, follow G.S. 150B-21.6. However, I suspect you intend to strike it entirely.*

*In (b), do you mean consultation with law enforcement? And what idea is this sentence supposed to convey?*

*Please adjust the indentation of (c)(1) and (2).*

*In (c)(2), do you mean to say that a Local Management Entity – Managed Care Organization will designate an employee as having responsibility for developing and implementing the plan? If so, state that. Or are you referring to the employees who are forensic evaluators?*

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

1 10A NCAC 27G .6702 is amended under temporary procedures as follows:

2  
3 **10A NCAC 27G .6702 OPERATIONS**

4 (a) Forensic Screening and Evaluation. Forensic screening and evaluation to assess capacity to proceed to trial shall  
5 be provided by evaluators trained and ~~registered~~ certified in accordance with the provisions of 10A NCAC 27H  
6 .0201 through .0207, ~~TRAINING AND REGISTRATION~~ CERTIFICATION OF FORENSIC EVALUATORS  
7 (DMH/DD/SAS publication APSR 100-3).

8 (b) Consultation to Law Enforcement Officials. Consultation to law enforcement officials, including consultation  
9 prior to the commitment of an offender or alleged offender to any state psychiatric hospital, shall be provided.

10 (c) Justice Treatment Services:

11 (1) Each ~~area-program~~ Local Management Entity-Managed Care Organization shall develop and implement  
12 a written justice treatment services plan which shall provide for the coordination of ~~area-program~~  
13 Local Management Entity-Managed Care Organization court related activities with the criminal  
14 justice system.

15 (2) An individual shall be designated who has responsibility for developing and implementing the justice  
16 treatment services plan.

17  
18 *History Note: Authority G.S. 15A-1002; 143B-147; S.L.2013-18;*

19 *Eff. May 1, 1996.*

20 *Temporary Eff. December 1, 2013.*

TEMPORARY RULE  
REQUEST FOR TECHNICAL CHANGE

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

**RULE CITATION:** 10A NCAC 27H .0201

**DEADLINE FOR RECEIPT: Friday, January 24, 2014**

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), line 7, and (b), line 11, what do you mean by "local"?*

*In (b), state "any licensed clinician defined in Rule 10A NCAC 27G .0104"*

*Since "licensed clinician" is defined in Rule 27G .0104(12), I assume that it the term you mean? Please note, there is no need to put the citation to the Subparagraph in this Rule, but I am confirming the intent.*

*Underline the (c) on line 12.*

*Also on line 12, capitalize "Rules." Delete "and procedures."*

*These rule changes reflect that the evaluators are no longer registered, but shall instead be certified. So, shouldn't the language in (c), line 12 state "Individuals who were registered under these Rules..."*

*Also in (c), since the requirement of Rule .0203(a)(1) is that the individual be a licensed clinician, why not just state that here? "Individuals who were registered... but are not licensed clinicians are eligible for certification provided they meet all other requirements of these Rules."*

*Will the individuals be eligible for certification or deemed certified? Does the certification expire?*

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 .0201 is amended under temporary procedures as follows:  
2

3 **SECTION .0200 – TRAINING AND CERTIFICATION OF FORENSIC EVALUATORS**  
4

5 **10A NCAC 27H .0201 SCOPE**

6 (a) The purpose of Rules .0201 through .0207 of this Section is to specify the requirements that shall be met to be  
7 ~~registered~~ certified as a local forensic evaluator by the Division of Mental Health, Developmental Disabilities and  
8 Substance Abuse Services.

9 (b) The provisions of Rules .0201 through .0207 of this Section apply to any licensed clinician pursuant to 10A  
10 NCAC 27G .0104 ~~qualified mental health professional or qualified substance abuse professional seeking registration~~  
11 certification as a local forensic evaluator by the Division.

12 (c) Individuals who were certified under these rules and procedures prior to December 1, 2013 but who do not meet  
13 the requirements in Rule .0203(a)(1) of this Section continue to be eligible for certification provided they meet all  
14 other requirements.  
15  
16

17 *History Note: Authority G.S. 15A-1002; 143B-147; S.L.2013-18;*

18 *Eff. July 1, 1982;*

19 *Amended Eff. January 1, 1996; May 1, 1990.*

20 *Temporary Eff. December 1, 2013.*  
21



TEMPORARY RULE  
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 24, 2014**

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 4, insert a comma after "Section"*

*On line 5, what is a "local" examination? One where the individual is not sent to a State operated facility? Is it still local if the examination takes place outside the county or if the examiner travels to conduct it?*

*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), since you intend to use "LME-MCO" throughout the rest of the Section, insert "(LME-MCO)" on line 17.*

*There is no need to restate the language that is currently in (3)(c). Delete it.*

*In Item 4, how will people know which unit has been so designated?*

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 .0202 is amended under temporary procedures as follows:

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

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

- 5 (1) "Forensic Evaluation" means ~~an~~ a local examination ordered by the court to determine if the  
6 defendant has the capacity to proceed to trial, does not have the capacity to proceed to trial, or  
7 needs further treatment at an inpatient facility or further evaluation at the Pre-Trial Evaluation  
8 Center.
- 9 (2) ~~"Pre-Trial Evaluation Center" means the forensic unit at Dorothea Dix Hospital.~~ "Licensed  
10 Clinician" 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~~  
13 ~~Substance Abuse Facilities and Services, APSM 40-2.~~ "Local Certified Forensic Evaluator"  
14 means a Licensed Clinician who:  
15 (a) has completed the training for certification and annual training seminars described in  
16 Rule .0204 of this Section; and  
17 (b) is employed by, or under contract with a Local Management Entity-Managed Care  
18 Organization as a Certified Forensic Evaluator.  
19 (c) Individuals who were certified under these rules and procedures prior to December 1,  
20 2013 but who do not meet the requirements in Rule.0203(a)(1) of this Section continue to  
21 be eligible for certification provided they meet all other requirements.
- 22 (4) ~~"Qualified Substance Abuse Professional" means the same as defined in 10A NCAC 27G .0104(e)~~  
23 ~~contained in Division publication, Rules for Mental Health, Developmental Disabilities and~~  
24 ~~Substance Abuse Facilities and Services, APSM 40-2.~~ "Pre-Trial Evaluation Center" means the  
25 Forensic Services Unit so designated by the Secretary of the North Carolina Department of Health  
26 and Human Services.

27  
28 *History Note: Authority G.S. 15A-1002; 143B-147; S.L.2013-18;*  
29 *Eff. July 1, 1982;*  
30 *Amended Eff. January 1, 1996; May 1, 1990.*  
31 *Temporary Eff. December 1, 2013.*

TEMPORARY RULE  
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 24, 2014

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 4, to be consistent, do you want to state "certified local forensic evaluator"?*

*(a)(1) and (2) restate Rule .0202(3). Do you need it here? If you need it here, shouldn't it be deleted in .0202?*

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

*On line 11, why is "forensic evaluations" capitalized?*

*Delete (c). There is no need to repeat this information.*

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 under temporary procedures as follows:

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

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

- 5 (1) ~~be a qualified mental health professional or a qualified substance abuse professional;~~  
6 be a licensed clinician pursuant to 10A NACA 27G .0104  
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 certification ~~registration~~ program by  
9 the ~~area~~ LME-MCO director.

10 (b) The ~~area program~~ LME-MCO shall verify that the applicant is licensed and has expertise with the population for  
11 whom the applicant will provide Forensic Evaluations. ~~meets the appropriate standards for a qualified mental health~~  
12 ~~professional that are referenced in Rule .0202 of this Section.~~

13 (c ) Individuals who were certified under these Rules and procedures prior to December 1, 2013 but who do not  
14 meet the requirements in Subparagraph (a)(1) of this Rule continue to be eligible for certification provided they meet  
15 all other requirements.

16  
17 *History Note: Authority G.S. 15A-1002; 143B-147; S.L.2013-18;*

18 *Eff. July 1, 1982;*

19 *Amended Eff. January 1, 1996; May 1, 1990.*

20 *Temporary Eff. December 1, 2013.*

TEMPORARY RULE  
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 24, 2014**

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:

*So, is the process that the individual must be eligible for training (Rule .0203), then complete the training (Rule .0204) and then – who is issuing the certification? The Division? The Commission? This needs to be in Rule somewhere. I suspect the issue is that the individuals used to be registered, which would indicate a more passive role than certification, so the rules cannot be updated by just replacing the language.*

*In (a), to what “procedures, techniques and reporting” are you referring? If you are referring to the guidelines set forth in SL 2013-18 Section 10, you need to state where these can be found and that they are the guidelines adopted by the Commission. If you are not referring to this, then where is the Commission’s authority to set these requirements outside of rulemaking?*

*In (a), line 4, delete “that is”*

*On line 5, should there be a “local” before “forensic evaluator”?*

*Do not include the “and” at the end of line 5. Further, if changing punctuation (which you are no longer doing here), make sure you do so properly, following Rule 26 NCAC 02C .0108(7).*

*In (b), delete or define “successfully”*

*Does the reference to “annual” mean a calendar year? I assume it does, but wanted to check.*

*In (b), how many hours will be required? That information needs to be in Rule. And what is the statutory authority for the Secretary to determine the topics?*

*In (c), why is “continuing education module” capitalized, when the term is not in (b)?*

*On line 8, what are you trying to say? That the following topics will be covered? Or are you trying to give examples? Note that S.L. 2013-18, Section 9(2) requires that the seminars provide continuing education and training in conducting forensic evaluations and screening examinations of defendants to determine capacity to proceed in preparing written reports required by law. Are these requirements covered by the topics listed in (c)(1) through (3)?*

*Delete the line space between lines 8 and 9.*

*In (c)(1), what is the "initial Basic Forensic Evaluator Training" you are referring to? Is this the training in (a)? Please note, that term is not used in (a).*

*In (c)(3), spell out what "mh/dd/sa" means.*

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 .0204 is amended under temporary procedures as follows:

2  
3 **10A NCAC 27H .0204 TRAINING AND CERTIFICATION**

4 (a) The applicant shall successfully complete training covering procedure, techniques, and reporting that is provided  
5 by the ~~Mental Health Section of the~~ Division in order to be ~~registered~~ certified as a forensic evaluator; and

6 (b) The applicant shall successfully complete annual continuing education module(s) provided by the Pre-Trial  
7 Evaluation Center designated by the Secretary of the North Carolina Department of Health and Human Services.

8 (c) Continuing Education Module topics may include:

9 (1) evaluation skills training to enhance the skills acquired through the initial Basic Forensic  
10 Evaluator Training;

11 (2) changes in current laws and current practices; and

12 (3) evaluation of mh/dd/sa populations.

13  
14 *History Note: Authority G.S. 15A-1002; 143B-147; S.L.2013-18;*

15 *Eff. July 1, 1982;*

16 *Amended Eff. May 1, 1990.*

17 *Temporary Eff. December 1, 2013.*

TEMPORARY RULE  
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 24, 2014**

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:

*Throughout the Rule, why are the terms "local certified forensic evaluator" and "forensic evaluations" capitalized, when they are not elsewhere? Be consistent throughout the Rules.*

*What is the authority for this Rule? 15A-1002(b)(1) states that the Commission has the authority to approve evaluators. The Session Law gave the Commission explicit authority to require training and continuing education requirements. This goes beyond that and instead governs LME-MCO management of these individuals. What authority is cited for this?*

*In (a), by "sufficient," you mean enough to handle the evaluations. Is this correct?*

*I take it the regulated public knows what a "catchment area" is?*

*End the sentence after "catchment area" and state "Each LME-MCO shall maintain..."*

*On line 6, are you referring to "local" certified forensic evaluators? Be consistent with the terminology if you mean the same thing.*

*Insert a comma after "LME-MCO" on line 7 and change "which" to "that" And is it really self-reporting of the expertise, or isn't it that the LME-MCO will have determined the expertise per Rule .0203(b)? Make the language clear here.*

*What happens if the LME-MCO cannot find a sufficient number of evaluators?*

*Delete the extra period in "G.S." on line 10.*

*At the end of line 11, delete the "as."*

*Delete or define "successfully" on line 12.*



*Change “described” on line 13 to “set forth”*

*Why do you need the language in (b)? If you want to say that the LME-MCO is responsible for ensuring the individual meets the requirements of Rules .0203 and .0204 of this Section, then just state that.*

*In (c), what is the authority for this? And is there a purpose for this log and submission?*

*End (d) and (e) with periods, not semicolons.*

*In (d), instead of stating “establish a mechanism for verifying” state “verify.” And again, why is the Pre-Trial Evaluation Center being notified? This doesn’t seem to have any bearing upon the process. Is this just for reporting purposes?*

*On line 18, delete or define “immediately”*

*In (e), line 19, do you mean “potentially”? And change “evaluators” to “any evaluator” And are you requiring this or is this aspirational language?*

*In (f), what is an “LME-MCO Quality Improvement System”? And what is the authority for this Paragraph? Note, these reports are not automatically public records [see G.S. 15A-1002(d)], so it’s interesting that someone else will apparently be reviewing them to monitor them for quality.*

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

10A NCAC 27H .0205 is amended under temporary procedures as follows:

**10A NCAC 27H .0205    LME-MCO OVERSIGHT OF FORENSIC EVALUATION 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 and shall maintain a list of Certified Forensic Evaluators who are currently employed or contracted by the LME-MCO which includes the populations for which each evaluator has reported having the clinical expertise to conduct Forensic Evaluations. This list shall include sufficient numbers of evaluators qualified to evaluate all populations and to complete the examinations ordered in the timeframes established in G.S. 15A-1002.

(b) The LME-MCO shall verify that each Local Certified Forensic Evaluator meets eligibility requirements as established in Rule .0203 of this Section, and that each successfully completes Basic Forensic Evaluator Training and annual continuing education modules as described in Rule .0204 of this Section.

(c) The LME-MCO shall maintain a log of Forensic Evaluations done in every county in the LME-MCO's catchment area and provide that log to the Pretrial Evaluation Center on a monthly basis.

(d) The LME-MCO shall establish a mechanism for verifying the continuing qualifications of Local Certified Forensic Evaluators employed or contracted by the LME-MCO, and inform the Pre-Trial Evaluation Center immediately of any changes which would result in termination of certification per Rule .0206 of this Section;

(e) The LME-MCO shall identify potential qualified applicants to enroll in training for certification to replace evaluators whose certification has been terminated or to increase the number of evaluators due to increased numbers of evaluations logged;

(f) 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 employed or contracted with the LME-MCO which includes:

(1) identifying an individual who is a Certified Forensic Evaluator who will monitor the overall quality and outcomes of the reports of Forensic Evaluations done by Certified Forensic Evaluators employed or contracted with the LME-MCO; and

(2) establishing a procedure for responding to questions and concerns related to the quality of reports of Forensic Screening Examinations done by Local Certified Forensic Evaluators employed or contracted with the LME-MCO.

*History Note: Authority G.S. 15A-1002; 143B-147; S.L.2013-18;  
Eff. July 1, 1982;  
Amended Eff. May 1, 1990.  
Temporary Eff. December 1, 2013.*

TEMPORARY RULE  
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 24, 2014**

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 4, do you mean "local"? And should "Forensic Evaluator Certification" be capitalized?*

*What body will declare the certification "void"? This needs to be in Rule. And do you really mean "void" versus "terminated" or "ended"?*

*I think Item (1) would read better if it were written "the evaluator notifies the LME-MCO in writing he or she no longer wishes to be certified."*

*Also in (1), line 5, do you mean "required by" or "required of"?*

*And in (1), the individual has to no longer be certified and no longer perform the duties? Right now, the Rule reads that if an individual wishes to certified but no longer perform the duties, then they can keep the certification. Is that what is intended?*

*In Item (2), the original language is:*

(2) the evaluator is no longer employed by, or under contract with, an area program; or

*You moved the semicolon to the end of the sentence, following "or" Please show changes to the current text.*

*In Item (3), are you referring to the requirements of Rule .0203?*

*In Item (4), delete or define "successfully."*

*In Items (4) and (5), there appears to be an extra space between "evaluator" and "fails." If there is, please remove.*

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 under temporary procedures as follows:

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

4 A Forensic Evaluator ~~Registration~~ Certification will be declared void when:

- 5 (1) the evaluator no longer desires to be ~~registered~~ certified and perform the duties required by an  
6 ~~evaluator~~; evaluator and provides written notice of the same to the LME-MCO;  
7 (2) the evaluator is no longer employed by, or under contract with, an ~~area program or~~ LME-MCO as  
8 a certified forensic evaluator;  
9 (3) the evaluator no longer meets the ~~registration eligibility requirements~~ requirements;  
10 (4) the evaluator fails to successfully complete annual continuing education seminars; or  
11 (5) the evaluator fails to perform any of the duties described in Rule .0207 of this Section.

12  
13 *History Note: Authority G.S. 15A-1002; 143B-147; S.L.2013-18;*

14 *Eff. July 1, 1982;*

15 *Amended Eff. May 1, 1990.*

16 *Temporary Eff. December 1, 2013.*

TEMPORARY RULE  
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 24, 2014**

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:

*Where is the Commission's statutory authority to state what will be in the report? The rulemaking authority in the Session Law and G.S. 15A-1002 states the Commission can approve the evaluators, and set the certification and continuing education requirements of the individuals, which includes writing the reports. It does not speak to the Commission having authority over the contents of the report.*

*It appears to me that the statutes govern what will be in the report. G.S. 15A-1002(b)(1) says the report will describe the present state of the defendant's mental health. Paragraph (d) of that statute states that the report shall include a statement with "any conclusion as to whether the defendant has or lacks capacity."*

*If you are relying upon Section 7 of S.L. 2013-18, you need to cite to that specifically. But I note that really only speaks to individuals in a facility receiving treatment and requires an opinion as to whether there is a likelihood that the defendant will gain capacity to proceed. So please cite the specific authority relied upon for this language.*

*On line 4, should it state "local"? And why is the term "certified forensic evaluator" capitalized?*

*On line 5, that is not the proper way to insert punctuation. Please see Rule 26 NCAC 02C .0108(7).*

*Properly indent Items (1) through (4).*

*Item (2), line 12, delete "either," delete "or" before "that that"*

*Again, I am curious about the role of the Pre-Trial Evaluation Center in Item (3). Is the idea to recommend an examination per G.S. 15A-1002(b)(2)?*

*In Item (4), insert a comma after "capacity" and "evaluator" on line 16.*

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 .0207 is amended under temporary procedures as follows:

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

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

6 (1) ~~there is sufficient question of mental or emotional disorder to recommend inpatient evaluation or~~  
7 ~~treatment; or~~

8 (2) ~~there is sufficient information to recommend that the defendant does have capacity to proceed and~~  
9 ~~further evaluation is not indicated.~~

10 (1) is limited to evaluation of capacity to proceed to trial and does not address criminal responsibility, legal insanity,  
11 or diminished capacity;

12 (2) indicates the opinion of the evaluator either that the defendant clearly has the capacity to proceed, or that the  
13 defendant clearly lacks the capacity to proceed, or that the evaluator is unable to form a clear opinion;

14 (3) recommends a full evaluation at the Pre-Trial Evaluation Center if the evaluator is unable to form a clear opinion  
15 and the defendant is charged with any felony; and

16 (4) addresses the likelihood that the defendant will gain capacity if in the opinion of the evaluator the defendant  
17 clearly lacks the capacity to proceed.

18  
19 *History Note: Authority G.S. 15A-1002; 143B-147; S.L.2013-18;*

20 *Eff. July 1, 1982;*

21 *Amended Eff. May 1, 1990.*

22 *Temporary Eff. December 1, 2013.*