

# Rules v. Policies

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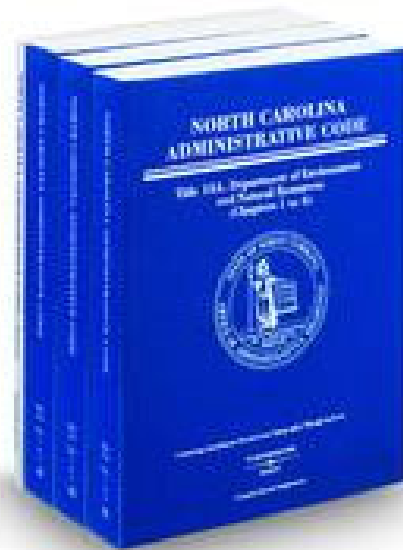
What do we mean when we talk about rules?

- ▶ Rule\* (dictionary definition):
  - ▶ Generally, an **established and authoritative** standard or principle; a general norm mandating or guiding conduct or action in a given type of situation.
- ▶ Rule=Rule\* enforceable under the North Carolina Administrative Procedure Act (G.S. 150B).

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## What is a Rule?

► 150B-2(8a) defines a Rule as, “any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule.”



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## What are not Rules?

- 150B-2(8a)
- **“Statements concerning only the internal management of an agency....**, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency...”
- **“nonbinding, interpretive statements** within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule”
- **“A form**, the contents or substantive requirements of which are prescribed by rule or statute”
- **“Scientific, architectural, or engineering standards, forms, or procedures**, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.”

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## A Brief Aside on Forms

- “a **form**, the contents or substantive requirements of which are prescribed by rule or statute.”

150B-2(8a)(d)

This means that if the contents of the form are not in the law, and the agency is requiring them, then the contents must be in a rule.

### 21 NCAC 06N .0106 FORM BAR-5

(a) The Form BAR-5 shall be filed by one applying to take the examination to receive a registered barber certificate. It requires the following:

- (1) the name, address, social security number, and birthdate of the applicant;
- (2) barber school training; and
- (3) the length of barbering experience.

(b) The Form BAR-5 shall include the applicant's attestation that the information in the form is correct.

(c) The fee in 21 NCAC 06N .0101(a)(4) shall accompany this form.

*History Note:* Authority G.S. 86A-1; 86A-3; 86A-10; 86A-25; 93B-14; Eff. February 1, 1976;  
Readopted Eff. February 8, 1978;  
Amended Eff. March 1, 1983;  
Legislative Objection Lodged Eff. March 7, 1983;  
Curative Amended Eff. April 6, 1983;  
Amended Eff. September 1, 2013; May 1, 1989;  
Readopted Eff. October 1, 2016;  
Amended Eff. October 1, 2020.

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## Rules Summarized:

- ▶ Delegated by the General Assembly.
- ▶ Of general applicability.
- ▶ Describe a procedure or practice.
- ▶ Directly or indirectly affects the rights of the public.
- ▶ Binding.
  - ▶ And not in a categorical exception: budgets; claratory rulings; rate orders; road signs; auditing guidelines; guidelines for negotiation of financial arrangements; case handling criteria; certain scientific, architectural, or engineering documents; job classification standards; interest rate for tax assessments; the State Medical Facilities Plan; information technology standards from State CIO.

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## What is the purpose of a Rule?

"[R]ules fill the interstices of statutes. They go beyond mere interpretation of statutory language or application of such language and within statutory limits set down additional substantive requirements."

*State, ex rel, Comm. of Insurance v. N.C. Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547, 567 (1980).

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## Why do I need rules?

- ▶ "An agency shall not seek to implement or enforce against any person a policy, guideline, or other interpretive statement that meets the definition of a rule contained in G.S. 150B-2(8a) if the policy, guideline, or other interpretive statement has not been adopted in accordance with this Article." G.S. 150B-18

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## Why does any of this matter?

Lawmaking authority ultimately comes from the people.

The people primarily act through the General Assembly.

The General Assembly delegates authority to State agencies.

The NC APA establishes default requirements for delegated lawmaking.

*In many circumstances, State agencies are required to make rules under the APA to use the power of the State against people.*

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### *Cabarrus County Board of Education v. Department of State Treasurer, Retirement Systems, 374 N.C. 3, 839 S.E.2d 814 (2020)*

- 2014: In an act to present pension-spiking, the General Assembly stated: "The Board of Trustees [of the retirement system] shall adopt a contribution-based benefit cap. . ."
- The Board of Trustees set a cap without going through the APA process.
- 2016: Board of Education asks courts to invalidate cap.
- 2020: NC Supreme Court holds: "the Board of Trustees was required to adopt the statutorily mandated cap factors utilizing the rulemaking procedures required by the [APA] and that the Retirement System erred by billing the . . . Board of Education an additional amount relating to [the] pension, in light of the Board of Trustees' failure to adopt the necessary cap factor in an appropriate manner"
- 2021: General Assembly enacted a session law allowing the retirement system to set caps without following the APA.

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## Takeaways from Cabarrus County Board of Education v. Department of State Treasurer, Retirement Systems, 374 N.C. 3, 839 S.E.2d 814 (2020)

- ▶ The APA sets default standards for rulemaking.
- ▶ Just because the General Assembly doesn't say "adopt a rule," doesn't mean that rules aren't required.
- ▶ But the General Assembly can set a different standard for particular rulemaking.
- ▶ Attempting to shortcut the APA procedures can lead to a much longer and more expensive process.

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## Examples of statutory language that provides agencies authority for rulemaking

"CREATE"  
 "ADOPT"  
 "ESTABLISH"  
 "REQUIRE"  
 "CHARGE A FEE"

- AND ALL OF THESE EXAMPLES ARE OFTEN IN STATUTE WITHOUT REFERRING TO "RULES" OR "APA" IN THE SENTENCE. SUCH AS "ESTABLISH A PROGRAM" OR "CREATE A PROCESS"
- THIS ALL GOES BACK TO THE DEFINITION OF RULE IN G.S. 150B-2(8A): "[A]NY AGENCY REGULATION, STANDARD, OR STATEMENT OF GENERAL APPLICABILITY[.] THE TERM INCLUDES THE ESTABLISHMENT OF A FEE[.]"

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# What else are not Rules?

"Nonbinding interpretive statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule." 150B-2(8a)(c)

## POLICIES

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# Rule vs. Policy

## Rule

"any agency regulation, standard, or statement of **general applicability** that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the **procedure or practice requirements** of an agency." 150B-2(8a)

## Policy

"any **nonbinding interpretive statement** within the delegated authority of an agency **that merely defines, interprets, or explains the meaning of a statute or rule**. The term includes any document issued by the agency which is intended and used purely to assist a person to comply with the law, such as a guidance document." 150B-2(7a)

Unlike a rule, a policy does not have the force of law.

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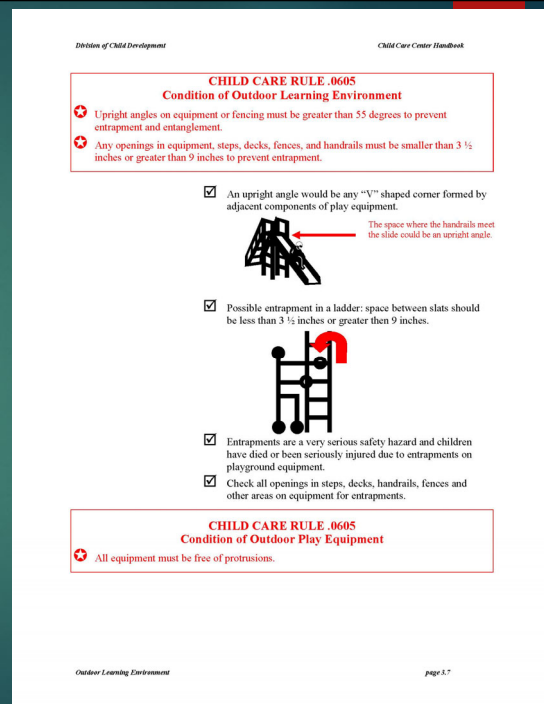
# Rule vs. Policy

## Child Care Commission

### 10A NCAC 09 .0605

(g) Any openings in equipment, steps, decks, handrails, and fencing shall be smaller than 3 ½ inches or greater than 9 inches to prevent entrapment.

(h) All upright angles shall be greater than 55 degrees to prevent entrapment and entanglement.



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# Rules vs. Policy

## Board of Pharmacy

### Rule

#### 21 NCAC 46 .2201 HOURS: RECORDS: PROVIDERS: CORRESPONDENCE: RECIPROCITY (EFFECTIVE UNTIL DECEMBER 31, 2017)

- (a) As a condition of license renewal, a pharmacist shall accumulate 15 hours of continuing education annually.
- (b) Eight of these continuing education hours shall be obtained through contact programs. Contact programs are those in which there is an opportunity for live two-way communication between the presenter and attendee. An on-line continuing education course may satisfy this contact-hour requirement provided that the live two-way communication standard is met.
- (c) A pharmacist who accumulates more than the required 15 hours of continuing education in a single year may carry forward up to five surplus hours to be applied to the following year's continuing education requirements.
- (d) A pharmacist shall preserve all continuing education records for three years.
- (e) Upon license renewal, the pharmacist shall report continuing education hours on a form provided by the Board. The Board may require a pharmacist to submit records, reports of accredited hours and certificates of credit on a random basis pursuant to a continuing education audit.
- (f) All continuing education shall be obtained through accredited continuing education courses. The Board shall approve continuing education courses as accredited if they provide education on matters that will maintain or increase the participant's professional competence and proficiency as a pharmacist.
- (g) Continuing education shall not serve as a barrier to reciprocity; however all licensees by reciprocity must observe the continuing education standards specified in this Rule within the first renewal period after licensure in this state.

► **History Note:** Authority G.S. 90-85.6; 90-85.17; 90-85.18;  
Eff. January 1, 1985;

Amended Eff. January 1, 2008; April 1, 2005; August 1, 2004; August 1, 1996; September 1, 1993; March 1, 1990

### Policy

Pharmacist FAQs available at  
<http://www.ncbop.org/faqs/PharmacistFAQs.pdf>

Q: What are the CE requirements for Pharmacists?

A: All Pharmacists are required to have, at minimum, a total of 15 hours to renew every year. Eight (8) of those hours have to be LIVE hours and the remainder hours can be either Live or Correspondence.

#### CARRY OVER HOURS

Q: What are carry over hours?

A: Carry over hours are surplus CE hours that may be carried over to the next year's renewal.

Q: How do the carry over hours work?

A: When you renew your license, the program will automatically carry over the additional hours. Pharmacists are allowed to carry over a maximum of 5 extra hours of CE.

Q: What CE hours qualify as carry over hours?

A: The carry over hours are chosen at random, and live hours are carried over first, followed by correspondence hours. Carry over hours are automatically calculated by the program. Make sure to enter in all your hours before you renew, so that the program will carry over the correct number of extra hours.

Q: How are carry over hours identified on my CE Profile?

A: A check mark in the CARRY OVER column will denote carry over hours.

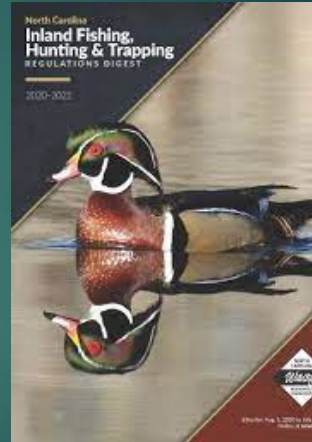
Q: How long must I maintain my CE certificates?

A: All Pharmacists must maintain their CE certificates for a period of 3 years at home or at work.

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# Other examples of policies...



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## When are rules not needed?

- Aspirational statements are **not** rules.
  - If you want to use a word other than "shall" because you cannot or do not intend to require something of your regulated public, it is not a rule.
- Purely internal standards are not rules.
- Educational documents are not rules.
- When you merely want to restate a federal law or a federal regulation. (See G.S. 150B-19(4))
  - G.S. 150B-21.6 Incorporating material in a rule by reference

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## When are rules not needed?

- When the General Assembly expressly states within statute what is required.
- When the General Assembly exempts an agency from the Rulemaking process

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## In Summary:

If a State agency says that a third party:

- ▶ Is required to do something;
- ▶ Can be penalized for not doing something; or
- ▶ Is given a right or benefit:

**IT'S A  
RULE**

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So, we need  
a rule, now  
what?

"An agency shall not seek to implement or enforce against any person a policy, guideline, or other interpretive statement that meets the definition of a rule contained in G.S. 150B-2(8a) if the policy, guideline, or other interpretive statement has not been adopted in accordance with this Article." G.S. 150B-18

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Questions?

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