

In The  
**United States Court Of Appeals  
For The Fourth Circuit**

**STEVE COOKSEY,**

*Plaintiff - Appellant,*

**v.**

**MICHELLE FUTRELL; BRENDA BURGIN ROSS;  
KATHLEEN SODOMA; CHRISTIE NICHOLSON;  
PHYLLIS HILLIARD; CATHLEEN E. OSTROWSKI;  
RICHARD W. HOLDEN, SR.,**

*Defendants – Appellees,*

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**AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA  
LEGAL FOUNDATION, INCORPORATED,**

*Amicus Supporting Appellant.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
AT CHARLOTTE**

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**BRIEF OF APPELLEES**

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**W. Clark Goodman  
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WOMBLE CARLYLE SANDRIDGE  
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*Counsel for Appellees*

*Counsel for Appellees*

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 12-2084 Caption: Steve Cooksey v. Michelle Futrell, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Michelle Futrell  
(name of party/amicus)

who is Appellee, makes the following disclosure:  
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
2. Does party/amicus have any parent corporations? ☐ YES ☒ NO  
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☒ NO  
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☒ NO  
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☒ NO  
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☒ NO  
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ W. Clark Goodman

Date: 9/19/12

Counsel for: Michelle Futrell

### **CERTIFICATE OF SERVICE**

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I certify that on 9/19/12 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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No. 12-2084 Caption: Steve Cooksey v. Michelle Futrell, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Brenda Burgin Ross  
(name of party/amicus)

who is Appellee, makes the following disclosure:  
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
2. Does party/amicus have any parent corporations? ☐ YES ☒ NO  
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☒ NO  
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☒ NO  
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☒ NO  
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☒ NO  
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ W. Clark Goodman

Date: 9/19/12

Counsel for: Brenda Burgin Ross

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No. 12-2084 Caption: Steve Cooksey v. Michelle Futrell, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Kathleen Sodoma  
(name of party/amicus)

who is Appellee, makes the following disclosure:  
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
2. Does party/amicus have any parent corporations? ☐ YES ☒ NO  
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☒ NO  
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☒ NO  
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☒ NO  
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☒ NO  
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ W. Clark Goodman

Date: 9/19/12

Counsel for: Kathleen Sodoma

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No. 12-2084 Caption: Steve Cooksey v. Michelle Futrell, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Christie Nicholson  
(name of party/amicus)

who is Appellee, makes the following disclosure:  
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
2. Does party/amicus have any parent corporations? ☐ YES ☒ NO  
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☒ NO  
If yes, identify all such owners:



4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☒ NO  
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5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☒ NO  
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☒ NO  
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ W. Clark GoodmanDate: 9/19/12Counsel for: Christie Nicholson**CERTIFICATE OF SERVICE**

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Phyllis Hilliard  
(name of party/amicus)

who is Appellee, makes the following disclosure:  
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
2. Does party/amicus have any parent corporations? ☐ YES ☒ NO  
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☒ NO  
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ W. Clark Goodman

Date: 9/19/12

Counsel for: Phyllis Hilliard

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Cathleen E. Ostrowski  
(name of party/amicus)

who is Appellee, makes the following disclosure:  
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
2. Does party/amicus have any parent corporations? ☐ YES ☒ NO  
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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☒ NO  
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ W. Clark Goodman

Date: 9/19/12

Counsel for: Cathleen E. Ostrowski

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Richard W. Holden, Sr.  
(name of party/amicus)

who is Appellee, makes the following disclosure:  
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☒ NO  
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ W. Clark Goodman

Date: 9/19/12

Counsel for: Richard W. Holden, Sr.

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(signature)

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## **STATEMENT OF THE ISSUES**

Plaintiff-Appellant Steve Cooksey, an internet blogger on dietary topics, challenges the constitutionality of a professional licensing scheme that requires individuals to meet certain requirements before practicing the profession of dietetics/nutrition in North Carolina. United States District Judge Max O. Cogburn, Jr. dismissed (without prejudice) Mr. Cooksey's claims for lack of standing on the bases that: (1) the lack of a formal decision by the North Carolina Board of Dietetics/Nutrition (the "Board") would "require the court to speculate as to what action the state board may have taken to enforce state law" and "forms the shakiest of foundations" to determine whether the applicable laws or regulations violate the First Amendment; and (2) Mr. Cooksey does not have standing under the First Amendment's chilling doctrine because "the speech at issue is restricted as a professional regulation." (J.A. 130) Now, though Mr. Cooksey was never charged, prosecuted, threatened with prosecution, enjoined, or even formally instructed to "cease and desist" his blogging activities, he appeals Judge Cogburn's order, urging this Court to find that he suffered a sufficient "injury in fact" to give rise to a justiciable controversy.

The issue before the Court in this appeal is thus whether the District Court properly determined that Mr. Cooksey lacks a justiciable claim against the quasi-governmental agency charged with enforcing the licensing scheme where (1) the

agency never determined whether Mr. Cooksey practiced dietetics/nutrition without a license; (2) Mr. Cooksey's purported claims are based on communications from an agency employee that merely noted "areas of concern" with Mr. Cooksey's website, invited further discussion, and requested changes to the website only if Mr. Cooksey agreed with the employee's concerns; and (3) Mr. Cooksey voluntarily made certain changes to the content of his website without requesting or obtaining a formal decision from the agency or accepting the agency employee's invitation for further discussion.

### **STATEMENT OF THE CASE**

The North Carolina Dietetics/Nutrition Practice Act, N.C. Gen. Stat. § 90-350, *et seq.*, (the "Act") requires individuals to obtain a license before engaging in the practice of dietetics/nutrition. On May 29, 2012, Mr. Cooksey – an internet blogger who advocates the use of a particular diet as a means of controlling diabetes – sued Defendants-Appellees in their official capacities as members of the North Carolina Board of Dietetics/Nutrition (the "Board"), which is the agency charged with enforcing the Act. Mr. Cooksey asserts that the Act and related regulations, 21 N.C. Admin. Code 17.0101, *et seq.*, (the "Regulations") – both on their face and as applied to him in particular – violate his First Amendment rights by requiring him to become a licensed dietitian before providing individualized, personal nutritional assessments and counseling to diabetics.



Mr. Cooksey sought a preliminary injunction to enjoin application of the Act, but Judge Cogburn denied Mr. Cooksey's motion on August 8, 2012 after concluding that Mr. Cooksey failed to show a likelihood of success on the merits. (J.A. 109-16) In his order, Judge Cogburn questioned whether Mr. Cooksey could establish standing and ripeness (J.A. 111-13) and determined that Mr. Cooksey's First Amendment claims were "unlikely to succeed at trial" because "the speech at issue is restricted as a professional regulation" and therefore "must only withstand a rational-basis test." (J.A. 113-14) Mr. Cooksey filed a timely appeal but has since abandoned his pursuit of a preliminary injunction. (Appellant Br. at 1)

The Board moved to dismiss Mr. Cooksey's complaint on July 27, 2012. (J.A. 117) On August 29, 2012, United States Magistrate Judge David S. Cayer recommended dismissal of the complaint for lack of standing, finding that Mr. Cooksey "cannot show that he has suffered an injury in fact traceable to [the Board's] conduct." (J.A. 117-23) Mr. Cooksey timely objected to Magistrate Judge Cayer's Memorandum and Recommendation. On October 5, 2012, Judge Cogburn affirmed Magistrate Judge Cayer's memorandum and recommendation and dismissed Mr. Cooksey's complaint for lack of standing. (J.A. 126-31)

In his order, Judge Cogburn reasoned that (1) there was no evidence – or even an allegation – that the Board made a final determination on whether Mr. Cooksey violated the Act or ordered compliance in any way; (2) “the lack of a formal decision” by the Board would “require the [District Court] to speculate as to what action the [Board] may have taken to enforce state law” and “forms the shakiest of foundations for [the District Court] to determine whether state laws or state regulations violate protections afforded under the First Amendment”; and (3) there was no need for Magistrate Judge Cayer to address the First Amendment’s “chilling doctrine” because the Board did not “suggest[] any limitation on [Mr. Cooksey’s] expression of his opinions” and the speech was restricted as a professional regulation. (J.A. 128-31)

Significantly, Judge Cogburn dismissed Mr. Cooksey’s complaint *without prejudice*. (J.A. 131) Rather than seeking official guidance from the Board in the wake of this dismissal – which likely would have either rendered this dispute moot or defined the parameters of the alleged restriction on Mr. Cooksey’s expression such that the Court could identify a concrete, justiciable dispute – Mr. Cooksey appealed the District Court’s dismissal on October 18, 2012.

## **STATEMENT OF FACTS**

### **I. THE CHALLENGED ACT AND REGULATIONS**

The North Carolina General Assembly adopted the Act in 1991 for the express purpose of protecting “the public health, safety and welfare and to protect the public from being harmed by unqualified persons by providing for the licensure and regulation of persons engaged in the practice of dietetics/nutrition and by the establishment of educational standards for those persons.” N.C. Gen. Stat. § 90-351. The Act comprises Article 25 of Chapter 90 of the North Carolina General Statutes, which regulates “Medicine and Allied Occupations.” Within Chapter 90’s scope is a wide range of medical professions, including physicians and physician assistants (Article 1), dentists (Article 2), pharmacists (Article 4), optometrists (Article 6), chiropractors (Article 8), and nurses (Article 9).

The Act establishes the minimum qualifications to be eligible for licensure and requires the Board – among other duties – to “[d]etermine the qualifications and fitness of applicants for licenses,” adopt rules necessary to carry out its duties, adopt a code of ethics, conduct investigations, and “do all other things necessary and proper” to enforce the Act. N.C. Gen. Stat. §§ 90-356, 90-357. Pursuant to its rule-making authority and obligations, the Board promulgated the Regulations, which address Licensure, 21 N.C. Admin. Code 17.0100, *et seq.*, Review and

Approval of Weight Control Services, 21 N.C. Admin. Code 17.0200, *et seq.*, Dietetic/Nutrition Students or Trainees, 21 N.C. Admin. Code 17.0300, *et seq.*, and Unlicensed Individuals. 21 N.C. Admin. Code 17.0400, *et seq.*

Under the Act and Regulations, a license is required to provide “nutrition care services,” which is defined to include “[a]ssessing the nutritional needs of individuals and groups”<sup>1</sup> and “[p]roviding nutrition counseling in health and disease.”<sup>2</sup> N.C. Gen. Stat. §§ 90-352, 90-365. Importantly, individuals who are not licensed dietitians – like Mr. Cooksey – are free to provide general “nutritional information.” 21 N.C. Admin. Code 17.0402(a)(1). As noted in the Board’s guideline summarizing the Act (the “Guideline”), which was provided to Mr. Cooksey, Mr. Cooksey was (and is) allowed to do the following:

- “Provid[e] information on healthy eating and healthy snacks”;
- “Discuss[] carbohydrates, proteins, fats, vitamins, minerals, and water as essential nutrients required by the body”; and
- “Provid[e] statistical, scientific information, regarding the correlation between chronic disease and the excesses or deficiencies of certain nutrients.”

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<sup>1</sup> “Nutrition assessment” is the “evaluation of the nutrition needs of individuals and groups based upon biochemical, anthropometric, physical, and food intake and diet history data to determine nutritional needs and recommend appropriate nutrition intake including enteral and parenteral nutrition.” 21 N.C. Admin. Code 17.0101(11).

<sup>2</sup> “Nutrition counseling” is “the advice and assistance provided by licensed dietitians/nutritionists to individuals or groups on nutrition intake by integrating information from the nutrition assessment with information on food and other sources of nutrient and meal preparation consistent with cultural background, socioeconomic status and therapeutic needs.” 21 N.C. Admin. Code 17.0101(12).

(J.A. 63) The Act and Regulations therefore permit unlicensed individuals such as Mr. Cooksey to share their own experiences and express generally their views about the benefits of a particular diet. Unlicensed individuals are, however, prohibited from providing information “based on an individual nutritional assessment” or “individualized to provide nutrition care services to prevent, manage, treat, cure, or rehabilitate a medical condition, illness, or injury for a specific person or group.” 21 N.C. Admin. Code 17.0402(a)(1).

The Act makes no reference to the content of any speech, and individuals must become licensed before practicing dietetics/nutrition irrespective of any message they wish to convey. Indeed, the Regulations specifically require licensees to “interpret controversial information without personal bias, recognizing that legitimate differences of opinion exist.” 21 N.C. Admin. Code 17.0114(3).

## **II. MR. COOKSEY’S ALLEGATIONS**

In late 2008, Mr. Cooksey was obese, sedentary, and chronically ill. (J.A. 8, ¶ 7) He was diagnosed with Type II diabetes in February 2009. (J.A. 8, ¶¶ 9-10) After his diagnosis, Mr. Cooksey researched dietary choices for diabetics and became convinced that the healthiest diet for him would be a high-fat/low-carbohydrate diet akin to that of our pre-agricultural ancestors, the so-called “Paleolithic” or “caveman” diet. (J.A. 9-11, ¶¶ 16-17, 20-21) He adopted Paleolithic diet principles, began exercising, and enjoyed positive results. (J.A. 11, ¶¶ 22-25)

About a year later, Mr. Cooksey started a website – later named “Diabetes Warrior” – to share information about his success with the Paleolithic diet. (J.A. 11, ¶ 26) Over time, Mr. Cooksey’s website expanded beyond merely sharing Mr. Cooksey’s own experiences with and opinions about Paleolithic diet principles to include Mr. Cooksey’s direct nutritional advice and emotional support to specific readers with dietary questions. (J.A. 12-13, ¶¶ 32-33, 37; J.A. 15 ¶ 47) While Mr. Cooksey claims that he “does not advise people to use or discontinue prescription (or any other) drugs” (Appellant Br. at 7), he has – at the very least – used his website to advocate the *reduction* of insulin and drugs for diabetics. (See J.A. 107 (advising diabetic reader to “reduce drugs and insulin” as her “blood sugars drop in the 80-90 [mg/dl range] fasted”))<sup>3</sup>

In autumn 2010, Mr. Cooksey saw an opportunity to turn his dietary advice into a revenue stream and began offering diabetes “Support Packages,” which included direct telephone and email counseling for a fee. (J.A. 17, ¶¶ 58-59; J.A. 47-50) He represented that he could help clients who purchased one of these packages “Improve Blood Sugar Control,” “Lose Weight,” and “Improve [their]

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<sup>3</sup> Mr. Cooksey made his website part of the pleadings by referring to it in his complaint and incorporating numerous references and excerpts into his pleading. (See, e.g., J.A. 7, ¶ 5; J.A. 14-16, ¶¶ 40, 42-49; J.A. 20, ¶¶ 75-76; J.A. 22, ¶ 88; J.A. 35-53) In any case, courts may consider evidence outside the pleadings in deciding a question of standing or ripeness. *Trinity Outdoor, L.L.C. v. City of Rockville*, 123 Fed. Appx. 101, 105 (4th Cir. 2005); *Bayer Cropscience, LP v. Nufarm Ams., Inc.*, No. 5:10-CV-559, 2012 U.S. Dist. LEXIS 44697, at \*17 (E.D.N.C. Mar. 30, 2012).

health and fitness.” (J.A. 50) By the end of 2011, Mr. Cooksey had also incorporated an advice column into his website for the express purpose of providing dietary and nutritional advice in response to specific questions from readers. (J.A. 14-16, ¶¶ 39-50)

In January 2012, Mr. Cooksey attended a nutritional seminar for diabetics. (J.A. 17, ¶ 60) During the question and answer portion of the seminar, Mr. Cooksey expressed his views about the “standard high-carbohydrate/low-fat diet for diabetics.” (J.A. 17-18, ¶¶ 61-62) The full scope and content of Mr. Cooksey’s comments are not entirely clear from the complaint, but someone in attendance at the seminar contacted the Board’s office and submitted a formal written complaint that Mr. Cooksey was acting as an unlicensed dietitian. (J.A. 18, ¶ 63) The Board’s Executive Director Charla Burill contacted Mr. Cooksey to inform him of the complaint. (*Id.*)

In accordance with the Act and Regulations’ requirements, the third-party complaint prompted Ms. Burill to work with the Board’s Complaint Committee to investigate Mr. Cooksey’s activities. (J.A. 18, ¶¶ 63, 67) While the investigation was ongoing, Ms. Burill sent Mr. Cooksey an email attaching the Guideline and an email with informal guidance in the form of Ms. Burill’s handwritten comments and suggestions on printed pages from his website (the “Comments”). (J.A. 19, ¶¶ 70-72; J.A. 35-53, 59-64, 66) Significantly, neither the Guideline nor the

Comments suggested any limitation on Mr. Cooksey's expression based on the content of his opinions. Indeed, in a telephone conversation with Mr. Cooksey, Ms. Burrill specifically informed him that "he was free to comment and speak about the Paleolithic diet." (J.A. 83, ¶ 7) Consistent with the Act, Regulations, and Ms. Burrill's statements – and as Mr. Cooksey himself acknowledges – the "general thrust" of the Comments was that he could express his opinions about dietary matters but could not assess specific individuals' circumstances and offer personal counseling. (J.A. 19-22, ¶¶ 73-83; J.A. 35-53, 59-64) As Ms. Burrill explained to Mr. Cooksey, "[h]e was simply prohibited under the law from providing nutrition care services without a license." (J.A. 83, ¶ 7)

In the email attaching the Comments, Ms. Burrill told Mr. Cooksey, "*Should you agree with our comments*, we would ask that you make any necessary changes to your site . . . ." (J.A. 66 (emphasis added)) In the alternative, Ms. Burrill indicated, "Should you disagree, I am happy to discuss. Please feel free to contact me with any questions you may have." (*Id.*) After sending this email, Ms. Burrill "was under the assumption that if Mr. Cooksey did not agree with a comment or area of concern, he would call to discuss the issue further." (J.A. 84-85, ¶ 16) Indeed, Ms. Burrill "was very willing to consider his thoughts and to work with him given [that the Comments] were just feedback and noted areas of concern, not any sort of formal decision of the Board." (*Id.*)



Mr. Cooksey did not express disagreement with the Comments, accept Ms. Burill's invitation to discuss the issue further, or seek additional guidance from the Board. Instead, Mr. Cooksey voluntarily made certain changes to the content of his website and filed this action despite the Board never taking – or even threatening – any formal or official action against him.

### **SUMMARY OF ARGUMENT**

Under Article III of the United States Constitution, federal courts only have jurisdiction over “cases and controversies.” *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006). To satisfy this case-or-controversy requirement, a plaintiff must have standing and his claims must be ripe. *Id.* at 316, 318-19.

In an attempt to create the appearance of standing and ripeness, Mr. Cooksey artfully creates the false impression that the Board reached a final conclusion about the legality of his conduct and effectively caused him to stop providing dietary advice.<sup>4</sup> However, the Board never had an opportunity to decide whether or to what extent Mr. Cooksey's conduct violated the Act, much less give Mr. Cooksey

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<sup>4</sup> See, e.g., Appellant Br. at 8 (“THE STATE BOARD TELLS APPELLANT COOKSEY THAT HIS DIETARY ADVICE IS ILLEGAL.”); 9 (“The State Board . . . indicat[ed] on a line-by-line basis what it is illegal for him to say without a . . . license.”); 10 (“The State Board told Appellant Cooksey that it is illegal to give free dietary advice to his friend Karen Gale . . . .”); 11 (“[T]he State Board told him that his speech was illegal.”); 12 (“[T]he State Board told [Mr. Cooksey] specifically that his speech was illegal . . . .”); 31 (“[T]he State Board expressly told Appellant Cooksey that his speech was illegal.”); 47 (“[T]he State Board told him that his speech was illegal unless he had a license.”).

a formal decision on the matter or tell “him that his speech was illegal.” (*See* Appellant Br. at 11) In reality, Mr. Cooksey’s supposed claims are based on the following:

- an investigation by Ms. Burill and the Complaint Committee, which was triggered by a third-party written complaint against Mr. Cooksey (*See* J.A. 18, ¶¶ 63-64, 67; J.A. 55-56; *see also* Appellant Br. at 8-9, 31-32, 38-45);
- an email sent by Ms. Burill in conjunction with the investigation that (1) attached handwritten Comments noting “areas of concern” with Mr. Cooksey’s website, (2) invited further discussion, and (3) asked Mr. Cooksey to make changes to his website if he agreed with the handwritten comments (*See* J.A. 19-23, ¶¶ 71-89; J.A. 35-53, 66; *see also* Appellant Br. at 9-10, 16, 31-32, 39-45);
- Mr. Cooksey voluntarily removing portions of his website without requesting or obtaining a formal decision from the Board or taking Ms. Burill up on her invitation for further discussion on the matter (*See* J.A. 18-19, 25, ¶¶ 65, 68-69, 101; *see also* Appellant Br. at 11, 32, 39-45); and
- the Board closing the third-party complaint against Mr. Cooksey without taking any official action because he had “remained in substantial compliance with the requirements of [the Act].” (J.A. 26, ¶ 105; *see also* Appellant Br. at 11, 32, 39-45)

By bringing an abstract claim based on how the Board *might* have interpreted and enforced the Act, Mr. Cooksey has failed to satisfy Article III’s ripeness and standing requirements.

## **ARGUMENT**

### **STANDARD OF REVIEW**

This Court reviews *de novo* a district court's dismissal for lack of standing or ripeness. *S.C. Citizens for Life, Inc. v. Krawcheck*, 301 Fed. Appx. 218, 220 (4th Cir. 2008); *Frank Krasner Enters. v. Montgomery County*, 401 F.3d 230, 234 (4th Cir. 2005). The burden of establishing standing and ripeness falls on the party bringing suit and claiming subject-matter jurisdiction. *Id.*

### **DISCUSSION OF THE ISSUES**

#### **I. MR. COOKSEY'S CLAIMS ARE NOT RIPE.**

In dismissing Mr. Cooksey's claims without prejudice, the District Court's analysis was limited to a conclusion that Mr. Cooksey failed to allege a justiciable claim because he had not yet suffered an injury in fact sufficient to establish standing. However, a plaintiff must have standing *and* his claims must be ripe in order to satisfy Article III's case-or-controversy requirement.<sup>5</sup> Mr. Cooksey's claims in this action are premature because the Board has not had the opportunity to determine how – or even whether – the Act applies to Mr. Cooksey's activities. For this case to be ripe for judicial review, it must involve “an administrative decision [that] has been formalized and its effects felt in a concrete way by the

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<sup>5</sup> As noted by the United States Court of Appeals for the Eleventh Circuit, there is sometimes “doctrinal overlap between standing and ripeness” analyses, and “in cases involving pre-enforcement review, the standing and ripeness inquiries may tend to converge.” *Elend v. Basham*, 471 F.3d 1199, 1205 (11th Cir. 2006).

challenging parties.” *See Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 208 (4th Cir. 1992) (citing *Pacific Gas & Elec. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 200 (1983)). In a well-reasoned decision that offers a useful analytical approach in considering the present case, the United States District Court for the Eastern District of North Carolina noted this requirement “prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference” before there is a formal decision with concrete effects. *The Int’l Acad. of Oral Med. & Toxicology v. The North Carolina State Bd. of Dental Exam’rs*, 451 F. Supp. 2d 746, 749 (E.D.N.C. 2006) (“*International Academy*”) (quoting *Nat’l Park Hospitality Ass’n v. Dep’t of Interior*, 538 U.S. 803, 807-08 (2003)).

Like Mr. Cooksey, the *International Academy* plaintiff brought claims prior to a formalized administrative decision. There, a non-profit dental academy brought First Amendment claims against the North Carolina Dental Board because of a Dental Board article advising dentists not to advertise, *inter alia*, that they practice mercury-free dentistry or that patients should eliminate exposure to mercury. *Id.* at 748. Though the article noted that failure to comply with the advertising rules would result in disciplinary action, the *International Academy* court dismissed the dentists’ claims as unripe after analyzing the two factors a

court “must evaluate” when assessing ripeness: “(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration.” *Id.* at 749 (quoting *Nat’l Park Hospitality*, 538 U.S. at 807-08)).

**A. The Issues Raised By Mr. Cooksey’s Claims Are Not Fit For Judicial Decision And Therefore Are Not Ripe.**

The present case is not fit for a court’s decision because the Board has not been given the opportunity to make a determination on the novel issues at the heart of this matter. A case is only fit for judicial decision where “the issues to be considered are purely legal ones and where the agency rule or action giving rise to the controversy is final and not dependent upon future uncertainties or intervening agency rulings.” *Id.* at 750 (quoting *Charter Fed.*, 976 F.2d at 208). Finding the case to be unfit for judicial decision, the *International Academy* court concluded that the article was “(at most) a Dental Board employee’s informal interpretation of the governing regulations on advertising” rather than the Dental Board’s final, official policy. *Id.* at 750-51. The court reasoned that postponing consideration of the plaintiffs’ claims would give the Dental Board a chance to interpret its own statutes and regulations, the outcome of which could “materially alter the question to be decided.” *Id.* at 751-52 (quoting *Renne v. Geary*, 501 U.S. 312, 323 (1991)).

Like the Dental Board in *International Academy*, the Board in this case has not had the opportunity to interpret its own Act and Regulations. Instead, Ms. Burill – a Board employee – reviewed Mr. Cooksey’s website with the Complaint

Committee, gave Mr. Cooksey informal guidance regarding “areas of concern,” and “ask[ed]” Mr. Cooksey to make changes only if he agreed with the Comments. (J.A. 19-23, ¶¶ 71-89; J.A. 66) At most, Ms. Burill merely identified concerns and invited further dialogue on the matter. (*See* J.A. 84-85, ¶ 16)<sup>6</sup> Mr. Cooksey chose to end the dialogue before Ms. Burill determined whether or to what extent Mr. Cooksey practiced dietetics/nutrition without a license, and the rest of the Board never weighed in at all.

The General Assembly enacted the Act in 1991, before the emergence of internet bloggers and the explosion of social media. Consequently, the Act does not specifically contemplate or address circumstances like those at issue in this case.<sup>7</sup> It is critical that the Board be given the first opportunity to make a decision concerning Mr. Cooksey’s activities, especially since the ubiquity of social media all but guarantees that similar issues will arise in the future. In the absence of a final determination from the Board, the Court can only guess as to what the Board

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<sup>6</sup> *See also* J.A. 66 (Mr. Cooksey stated in a January 18, 2012 email, “I did enjoy our conversation and I look forward to discussing my website’s compliance . . . and content with you. :)”).

<sup>7</sup> In 2006, the Regulations were updated to include Section 17.0403, which provides that unlicensed persons, “whether residing in this state or not,” who practice dietetics/nutrition “by use of electronic or other medium” are subject to the enforcement provisions available to the Board. However, this “Electronic Practice” regulation does not attempt to define specifically what types of electronic communications or expressions fall within the practice of dietetics/nutrition as contemplated by the Act.

would have concluded on these emerging issues based on the informal guidance provided by Ms. Burill and the Complaint Committee. This is precisely the sort of premature adjudication and judicial entanglement in agency affairs that the requirement of ripeness serves to prevent. This matter is therefore not yet fit for judicial decision.<sup>8</sup>

**B. Requiring Mr. Cooksey's Claims To Wait Until The Board's Position With Respect To Mr. Cooksey's Online Activities Would Not Impose A Substantial Hardship On Mr. Cooksey.**

The hardship to the parties “is measured by the immediacy of the threat and the burden imposed on the petitioner who would be compelled to act under threat of enforcement of the challenged law.” *Int’l Acad.*, 451 F. Supp. 2d at 753 (quoting *Charter Fed.*, 976 F.2d at 208-09). While the Dental Board article in *International Academy* indicated how the Dental Board might interpret its regulations, the applicable regulations also provided that dentists could seek a declaratory opinion from the Dental Board as to whether conduct complied with its statutes and regulations. *Id.* at 753. Acknowledging the existence of “arguable

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<sup>8</sup> The Board was required to investigate Mr. Cooksey following the third-party complaint lodged against him for the unlicensed practice of dietetics. See 21 N.C. Admin. Code 17.0116(d) (“An Investigator or other authorized Board staff *shall* investigate a complaint . . . .”) (emphasis added). In *International Academy*, the court determined that the Dental Board’s investigation of two dentists “d[id] not alter the unclear nature of the Dental Board’s policy on a dentist’s speech” where the Dental Board neither voted to take action nor determined whether violations occurred. 451 F. Supp. 2d at 752. Similarly, the Complaint Committee’s investigation in this case is no substitute for a final or official Board decision.

free-speech concerns,” the court noted that “[a]llegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.” *Id.* (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972)). The *International Academy* court ultimately determined that there was no substantial hardship and that an official interpretation would clarify the Dental Board’s position and “formulate a controversy specific enough for a court to adjudicate.” *Id.* at 754.

Mr. Cooksey likewise could have sought Board determination as to whether his actions violated the Act. *See* N.C. Gen. Stat. § 150B-4 (providing that, at the request of an aggrieved party, “an agency *shall* issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency”) (emphasis added). At the very least, Mr. Cooksey could have taken Ms. Burill up on her offer for continued dialogue or asked if her Comments represented the official position of the Board. He failed to do so and expressed no objections to the Comments or Guideline before filing this lawsuit.

Mr. Cooksey was given another opportunity to seek an official position from the Board before filing this appeal. Significantly, the District Court dismissed Mr. Cooksey’s complaint *without* prejudice. (J.A. 131) Mr. Cooksey therefore could have addressed the deficiencies in the ripeness of this action (as well as his lack of



standing) – or perhaps rendered this entire lawsuit moot – by simply requesting a declaratory ruling from the Board. *See* N.C. Gen. Stat. § 150B-4. However, he decided to forge ahead without a declaratory ruling from the Board as to the legality of his conduct (or any other formal or final administrative action), leaving the Court to speculate as to what position the Board *might* have taken had Mr. Cooksey simply accepted Ms. Burill’s invitation to discuss this matter further or availed himself of the opportunity to obtain a declaratory ruling from the Board as provided under North Carolina law.

“Strict application of the ripeness doctrine prevents federal courts from rendering impermissible advisory opinions and wasting resources through review of potential or abstract disputes.” *Nat’l Adver. Co. v. City of Miami*, 402 F.3d 1335, 1339 (11th Cir. 2005). The Court should exercise particular caution not to decide potential or abstract disputes where the effect of granting the requested relief would be to strike down a statute that has been duly enacted by the elected legislature of a sovereign state. There is little hardship in requiring Mr. Cooksey to seek a formal Board interpretation of the Act, especially in the context of a challenge to the constitutionality of an entire professional licensing scheme. The Court should therefore affirm the District Court’s dismissal of the complaint because Mr. Cooksey’s claims are not yet ripe.

## II. MR. COOKSEY DOES NOT HAVE STANDING TO BRING THESE CLAIMS.

Mr. Cooksey's allegations of possible future injury are also insufficient to satisfy Article III's standing requirements. To have standing, a plaintiff must – “[a]t an irreducible minimum” – show “that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.” *Trinity Baptist Church, Inc. v. City of Asheville*, 88 F. Supp. 2d 487, 490 (W.D.N.C. 1999). In other words, Mr. Cooksey must have suffered an “injury in fact” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotation marks omitted). He has suffered no such injury.<sup>9</sup>

### A. Rather Than Alleging An Injury In Fact, Mr. Cooksey Alleges Only A Hypothetical “Injury” Based On What The Board Might Do In The Future.

In *Kemler v. Poston*, the United States District Court for the Eastern District of Virginia considered analogous circumstances and authored an opinion that offers a useful analysis of the standing issue presently before this

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<sup>9</sup> Despite Mr. Cooksey's assertion that “[t]he other two elements of standing – causation and redressability – have never been in dispute in this case” (Appellant Br. at 31 n.6), the District Court correctly noted in its order denying Mr. Cooksey's motion for a preliminary injunction that redressability “is difficult to determine because [the Board has] not taken any formal action which a court could find violated [Mr. Cooksey's] rights” given that Mr. Cooksey “has already removed the content which [the Board] objected to, thus a favorable decision to [Mr. Cooksey] would not necessarily provide him with full redress.” (J.A. 112)

Court. In *Kemler*, the district court held that two substitute judges lacked standing to bring a First Amendment challenge to a Judicial Ethics Advisory Committee advisory opinion, which took the view that, “to avoid the appearance of impropriety, Virginia judges must refrain from voting in primary elections.” 108 F. Supp. 2d 529, 531 (E.D. Va. 2000) In reaching its conclusion, the *Kemler* court found that the plaintiffs were unable to show (1) that they had been “compel[led] to do, or to refrain from doing, anything” and (2) that there was a threat of “imminent enforcement” of the advisory opinion. *Id.* at 538.

Similarly, in the present case, the Board never compelled Mr. Cooksey to refrain from doing anything, and there was neither actual nor imminent enforcement of the Act. As noted above, Ms. Burill merely highlighted “areas of concern” and sought further discussion, and there is no evidence that the Board made any determination as to whether Mr. Cooksey violated the Act, took – or even threatened – any formal action in response to the written complaint lodged against Mr. Cooksey, or ordered compliance in any way. The Board never sought an injunction to prevent Mr. Cooksey from practicing dietetics/nutrition without a license. *See* N.C. Gen. Stat. § 90-367 (giving the Board authority to “make application to any appropriate court for an order enjoining violations of [the Act]”). Nor did the Board refer the matter to a

district attorney's office for the unlawful practice of dietetics/nutrition. *See* N.C. Gen. Stat. § 90-366.<sup>10</sup> The Board never even sent Mr. Cooksey a cease-and-desist letter.

Instead, Mr. Cooksey bases his claims on communications from Ms. Burill that were explicitly characterized as “comments” and “requests.” (*See* J.A. 55 (referring in a January 18, 2012 email to “requested changes”; J.A. 66 (referring to the mark-up of Mr. Cooksey's website as “comments” and stating, “*should you disagree, I am happy to discuss*”) (emphasis added))

The inconclusive and open-ended nature of the guidance Mr. Cooksey received and his subsequent failure even to seek clarification presents a sharp contrast to the circumstances at issue in *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999) (“*NCRL*”), on which Mr. Cooksey relies heavily in his brief. Unlike Mr. Cooksey, the *NCRL* plaintiff specifically requested an opinion from the State Board of Elections as to whether its proposed conduct –

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<sup>10</sup> In the absence of evidence to establish a specific threat of an enforcement action against him, Mr. Cooksey attempts to create the appearance of an imminent threat by citing an article from *Carolina Journal Online* reporting that the Board has “investigated nearly 50 people or organizations over the past five years.” (Appellant Br. at 38 n.8) This article is, on its face, inherently unreliable and inaccurate. The Act expressly exempts health care professionals otherwise licensed under Chapter 90 of the North Carolina General Statutes. N.C. Gen. Stat. § 90-368(1). Accordingly, the Board does not even have the authority to investigate “athletic trainers, a nurse, a pharmacist,” or other health care professionals as reported in the article. At most, the Board could refer complaints about such individuals to their respective licensing authorities.

distributing a voter guide – would violate a North Carolina statute forbidding corporate expenditures for a political purpose. *Id.* at 709. In other words, the *NCRL* plaintiff did precisely what the District Court faulted Mr. Cooksey for not doing – requesting a decision from the agency about a statute’s applicability to his activities. (J.A. 122, 130) Moreover, instead of offering informal “comments,” “requests,” and invitations for further discussion like Ms. Burill, the Chief Deputy Director of the Board of Elections responded to the *NCRL* plaintiff’s request with an unequivocal opinion on behalf of the State Board of Elections that distributing the voter guide would violate the law. *NCRL*, 168 F.3d at 709-10. Consequently, there was no doubt in *NCRL* that the Board of Elections deemed the plaintiff’s dissemination of voter guides to be unlawful.

Similarly, in *Preston v. Leake*, 660 F.3d 726 (4th Cir. 2011), on which Mr. Cooksey relies and which the ACLU of North Carolina (the “ACLU”) cites extensively in its *amicus* brief, the plaintiff was a registered lobbyist who wanted to make campaign contributions, and the statute at issue expressly prohibited registered lobbyists from making campaign contributions. *Id.* at 729. Thus, there was no question as to whether the applicable statute restrained the expression at issue.

The present case does not present the sort of clearly defined and unequivocal restriction on expression at issue in *Preston* and *NCRL*.<sup>11</sup> Here, the Act and Regulations do not specifically contemplate or forbid Mr. Cooksey's activities, *see* Section I.A., *supra*, Mr. Cooksey failed to request an opinion from the Board or Ms. Burill regarding the legality of his activities, and it is unclear whether or to what extent the Board would find that Mr. Cooksey practiced dietetics without a license. So while the plaintiffs in *Preston* and *NCRL* were faced with statutory provisions and specific administrative guidance that unquestionably restrained their expressive conduct, Mr. Cooksey's claims rest on the shaky foundation of informal comments, requests, and a declined invitation for further discussion.

The inconclusive nature of the guidance Mr. Cooksey received and the lack of resulting injury are illustrated by Mr. Cooksey's own conduct in the wake of his communications with Ms. Burill. Mr. Cooksey now tries to persuade the Court that he was faced with "speech-chilling uncertainty about the legality of [communications] in the form of personal dietary advice" (J.A. 21, ¶¶ 103-04), but his conduct suggests that his speech was hardly "chilled." Nearly seven months

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<sup>11</sup> *NCRL* and *Preston* can be further distinguished by the simple fact that they arose from restrictions of political campaign speech, which has been recognized as expression protected by the First Amendment. In contrast, the Act and Regulations here regulate the practice of a profession and have only an incidental effect on expression, which this Court has held not to implicate expression protected under the First Amendment. *See* Section II.B., *infra*.

after receiving Ms. Burill's comments and approximately two months after filing this lawsuit, Mr. Cooksey provided detailed, individualized advice to diabetics through his website. (*See* J.A. 107 (providing reader with a meal plan and advising her to "[e]at 30 grams of TOTAL carbs per day (do not count net carbs) . . . or less until your blood sugars stabilize in the sub 100 mg/dl range while in a fasted state" and to "reduce drugs and insulin" when her "blood sugars drop in the 80-90's fasted"))

Mr. Cooksey was invited to express disagreement with (or request clarification regarding) the requests and Comments he received from Ms. Burill. He declined the invitation and instead filed this lawsuit based on how the Board potentially could have interpreted and enforced the Act with respect to his conduct. If, as Mr. Cooksey and the ACLU contend, the reasoning of cases such as *Preston* and *NCRL* could be extended to the circumstances at issue in this case, then any person in North Carolina would have standing to challenge any professional licensing statute on First Amendment grounds merely by alleging a desire to render advice that would otherwise require a license and claiming a non-specific "chilling" of their expression. In the absence of actual or imminent enforcement of the Act, however, Mr. Cooksey's claims present legal questions "in the rarefied atmosphere of a debating society" rather than the "concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *See*

*Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 153-54 (4th Cir. 2000) (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)). Accordingly, Mr. Cooksey lacks standing to assert the claims alleged in his complaint.

**B. The First Amendment’s “Chilling Doctrine” Does Not Apply Because This Case Is About A Valid Professional Regulation, Not A Violation Of Mr. Cooksey’s Freedom Of Speech.**

Unable to allege a concrete and particularized injury, Mr. Cooksey devotes most of his brief to arguing that the Court should apply the First Amendment’s “chilling doctrine,” which provides for a “more lenient” standing analysis in First Amendment cases. (See, e.g., Appellant Br. at 13-14 (criticizing the “district court’s erroneous view that this is not a First Amendment case”)) Contrary to Mr. Cooksey’s dramatic characterization of his claims as a challenge to unconstitutional “censorship on ordinary advice” (J.A. 6), this case is not actually about an infringement of Mr. Cooksey’s rights under the First Amendment. It is instead about North Carolina’s authority to license occupations to safeguard the public health and safety.

The challenged Act – which requires individuals to be licensed before practicing dietetics/nutrition – is a professional regulation that does not abridge the freedom of speech protected under the First Amendment. As the District Court correctly concluded:



Significantly, neither the [Guideline] sent to [Mr. Cooksey] as an email attachment nor Ms. Burill's comments suggested any limitation on his expression of his opinions. In accordance with the Act and the Regulations, and as [Mr. Cooksey] himself acknowledges, the "general thrust" of the comments was that he could express his opinions about dietary matters but could not perform individualized personal assessments or counseling.

(J.A. 121-22; J.A. 130) In short, the First Amendment's "chilling doctrine" does not apply because (1) the state of North Carolina has a compelling interest in regulating the profession of dietetics/nutrition and (2) the regulation of this profession does not violate the First Amendment. The Court should therefore affirm the District Court's dismissal of Mr. Cooksey's complaint.

**1. The Regulation Of Dietitians And Nutritionists Promotes A Compelling Governmental Interest.**

As a threshold matter, it is well established that states may regulate the practice of professions:

States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.

*Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 108 (1992). This is particularly true with respect to the regulation and licensing of professions that directly implicate matters of public health, like dietetics/nutrition and other professions appearing in Chapter 90 of the North Carolina General Statutes. *See National Ass'n for the Advancement of Psychoanalysis v. California Bd. of*

*Psychology*, 228 F.3d 1043, 1054 (9th Cal. 2000) (“NAAP”) (noting that exercising “the state’s police power to regulate and license professions” is especially proper “when public health concerns are affected”) (citing *Watson v. Maryland*, 218 U.S. 173, 176 (1910)).

Faced with this established standard and the obvious correlation between dietary counseling and health, Mr. Cooksey attempts to minimize the value of the Act and Regulations and downplay the nature and scope of his activities. First, he notes that a person may choose not to follow a dietitian’s advice. (J.A. 24, ¶ 97) This, of course, could also be said about the advice of other licensed professionals – including physicians, attorneys, and accountants – and has no bearing on the legitimacy of a licensing scheme for dietitians.

Second, he describes the allegedly prohibited activities as the giving of basic and “ordinary advice on [the] age-old topic” of healthy eating. (J.A. 6; *see also* Appellant Br. at 30 (“the sort of advice laypeople exchange every day”); *id.* at 6 (“advice amounts to recommendations about what to buy at the grocery store – more steak and avocados and less pasta, for example”))<sup>12</sup> But this sort of advice is not prohibited under the Act. To the contrary, Mr. Cooksey is free to provide general “nutritional information,” which – as noted in the Guideline – includes

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<sup>12</sup> *See also, e.g.*, Appellant Br. at 12 (“Cooksey wants to communicate . . . advice about what food to buy at the grocery store . . . .”); 18 (“eat more steak and less bread”); 21 (“advice about what adults should buy at the grocery store”); 25 (“lay advice”; “suppressing speech about what adults should buy at the grocery store”).

“[p]roviding information on healthy eating and healthy snacks....” (J.A. 63; *see also* J.A. 83, ¶ 7 (recounting conversation where Ms. Burill told Mr. Cooksey that “he was free to comment and speak about the Paleolithic diet” and “was simply prohibited . . . from providing nutrition care services without a license”)); 21 N.C. Admin. Code 17.0402(a)(1). If Mr. Cooksey’s actions were unlawful – an issue not yet addressed by the Board – it is not because he shared his grocery list. It would instead be because he engaged in nutrition “assessment” and “counseling,” which involves evaluating “the nutrition needs of individuals and groups based upon biochemical, anthropometric, physical, and food intake and diet history data” and providing “advice and assistance . . . by integrating information from the nutrition assessment with information on food and other sources of nutrient and meal preparation consistent with cultural background, socioeconomic status and therapeutic needs.” 21 N.C. Admin. Code 17.0101(11)-(12).

Third, Mr. Cooksey paints a picture of providing advice to his family and “genuine friends.” (*See, e.g.*, J.A. 12, ¶ 31; J.A. 13, ¶¶ 33-34; J.A. 16-17, ¶¶ 54-57; J.A. 26, ¶¶ 103-04) However, Mr. Cooksey’s website had approximately 20,000 unique visitors over just a 2-month period and was viewed in over 100 countries spanning 6 continents in December 2011 alone. (J.A. 11, ¶ 26; J.A. 14, ¶ 38) He provided advice to people across the United States and its territories plus Canada, Great Britain, Jamaica, Indonesia, Australia, and South Africa. (J.A. 14, ¶ 38)

Looking past Mr. Cooksey's attempts to minimize the importance of the Act and Regulations and the significance of his own activities, there are potentially serious health implications when unlicensed persons such as Mr. Cooksey provide nutrition assessment or counseling. Specifically, non-licensees are not subject to the numerous limitations and obligations designed to protect persons receiving individualized dietary counseling. By way of example:

- **Satisfying minimum qualification levels and requirements for continuing education** (N.C. Gen. Stat. §§ 90-356, 90-357, 90-365; 21 N.C. Admin. Code 17.0103-.0106) – Mr. Cooksey does not allege that he has any specialized training or education on managing and treating diabetes. There are more variables to consider in the assessment of a diabetic's diet than protein, carbohydrates, and exercise. However, without adequate and appropriate training, an unlicensed person such as Mr. Cooksey may not have a foundation for appreciating the significance of factors he does not consider in rendering advice.
- **Coordinating care with other health care providers** (21 N.C. Admin. Code 17.0114(a)(10)) – The Act's location in Chapter 90 with the medical professions is no accident. The regulatory scheme under the Act specifically contemplates coordination of dietary and nutritional counseling with other health care services. Subject to a client's consent, a licensee must provide information to the client's physician "where a client's nutritional status indicates a change in health status." In contrast, Mr. Cooksey's counseling and advice takes place independently of – and sometimes in conflict with – treatment and advice from physicians.
- **Assuming responsibility and accountability for competence in practice** (21 N.C. Admin. Code 17.0114(a)(5), (13)) – Each time a licensed dietitian renders advice, he puts his or her license and livelihood on the line, and he or she is accountable for the consequences of that advice. In contrast, if one of Mr.

Cooksey's many "friends" suffered adverse health consequences as a result of following Mr. Cooksey's individualized advice, he would likely be "just a blogger" with no responsibility or accountability.

- **Maintaining confidentiality** (21 N.C. Admin. Code 17.0114(a)(8)) – Mr. Cooksey's website contains a "Privacy Page" that discloses the type of information collected from website users. However, there is no commitment to preserving the confidentiality of persons seeking personal advice. Unlike clients of a licensed dietitian, Mr. Cooksey's diet coaching clients and "internet friends" have no assurance that their information will not later be published on Mr. Cooksey's website.
- **Refusing to perform services where not qualified** (21 N.C. Admin. Code 17.0114(a)(9)) – A licensee under the Act is obligated to refrain from performing services that "the licensee knows or has reason to know that he or she is not qualified to perform." However, nothing constrains Mr. Cooksey from attempting to answer any inquiry posed to him regardless of his knowledge and qualifications.

In summary, the regulation and licensing of dietitians and nutritionists advance a compelling governmental interest and are well within the state's constitutional powers.

## **2. The Act And Regulations Do Not Violate The First Amendment.**

In light of the fundamental proposition that the regulation and licensing of professions – including dietetics/nutrition – are a constitutional exercise of the state's powers, the remaining question raised here is whether an otherwise permissible professional regulation becomes subject to First Amendment scrutiny because the regulated conduct includes spoken or written advice. This Court has

considered this question and answered with a resounding, “No.” Just last year, the United States Court of Appeals for the Eleventh Circuit also considered this question and reached the same conclusion.

**a. *Professional Regulations Are Not Subject To First Amendment Scrutiny Simply Because They Regulate Activities That Include Communications.***

As this Court has previously held, “[p]rofessional regulation is not invalid, nor is it subject to first amendment strict scrutiny, merely because it restricts some kinds of speech.” *Accountant’s Society of Virginia v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988) (citing *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456-57 (1978) (“[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”)); *see also* *Lowe v. S.E.C.*, 472 U.S. 181, 228 (1985) (White, J., concurring) (“The power of government to regulate the professions is not lost whenever the practice of a profession entails speech.”). Indeed, “[a] statute that governs the practice of an occupation is not unconstitutional as an abridgment of the right to free speech, so long as ‘any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation.’” *Bowman*, 860 F.2d at 604 (quoting *Underhill Assoc. v. Bradshaw*, 674 F.2d 293, 296 (4th Cir. 1982)). Numerous other courts have similarly held that professional conduct, even

conduct involving speech, can be regulated without violating the First Amendment. *See, e.g., Ohralik*, 436 U.S. at 456-59 (attorneys); *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011) (interior designers); *Bradshaw*, 674 F.2d at 296 (securities broker-dealers); *NAAP*, 228 F.3d at 1053-56 (psychologists); *Wilson v. State Bar*, 132 F.3d 1422, 1429-30 (11th Cir. 1998) (attorneys); *Lawline v. Am. Bar Ass'n*, 956 F.2d 1378, 1386 (7th Cir. 1992) (attorneys).

Of course, states do not have carte blanche to limit all speech under the guise of professional regulations. The key is determining the “point where regulation of a profession leaves off and prohibitions on speech begin.” *Lowe*, 472 U.S. at 230, 232 (White, J., concurring). This Court has followed the “sound, specific guidelines” from Justice White’s concurrence in *Lowe* in defining that point. *Bowman*, 860 F.2d at 604. According to Justice White, the distinction lies in whether there is a “personal nexus between professional and client.” *Lowe*, 472 U.S. at 232 (White, J., concurring). In other words, a person “who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client’s individual needs and circumstances is properly viewed as engaging in the practice of a profession.” *Id.* Requiring such individuals to obtain a license does not limit free speech subject to First Amendment scrutiny. *Id.* Only when this “personal nexus” is lacking must a regulation satisfy the level of scrutiny that the First Amendment demands. *Id.*

Relying heavily on Justice White's concurrence, this Court in *Bowman* analyzed a statute prohibiting unlicensed accountants from using certain terms in documents they prepared for their clients, including giving an "assurance" as defined by statute and describing the "principles" and "standards" related to preparation of financial statements. 860 F.2d at 603. Noting that the non-CPAs "exercise their professional judgment in making individualized assessments of each client's financial situation," the *Bowman* Court held that the statute – which "restrict[ed] only accountants' communications with and on behalf of their clients, as a means of regulating the professional activities of non-CPAs" – was a "permissible regulation of a profession, not an abridgment of speech protected by the first amendment." *Id.* at 604-05.

**b. *The Authority On Which Mr. Cooksey Relies Does Not Undermine Or Conflict With The Principles Stated In Bowman.***

Relying primarily on *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), Mr. Cooksey submits that "*Bowman* should be treated as bad law." (Appellant Br. at 24; *see also id.* at 16-19, 22-24, 29 (discussing *Humanitarian Law Project* and *United States v. Stevens*, 130 S. Ct. 1577 (2010))) According to Mr. Cooksey, *Humanitarian Law Project* "irreconcilably conflicts" with the principles articulated in *Bowman*. (Appellant Br. at 22-24, 30) Contrary to the implication of Mr. Cooksey's arguments, however, *Humanitarian Law Project*



did not represent a fundamental shift in First Amendment jurisprudence that somehow superseded or undermined this Court's analysis in *Bowman*.

Instead, the *Humanitarian Law Project* Court applied principles established seventeen years *prior* to *Bowman* in *Cohen v. California*, 91 S. Ct. 1780 (1971), where the Supreme Court applied First Amendment scrutiny to the conviction of Mr. Cohen for a "breach of the peace" by wearing a jacket with an offensive epithet in a courthouse. In reaching its conclusion that a statute impermissibly burdened rights protected under the First Amendment, the *Humanitarian Law Project* Court rejected the government's suggestion that the conduct at issue should be decided under the intermediate level of scrutiny established in *United States v. O'Brien*, 88 S. Ct. 1673 (1968) (addressing the incidental effect on free expression resulting from a statutory ban on knowingly destroying "draft cards") and found instead that the circumstances were akin to those in *Cohen* because "*O'Brien* does not provide the applicable standard for reviewing a content-based regulation of speech." *Humanitarian Law Project*, 130 S. Ct. at 2723. The *Humanitarian Law Project* decision does not purport to replace or modify the long-recognized standards established in *O'Brien* and *Cohen*; instead, it merely applies the *Cohen* standard to the particular circumstances at issue in that case. This Court was not constrained by *Cohen* when deciding *Bowman* and, similarly, it is not constrained by *Humanitarian Law Project* in deciding this case.

In *Humanitarian Law Project*, a “material support” statute prohibited the plaintiffs from providing legal training to groups designated as foreign terrorist organizations. 130 S. Ct. at 2712-13. Finding that the statute restricted speech communicating advice derived from specialized knowledge, the *Humanitarian Law Project* Court applied the standard established in *Cohen* and affirmed the statute’s constitutionality as to the activities the plaintiffs wished to pursue. *Id.* at 2712, 2723-24, 2729-30. Here, in contrast, the issue is not a statutory limit on what licensed dietitians/nutritionists may say or to whom they may provide counseling, but rather the constitutionality of the licensing requirements themselves.

Where the material support statute prevented the *Humanitarian Law Project* plaintiffs from communicating advice *derived from* specialized knowledge, the Act merely prevents Mr. Cooksey from providing certain individualized assessment and counseling *in the absence of* the specialized knowledge required to qualify for licensure under the Act. Alternately stated, *Humanitarian Law Project* may have “held that the First Amendment was applicable to the advice the lawyers wanted to convey to the terrorists” (Appellant Br. at 17), but the case says nothing about whether a state may require an individual to meet certain criteria before becoming a lawyer in the first place. Thus, contrary to Mr. Cooksey’s assertion, there is no conflict – “irreconcilable” or otherwise – between *Humanitarian Law Project* and *Bowman*.

Similarly, Mr. Cooksey argues that the Supreme Court in *Ohralik* “appl[ied] First Amendment scrutiny to a prohibition on in-person solicitation by lawyers.” (Appellant Br. at 29) However, *Ohralik* focuses on the question of whether a lawyer’s in-person solicitation constitutes general advertising or a business transaction. 436 U.S. at 454-59. It does not suggest that the State of Ohio’s requirement of a law license to practice law is subject to heightened First Amendment scrutiny merely because the practice of law includes communicative conduct.

Recent decisions confirm that the principle applied in *Humanitarian Law Project* does not extend to the analysis of state laws regulating the practice of professions. Just last year, the Eleventh Circuit relied on Justice White’s concurrence in *Lowe* – and this Court’s *Bowman* decision – in holding that a Florida statute requiring interior designers to be licensed before practicing in a commercial setting was a professional regulation that “d[id] not implicate constitutionally protected activity under the First Amendment.” *Locke*, 634 F.3d at 1191. In so holding, the *Locke* court stated, “There is a difference, for First Amendment purposes, between regulating professionals’ speech to the public at large versus their direct, personalized speech with clients.” *Id.* Because “Florida’s license requirement regulates solely the latter,” the First Amendment did not apply. *Id.*

Indeed, since the Supreme Court issued its decisions in *Humanitarian Law Project* and *Stevens*, this Court also has reaffirmed the principle articulated in *Bowman*, noting earlier this year that:

The Supreme Court has not recognized the notion that ‘professional speech,’ *unconnected to state regulation or licensing*, is entitled to less protection under the First Amendment. We have, however, recognized that the government may regulate the professions and, as necessary to serve the state’s interest in such regulation, so regulate the professionals’ speech.

*Greater Balt. Ctr. for Pregnancy Concerns v. Mayor & City Council*, 683 F.3d 539, 555 n.3 (4th Cir. 2012) (emphasis added) (citing *Bowman*, 860 F.2d at 603-05 (noting that “governmental regulation of the professions is constitutional if the regulations have a rational connection with the applicant’s fitness or capacity to practice the profession”)).<sup>13</sup>

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<sup>13</sup> A California federal court decision from earlier this month further demonstrates that *Bowman* and *Humanitarian Law Project* are actually in harmony. See *Welch v. Brown*, No. 2:12-2484, 2012 U.S. Dist. LEXIS 172029 (E.D. Cal. Dec. 3, 2012). While the *Welch* court applied *Humanitarian Law Project* to hold that “a law regulating conduct that incidentally affects speech is subject to strict scrutiny *if it is content- or viewpoint-based*,” *Id.* at \*28 (emphasis added), it also recognized the continued vitality of the principle that professional regulations only need to “have a rational connection with the applicant’s fitness or capacity to practice the profession” when the regulations deal with “entry into a profession” as opposed to “impos[ing] restrictions on a professional’s speech.” *Id.* at \*14-21 (discussing *Bowman* and *Lowe*) (quotation marks omitted).

In short, despite Mr. Cooksey's best efforts to steer this Court's review into the deep waters of unrelated First Amendment principles, his challenge to the Act remains squarely within the legal authority directly addressing the standards for reviewing professional licensing laws. Under that authority, which is unaffected by the decision in *Humanitarian Law Project*, First Amendment scrutiny does not apply to this case and the District Court's dismissal of Mr. Cooksey's claims should be affirmed.

**c. *The Review Of A Professional Licensing Law's Incidental Effect On Speech Is Subsumed Within Scrutiny Of The Law Generally.***

Establishing a consistent standard for reviewing professional licensing laws presents a unique challenge because some, but not all, conduct in performing professional services consists of communicating information and advice. To address this challenge, courts have focused on determining where speech incidental to the practice of the profession ends and personal speech begins. *See Bowman*, 860 F.2d at 603-05; *Locke*, 634 F.3d at 1191. By defining what speech constitutes the practice of a regulated profession, all aspects of professional licensing – including the incidental effect on speech – are subject to the same level of scrutiny to determine whether the regulations “have a rational connection with the applicant's fitness or capacity to practice the profession.” *See Bowman*, 860 F.2d at 603-604 (quoting *Lowe*, 472 U.S. at 228 (White, J., concurring)).

Under this analytical framework, the Act must have a rational basis in the first instance. By extension, restrictions on communications incidental to the practice of dietetics/nutrition are therefore also subject to the same rational basis scrutiny because such communications are by definition subsumed within the practice of the profession. The District Court implicitly recognized this standard by noting that, “[b]ecause the speech at issue is restricted as a professional regulation, it must withstand only a rational-basis test.” (J.A. 114, 130) Restrictions on speech about matters of dietetics/nutrition that are not subsumed within the practice of the profession – here, speech outside the context of nutritional “assessment” and “counseling” as defined by the Act and Regulations – remain subject to separate scrutiny under the appropriate First Amendment standard.

Without this framework to define speech that constitutes the practice of a regulated profession and treat it accordingly, a single professional licensing law would be subject to scrutiny under multiple standards of review depending on the nature of a particular regulated task. Under Mr. Cooksey’s proposed approach, professional licensing regulations governing a surgeon in the operating room would not be subject to heightened First Amendment scrutiny, but licensing regulations governing the same surgeon providing advice and consultation to the same patient about the exact same surgery would. In addition to being nearly

impossible to apply, this task-by-task dissection of professional licensing laws would undermine states' undisputed authority to regulate the practice of professions, with scrutiny on the incidental effects of licensing laws taking priority over the fundamental questions of whether the laws protect the public health and safety and have a rational connection with applicants' qualifications to practice the profession. *See Gade*, 505 U.S. at 108; *Bowman*, 860 F.2d at 603-05.

Mr. Cooksey and his lawyers obviously disagree with the principle set out in *Bowman* and would seemingly have this Court subject any professional licensing regulation with an incidental effect on communications to strict First Amendment scrutiny. Indeed, in Mr. Cooksey's prayer for relief, he specifically asked the District Court to declare unconstitutional that which is constitutional under *Bowman* – the requirement of a license to provide advice as to “what a *specific individual* ought to eat *in light of the circumstances of that individual's life*.” (J.A. 31-32 (emphasis added)) However, the principles set out in *Bowman*, and reaffirmed earlier this year in *Greater Baltimore Center*, remain the law in this Circuit. The District Court correctly declined to apply the more lenient standard for standing that applies where expression protected by the First Amendment has been “chilled,” and its dismissal of Mr. Cooksey's claims should be affirmed.

**d.     *The Act, Regulations, And Comments Are Consistent  
With The Principles Articulated In Bowman.***

Under *Bowman*, a professional regulation that has “a rational connection with the applicant’s fitness or capacity to practice the profession” does not violate the First Amendment by restricting communications where there is a “personal nexus” involving the exercise of judgment on behalf of an individual in light of his or her particular needs and circumstances. 860 F.2d at 603-05 (quotation marks omitted); *see also Greater Balt. Ctr.*, 683 F.3d at 555 n.3. Here, the Act and Regulations set forth the requirements necessary to practice the profession of dietetics/nutrition in North Carolina.<sup>14</sup> As defined by the Act, a dietitian’s “primary function” includes assessing and evaluating the nutritional

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<sup>14</sup> Implicit throughout Mr. Cooksey’s appellate brief is a generally disparaging attitude toward the profession of dietetics/nutrition, characterizing conduct regulated under the Act as “the sort of advice that laypeople exchange every day.” (Appellant Br. at 30; *see also id.* at 26 (“[T]here is nothing to support any argument that . . . a life coach is a fiduciary of a client in the same way that a doctor is a fiduciary of a patient.”)) However, as defined under the Act, dietetics/nutrition consists of “the integration and application of principles derived from the science of nutrition, biochemistry, physiology, food, and management and from behavioral and social sciences to achieve and maintain a healthy status.” N.C. Gen. Stat. § 90-352(2). Similarly, the Act and Regulations establish rigorous requirements for licensure, call for coordination with other health care professionals, impose a duty of confidentiality, and require dietitians to refrain from performing services they are not qualified to perform. *See* Section II.B.1., *supra*. Neither Mr. Cooksey’s disdain for the profession nor his apparent skepticism as to whether dietetics/nutrition is sufficiently specialized to warrant licensure requirements is a sufficient basis for this Court to substitute its judgment for that of the duly elected General Assembly of North Carolina as to the need for the Act’s licensing requirements.



needs of his or her clients, counseling clients on nutrition-related issues, and establishing goals and objectives based on the client's individualized health needs. N.C. Gen. Stat. § 90-352(2), (4). Dietitians – like lawyers, doctors, accountants, and interior designers – thus “exercise[] judgment on the client's behalf according to the client's particular needs and circumstances.” *See Locke v. Shore*, 682 F. Supp. 2d 1283, 1292 (N.D. Fla. 2010). Because of the “personal nexus” between a dietitian and his client, the Act's requirement that dietitians be licensed “is a professional regulation, and its effect on speech is incidental.” *See id.* The Act's license requirement is therefore not subject to First Amendment scrutiny.” *Id.*

Similarly, the Comments were consistent with the standard set out in *Bowman* as they do nothing more than attempt to identify instances where Mr. Cooksey took “the affairs of a client personally in hand” by offering personalized nutritional advice based on a “client's individual needs and circumstances.” *See Bowman*, 860 F.2d at 604; *Locke*, 682 F. Supp. 2d at 1291-92. Nowhere do the Comments suggest censorship of the content of Mr. Cooksey's website; they instead highlight entries where Mr. Cooksey may have been “assessing and advising” a specific person based on his or her individual circumstances. (J.A. 35-41; 83, ¶ 7)

It is at this point that the analysis comes full circle and runs headlong into the ripeness and standing issues discussed in Section I, *supra*. Until the Board specifically determines the point at which internet communications such as Mr. Cooksey's constitute the practice of dietetics/nutrition requiring a license under the Act, Mr. Cooksey has not suffered an injury in fact and this dispute is not ripe for resolution. In proceeding directly to litigation rather than accepting Ms. Burill's invitation for further discussion or requesting a declaratory ruling as permitted under North Carolina law, Mr. Cooksey has asked this Court – rather than the Board – to define the applicability of the Act to internet communications. The District Court properly declined this invitation to substitute its judgment for that of the Board, and this Court should do the same.

### **CONCLUSION**

The real question before the District Court was not whether Mr. Cooksey's speech has been "chilled" but instead whether the possible future enforcement of professional licensing regulations is sufficient to create a justiciable claim. For the reasons set forth above, the circumstances at issue in this case do not establish standing and ripeness sufficient to constitute a justiciable case or controversy as required by Article III of the United States Constitution. This Court should therefore affirm the District Court's dismissal of Mr. Cooksey's claims.

Dated: December 19, 2012

/s/ W. Clark Goodman

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N.C. Gen. Stat. § 90-350 (2012)

§ 90-350. Short title

This Article shall be known as the Dietetics/Nutrition Practice Act.

**HISTORY:** 1991, c. 668, s. 1.



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N.C. Gen. Stat. § 90-351 (2012)

§ 90-351. Purpose

It is the purpose of this Article to safeguard the public health, safety and welfare and to protect the public from being harmed by unqualified persons by providing for the licensure and regulation of persons engaged in the practice of dietetics/nutrition and by the establishment of educational standards for those persons.

**HISTORY:** 1991, c. 668, s. 1.



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N.C. Gen. Stat. § 90-352 (2012)

§ 90-352. Definitions

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

- (1) "Board" means the North Carolina Board of Dietetics/Nutrition.
- (2) "Dietetics/nutrition" means the integration and application of principles derived from the science of nutrition, biochemistry, physiology, food, and management and from behavioral and social sciences to achieve and maintain a healthy status. The primary function of dietetic/nutrition practice is the provision of nutrition care services.
- (3) "Licensed dietitian/nutritionist" means an individual licensed in good standing to practice dietetics/nutrition.
- (4) "Nutrition care services" means any, part or all of the following:
  - a. Assessing the nutritional needs of individuals and groups, and determining resources and constraints in the practice setting.
  - b. Establishing priorities, goals, and objectives that meet nutritional needs and are consistent with available resources and constraints.
  - c. Providing nutrition counseling in health and disease.
  - d. Developing, implementing, and managing nutrition care systems.
  - e. Evaluating, making changes in, and maintaining appropriate standards of quality in food and nutrition services.

N.C. Gen. Stat. § 90-352

"Nutrition care services" does not include the retail sale of food products or vitamins.

**HISTORY:** 1991, c. 668, s. 1.





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N.C. Gen. Stat. § 90-353 (2012)

§ 90-353. Creation of Board

- (a) The North Carolina Board of Dietetics/Nutrition is created. The Board shall consist of seven members as follows:
- (1) One member shall be a professional whose primary practice is clinical dietetics/nutrition;
  - (2) One member shall be a professional whose primary practice is community or public health dietetics/nutrition;
  - (3) One member shall be a professional whose primary practice is consulting in dietetics/nutrition;
  - (4) One member shall be a professional whose primary practice is in management of nutritional services;
  - (5) One member shall be an educator on the faculty of a college or university specializing in the field of dietetics/nutrition;
  - (6) Two members shall represent the public at large.
- (b) Professional members of the Board shall:
- (1) Be citizens of the United States and residents of this State;
  - (2) Have practiced in the field of dietetics/nutrition for at least five years; and
  - (3) Be licensed under this Article, except that initial appointees shall be licensed under this Article no later than March 31, 1992.
- (c) The members of the Board appointed from the public at large shall be citizens of the United States and residents

of this State and shall not be any of the following:

- (1) A dietician/nutritionist.
- (2) An agent or employee of a person engaged in the profession of dietetics/nutrition.
- (3) A licensed health care professional or enrolled in a program to become prepared to be a licensed health care professional.
- (4) An agent or employee of a health care institution, a health care insurer, or a health care professional school.
- (5) A member of any allied health profession or enrolled in a program to become prepared to be a member of an allied health profession.
- (6) The spouse of an individual who may not serve as a public member of the Board.

**HISTORY:** 1991, c. 668, s. 1.



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N.C. Gen. Stat. § 90-354 (2012)

§ 90-354. Appointments and removal of Board members, terms and compensation

(a) The members of the Board shall be appointed as follows:

(1) The Governor shall appoint the professional member described in G.S. 90-353(a)(5) and the two public members described in G.S. 90-353(a)(6);

(2) The General Assembly upon the recommendation of the Speaker of the House of Representatives shall appoint the professional members described in G.S. 90-353(a)(1) and G.S. 90-353(a)(2) in accordance with G.S. 120-121, one of whom shall be a nutritionist with a masters or higher degree in a nutrition-related discipline; and

(3) The General Assembly upon the recommendation of the President Pro Tempore of the Senate shall appoint the professional members described in G.S. 90-353(a)(3) and G.S. 90-353(a)(4) in accordance with G.S. 120-121, one of whom shall be a nutritionist with a masters or higher degree in a nutrition-related discipline.

(b) Members of the Board shall take office on the first day of July immediately following the expired term of that office and shall serve for a term of three years and until their successors are appointed and qualified.

(c) No member shall serve on the Board for more than two consecutive terms.

(d) The Governor may remove members of the Board, after notice and opportunity for hearing, for:

(1) Incompetence;

(2) Neglect of duty;

(3) Unprofessional conduct;

N.C. Gen. Stat. § 90-354

(4) Conviction of any felony;

(5) Failure to meet the qualifications of this Article; or

(6) Committing any act prohibited by this Article.

(e) Any vacancy shall be filled by the appointing authority originally filling that position, except that any vacancy in appointments by the General Assembly shall be filled in accordance with G.S. 120-122.

(f) Members of the Board shall receive no compensation for their services, but shall be entitled to travel, per diem, and other expenses authorized by G.S. 93B-5.

**HISTORY:** 1991, c. 668, s. 1; 1995, c. 490, s. 16; 2001-342, s. 1.



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N.C. Gen. Stat. § 90-355 (2012)

§ 90-355. Election of officers; meetings of Board

(a) The Board shall elect a chairman and a vice-chairman who shall hold office according to rules adopted by the Board.

(b) The Board shall hold at least two regular meetings each year as provided by rules adopted by the Board. The Board may hold additional meetings upon the call of the chairman or any two Board members. A majority of the Board membership shall constitute a quorum.

**HISTORY:** 1991, c. 668, s. 1; 2001-342, s. 2.



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N.C. Gen. Stat. § 90-356 (2012)

§ 90-356. Power and responsibility of Board

The Board shall:

- (1) Determine the qualifications and fitness of applicants for licenses, renewal of licenses, and reciprocal licenses;
- (2) Adopt rules necessary to conduct its business, carry out its duties, and administer this Article;
- (3) Adopt and publish a code of ethics;
- (4) Deny, issue, suspend, revoke, and renew licenses in accordance with this Article;
- (5) Conduct investigations, subpoena individuals and records, and do all other things necessary and proper to discipline persons licensed under this Article and to enforce this Article;
- (6) Employ professional, clerical, investigative or special personnel necessary to carry out the provisions of this Article, and purchase or rent office space, equipment and supplies;
- (7) Adopt a seal by which it shall authenticate its proceedings, official records, and licenses;
- (8) Conduct administrative hearings in accordance with Article 3A of Chapter 150B of the General Statutes when a "contested case" as defined in G.S. 150B-2(2) arises under this Article;
- (9) Establish reasonable fees for applications for examination; initial, provisional, and renewal licenses; and other services provided by the Board;
- (10) Submit an annual report to the Governor and General Assembly of all its official actions during the

## N.C. Gen. Stat. § 90-356

preceding year, together with any recommendations and findings regarding improvements of the practice of dietetics/nutrition;

(11) Publish and make available upon request the licensure standards prescribed under this Article and all rules adopted by the Board;

(12) Request and receive the assistance of State educational institutions or other State agencies;

(13) Approve educational curricula, clinical practice and continuing education requirements for persons seeking licensure under this Article.

**HISTORY:** 1991, c. 668, s. 1; 2001-342, ss. 3, 4.



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N.C. Gen. Stat. § 90-357 (2012)

§ 90-357. License requirements

Each applicant for a license as a licensed dietitian/nutritionist shall meet the following requirements:

- (1) Submit a completed application as required by the Board;
- (2) Submit any fees required by the Board; and
- (3) Either:
  - a. Provide evidence of current registration as a Registered Dietitian by the Commission on Dietetic Registration; or
  - b. 1. Have received a minimum of a baccalaureate degree from a regionally accredited college or university with a major course of study in human nutrition, foods and nutrition, dietetics, community nutrition, public health nutrition, or an equivalent major course of study, as approved by the Board. Regardless of the course of study, applicants must have successfully completed the Board's minimum course requirements in food sciences, social and behavioral sciences, chemistry, biology, human nutrition, diet therapy, advanced nutrition, and food systems management. Applicants who have obtained their education outside of the United States and its territories must have their academic degree validated by the Board as equivalent to a baccalaureate or masters degree conferred by a regionally accredited college or university in the United States; and
  2. Have completed a planned, continuous program in approved clinical practice of not less than 900 hours under the supervision of a licensed dietitian/nutritionist as approved by the Board; and
  3. Have passed an examination as defined by the Board; or



## N.C. Gen. Stat. § 90-357

c. 1. Have received from a regionally accredited college or university a masters degree in human nutrition, nutrition education, foods and nutrition, public health nutrition or an equivalent major course of study as approved by the Board. Applicants who have obtained their education outside of the United States and its territories must have their academic degree validated by the Board as being equivalent to a masters degree conferred by a regionally accredited college or university in the United States; and

2. Have a documented supervised practice experience component in dietetic practice of not less than 900 hours under the supervision of a licensed health care provider; and

3. Have passed an examination as defined by the Board; or

d. Have received from a regionally accredited college or university a doctorate in human nutrition, nutrition education, foods and nutrition, public health nutrition, or an equivalent major course of study as approved by the Board, or have received a Doctor of Medicine. Regardless of the course of study, applicants must have successfully completed the Board's minimum course requirements in social and behavioral sciences, chemistry, biology, human nutrition, diet therapy and advanced nutrition. Applicants who have obtained their education outside of the United States and its territories must have their academic degree validated by the Board as being equivalent to a doctorate or Doctor of Medicine conferred by a regionally accredited college or university in the United States.

**HISTORY:** 1991, c. 668, s. 1.



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N.C. Gen. Stat. § 90-358 (2012)

§ 90-358. Notification of applicant following evaluation of application

After evaluation of the application and of any other evidence submitted, the Board shall notify each applicant that the application and evidence submitted are satisfactory and accepted, or unsatisfactory and rejected. If rejected, the notice shall state the reasons for the rejection.

**HISTORY:** 1991, c. 668, s. 1.



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N.C. Gen. Stat. § 90-359 (2012)

§ 90-359. Examinations

Competency examinations shall be administered at least twice each year to qualified applicants for licensing. The examinations may be administered by a national testing service. The Board shall prescribe or develop the examinations which may include an examination given by the Commission on Dietetic Registration of the American Dietetic Association or any other examination approved by two-thirds vote of the entire Board.

**HISTORY:** 1991, c. 668, s. 1.



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N.C. Gen. Stat. § 90-360 (2012)

§ 90-360. Granting license without examination

The Board may grant, upon application and payment of proper fees, a license without examination to a person who at the time of application holds a valid license as a licensed dietitian/nutritionist issued by another state or any political territory or jurisdiction acceptable to the Board if in the Board's opinion the requirements for that license are substantially the same as the requirements of this Article.

**HISTORY:** 1991, c. 668, s. 1.



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N.C. Gen. Stat. § 90-361 (2012)

§ 90-361. Provisional licenses

The Board may grant a provisional license for a period not exceeding 12 months to any individual who has successfully completed the educational and clinical practice requirements and has made application to take the examination required under G.S. 90-357. A provisional license shall allow the individual to practice as a dietitian/nutritionist under the supervision of a dietitian/nutritionist licensed in this State and shall be valid until revoked by the Board.

**HISTORY:** 1991, c. 668, s. 1.



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N.C. Gen. Stat. § 90-362 (2012)

§ 90-362. License as constituting property of Board; display requirement; renewal; inactive status

- (a) A license issued by the Board is the property of the Board and must be surrendered to the Board on demand.
- (b) The licensee shall display the license certificate in the manner prescribed by the Board.
- (c) The licensee shall inform the Board of any change of the licensee's address.
- (d) The license shall be reissued by the Board annually upon payment of a renewal fee if the licensee is not in violation of this Article at the time of application for renewal and if the applicant fulfills current requirements of continuing education as established by the Board.
- (e) Each person licensed under this Article is responsible for renewing his license before the expiration date. The Board shall notify a licensee of pending license expiration at least 30 days in advance thereof.
- (f) The Board may provide for the late renewal of a license upon the payment of a late fee, but no such late fee renewal may be granted more than five years after a license expires.
- (g) Under procedures and conditions established by the Board, a licensee may request that his license be declared inactive. The licensee may apply for active status at any time and upon meeting the conditions set by the Board shall be declared in active status.

**HISTORY:** 1991, c. 668, s. 1.



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N.C. Gen. Stat. § 90-363 (2012)

§ 90-363. Suspension, revocation and refusal to renew license

(a) The Board may deny or refuse to renew a license, may suspend or revoke a license, or may impose probationary conditions on a license if the licensee or applicant for licensure has engaged in any of the following conduct:

(1) Employment of fraud, deceit or misrepresentation in obtaining or attempting to obtain a license, or the renewal of a license;

(2) Committing an act or acts of malpractice, gross negligence or incompetence in the practice of dietetics/nutrition;

(3) Practicing as a licensed dietitian/nutritionist without a current license;

(4) Engaging in conduct that could result in harm or injury to the public;

(5) Conviction of or a plea of guilty or nolo contendere to any crime involving moral turpitude;

(6) Adjudication of insanity or incompetency, until proof of recovery from the condition can be established;

(7) Engaging in any act or practice violative of any of the provisions of this Article or any rule adopted by the Board, or aiding, abetting or assisting any person in such a violation.

(b) Denial, refusal to renew, suspension, revocation or imposition of probationary conditions upon a license may be ordered by the Board after a hearing held in accordance with Chapter 150B of the General Statutes and rules adopted by the Board. An application may be made to the Board for reinstatement of a revoked license if the revocation has been in effect for at least one year.

N.C. Gen. Stat. § 90-363

**HISTORY:** 1991, c. 668, s. 1.





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N.C. Gen. Stat. § 90-364 (2012)

§ 90-364. Fees

The Board shall establish fees in accordance with Chapter 150B of the General Statutes for the following purposes:

- (1) For an initial application, a fee not to exceed one hundred dollars (\$ 100.00).
- (2) For examination or reexamination, a fee not to exceed two hundred dollars (\$ 200.00).
- (3) For issuance of a license, a fee not to exceed two hundred dollars (\$ 200.00).
- (4) For the renewal of a license, a fee not to exceed one hundred twenty-five dollars (\$ 125.00).
- (5) For the late renewal of a license, an additional late fee not to exceed one hundred dollars (\$ 100.00).
- (6) For a provisional license, a fee not to exceed one hundred dollars (\$ 100.00).
- (7) For copies of Board rules and licensure standards, charges not exceeding the actual cost of printing and mailing.

**HISTORY:** 1991, c. 668, s. 1; 2001-342, s. 5.



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N.C. Gen. Stat. § 90-365 (2012)

§ 90-365. Requirement of license

After March 31, 1992, it shall be unlawful for any person who is not currently licensed under this Article to do any of the following:

- (1) Engage in the practice of dietetics/nutrition.
- (2) Use the title "dietitian/nutritionist".
- (3) Use the words "dietitian," "nutritionist," or "licensed dietitian/nutritionist" alone or in combination.
- (4) Use the letters "LD," "LN," or "LDN," or any facsimile or combination in any words, letters, abbreviations, or insignia.
- (5) To imply orally or in writing or indicate in any way that the person is a licensed dietitian/nutritionist.

**HISTORY:** 1991, c. 668, s. 1.



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N.C. Gen. Stat. § 90-366 (2012)

§ 90-366. Violation a misdemeanor

Any person who violates any provision of this Article shall be guilty of a Class 1 misdemeanor. Each act of such unlawful practice shall constitute a distinct and separate offense.

**HISTORY:** 1991, c. 668, s. 1; 1993, c. 539, s. 652; 1994, Ex. Sess., c. 24, s. 14(c).



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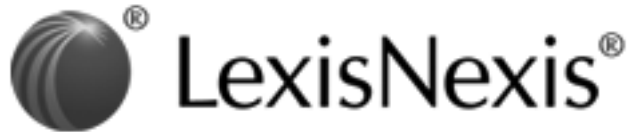
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N.C. Gen. Stat. § 90-367 (2012)

§ 90-367. Injunctions

The Board may make application to any appropriate court for an order enjoining violations of this Article, and upon a showing by the Board that any person has violated or is about to violate this Article, the court may grant an injunction, restraining order, or take other appropriate action.

**HISTORY:** 1991, c. 668, s. 1.



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N.C. Gen. Stat. § 90-368 (2012)

§ 90-368. Persons and practices not affected

The requirements of this Article shall not apply to:

- (1) A health care professional duly licensed in accordance with Chapter 90 of the General Statutes.
- (2) A student or trainee, working under the direct supervision of a licensed dietitian/nutritionist while fulfilling an experience requirement or pursuing a course of study to meet requirements for licensure, for a limited period of time as determined by the Board.
- (3) A dietitian/nutritionist serving in the Armed Forces or the Public Health Service of the United States or employed by the Veterans Administration when performing duties associated with that service or employment.
- (4) A person aiding the practice of dietetics/nutrition if the person works under the direct supervision of a licensed dietitian/nutritionist and performs only support activities that do not require formal academic training in the basic food, nutrition, chemical, biological, behavioral, and social sciences that are used in the practice of dietetics.
- (5) An employee of the State, a local political subdivision, or a local school administrative unit or a person that contracts with the State, a local political subdivision, or a local school administrative unit while engaged in the practice of dietetics/nutrition within the scope of that employment.
- (6) A retailer who does not hold himself out to be a dietitian or nutritionist when that retailer furnishes nutrition information to customers on food, food materials, dietary supplements and other goods sold at his retail establishment in connection with the marketing and distribution of those goods at his retail establishment.
- (7) A person who provides weight control services; provided the program has been reviewed by, consultation is available from, and no program change can be initiated without prior approval of:

N.C. Gen. Stat. § 90-368

a. A licensed dietitian/nutritionist;

b. A dietitian/nutritionist licensed in another state that has licensure requirements that are at least as stringent as under this Article; or

c. A dietitian registered by the Commission on Dietetic Registration of the American Dietetic Association.

(8) Employees or independent contractors of a hospital or health care facility licensed under Article 5 or Part A of Article 6 of Chapter 131E or Article 2 of Chapter 122C of the General Statutes.

(9) A person who does not hold himself out to be a dietitian or nutritionist when that person furnishes nutrition information on food, food materials, or dietary supplements. This Article does not prohibit that person from making explanations to customers about foods or food products in connection with the marketing and distribution of these products.

(10) An herbalist or other person who does not hold himself out to be a dietitian or nutritionist when the person furnishes nonfraudulent specific nutritional information and counseling about the reported or historical use of herbs, vitamins, minerals, amino acids, carbohydrates, sugars, enzymes, food concentrates, or other foods.

**HISTORY:** 1991, c. 668, s. 1; 1995, c. 509, s. 135.2(s).



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CHAPTER 90. MEDICINE AND ALLIED OCCUPATIONS  
ARTICLE 25. DIETETICS/NUTRITION

**Go to the North Carolina Code Archive Directory**

N.C. Gen. Stat. § 90-369 (2012)

§ 90-369. Third party reimbursement; limitation on modifications

Nothing in this Article shall be construed to require direct third-party reimbursement to persons licensed under this Article.

**HISTORY:** 1991, c. 668, s. 1; 2007-123, s. 1.

**NOTES:** EFFECT OF AMENDMENTS. --Session Laws 2007-123, s. 1, effective June 27, 2007, deleted the former last sentence which read: "In no event shall there be any substantive change to G.S. 90-352, 90-357, or 90-368 unless the change is reviewed by the Legislative Committee on New Licensing Boards pursuant to Article 18A of Chapter 120 of the General Statutes."



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N.C. Gen. Stat. § 90-370 (2012)

§ 90-370. Costs

The Board may assess the costs of disciplinary actions against a licensee or person found to be in violation of this Article or rules adopted by the Board. Costs recovered pursuant to this section shall be the property of the Board.

**HISTORY:** 2009-271, s. 1.

**NOTES:** EDITOR'S NOTE. --Session Laws 2009-271, s. 2, made this section effective October 1, 2009, and applicable to acts or omissions committed on or after that date.





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N.C. Gen. Stat. § 90-371 (2012)

§§ 90-371 through 90-379

Reserved for future codification purposes.

[Repealed/Reserved]



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SECTION .0100. LICENSURE

21 N.C.A.C. 17.0101 (2012)

.0101 DEFINITIONS

As used in this Chapter, the following terms and phrases, which have not already been defined in the Practice Act, G.S. 90-350 through 90-369, have the meanings specified:

- (1) "Act" means Dietetics/Nutrition Practice Act.
- (2) "ADA" means The American Dietetic Association.
- (3) "Applicant" means any person who has applied to the Board for a license to practice dietetics/nutrition in the State of North Carolina.
- (4) "Application" means a written request directed to and received by the Board, on forms supplied by the Board, for a license to practice dietetics/nutrition in the State of North Carolina, together with all information, documents and other materials necessary for the Board to act on that application.
- (5) "CDR" means the Commission on Dietetic Registration which is a member of the National Commission for Health Certifying Agencies.
- (6) "CADE" means the Commission on Accreditation for Dietetics Education.
- (7) "Degree" means a degree received from a college or university that was regionally accredited at the time the degree was conferred.
- (8) "Dietitian/nutritionist" means one engaged in dietetics/nutrition practice.
- (9) "Executive Secretary" means the person employed to carry out the administrative functions of the Board.
- (10) "Health care practitioner" includes any individual who is licensed under G.S. 90.
- (11) "Nutrition assessment" means the evaluation of the nutrition needs of individuals and groups based upon biochemical, anthropometric, physical, and food intake and diet history data to determine nutritional needs and

recommend appropriate nutrition intake including enteral and parenteral nutrition.

(12) "Nutrition counseling" means the advice and assistance provided by licensed dietitians/nutritionists to individuals or groups on nutrition intake by integrating information from the nutrition assessment with information on food and other sources of nutrient and meal preparation consistent with cultural background, socioeconomic status and therapeutic needs.

(13) "Provisionally licensed dietitian/nutritionist" means a person provisionally licensed under the act.

(14) "Equivalent major course of study" means one which meets the knowledge requirements of the ADA-Approved Didactic Program in Dietetics as referenced in the most current edition of the "Eligibility Requirements and Accreditation Standards for Didactic Programs in Dietetics (DPD)" which is hereby incorporated by reference including any subsequent amendments and editions of the referenced material. Copies of this manual are available at no charge through the ADA's website at: <http://www.eatright.org/CADE/content.aspx?id=57>.

(15) "Supervised practice program" means one which meets the standards of the ADA-accredited Dietetic Internship Program as referenced in the most current edition of the "Eligibility Requirements and Accreditation Standards for Dietetic Internship Programs (DI)" which is hereby incorporated by reference including any subsequent amendments and editions of the referenced material. Copies of this manual are available at no charge through the ADA's website at: <http://www.eatright.org/CADE/content.aspx?id=57>.

(16) "Medical nutrition therapy" (MNT) is an evidence-based application of the Nutrition Care Process, as currently defined by the ADA, focused on prevention, delay or management of diseases and conditions, and involves an in-depth assessment, periodic reassessment and intervention. The ADA's definition of "Nutrition Care Process," which is listed in the ADA's "Definition of Terms List," is hereby incorporated by reference including any subsequent amendments and editions of the referenced material. Copies of this publication can be found on the ADA's website at: <http://www.eatright.org/HealthProfessionals/content.aspx?id=6867>.

Authority G.S. 90-352; 90-356;

#### **NOTES:**

##### History Note:

Temporary Adoption Eff. March 19, 1992 for a period of 180 days to expire on September 13, 1992;  
Eff. June 1, 1992;  
Recodified from 21 NCAC 17 .0001 Eff. February 1, 1995;  
Amended Eff. December 1, 2011; April 1, 2010; July 18, 2002; March 1, 1996.



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21 N.C.A.C. 17.0102 (2012)

.0102 REQUIREMENT OF LICENSE [REPEALED]

Authority G.S. 90-352; 90-356;

**NOTES:**

History Note:

Filed as a Temporary Adoption Eff. March 19, 1992 for a Period of 180 Days to Expire on September 13, 1992;  
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Amended Eff. March 1, 1996;

Repealed Eff. July 18, 2002.



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21 N.C.A.C. 17.0103 (2012)

.0103 QUALIFICATIONS FOR LICENSURE

Each applicant for an initial license as a licensed dietitian/nutritionist shall meet the qualifications as set forth in G.S. 90-357.

Authority G.S. 90-356; 90-357;

**NOTES:**

History Note:

Temporary Adoption Eff. March 19, 1992 for a Period of 180 Days to Expire on September 13, 1992;  
Eff. June 1, 1992;  
Recodified from 21 NCAC 17 .0003 Eff. February 1, 1995;  
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21 N.C.A.C. 17.0104 (2012)

.0104 APPLICATIONS

- (a) Each applicant for initial licensure or renewal shall file a completed application with the Board.
- (b) Applicants shall submit an application that is typed or written in ink, signed by the applicant under the penalty of perjury and accompanied by the appropriate nonrefundable fees and by such evidence, statements or documents showing to the satisfaction of the Board that applicant meets requirements.
- (c) Applicants shall submit a completed application to: North Carolina Board of Dietetics/Nutrition, 1000 Centre Green Way, Suite 200, Cary, NC 27513.
- (d) Applications and all documents filed in support thereof shall become the property of the Board upon receipt.
- (e) The Board shall not consider an application until the applicant pays the application fee.
- (f) Applicants seeking examination eligibility from the Board must submit the application at least 60 days prior to the date the applicant wishes to take the examination.
- (g) The Executive Secretary shall send a notice to an applicant who does not complete the application which lists the additional materials required.
- (h) Applicants, who must provide evidence of current registration as a Registered Dietitian by the CDR in G.S. 90-357(3)a, shall submit a notarized photocopy of the applicant's signed registration identification card.
- (i) Applicants, who must provide evidence of completing academic requirements in G.S. 90-357(3) b.1, c.1 and d, shall either:
  - (1) Submit transcripts and a verification statement which includes the original signature of the Program Director of a college or university in which the course of study has been approved by the Commission on Accreditation for Dietetics Education as meeting the current knowledge requirements of the ADA; or
  - (2) Submit sufficient documentation for the Board to determine if the equivalent major course of study meets the

21 N.C.A.C. 17.0104

ADA requirements as referenced in 21 NCAC 17 .0101(14).

(j) Applicants, who must provide evidence of completing supervised practice program in G.S. 90-357(3)b.2 and c.2, shall either:

(1) Submit a verification statement which includes the original signature of the Program Director or Sponsor of a supervised practice program; or

(2) Submit sufficient documentation for the Board to determine if the supervised practice program meets the ADA requirements as referenced in 21 NCAC 17 .0101(15).

(k) Applicants who have obtained their education outside of the United States and its territories must:

(1) Have their academic degree evaluated by CDR, as equivalent to the baccalaureate or higher degree conferred by a U.S. college or university accredited by the regional accrediting agencies recognized by the Council on Postsecondary Accreditation and the U.S. Department of Education; and

(2) Have any Board required documents submitted in a language other than English be accompanied by a certified translation thereof in English from World Education Services, Inc.

Authority G.S. 90-356;

**NOTES:**

History Note:

Temporary Adoption Eff. March 19, 1992 for a Period of 180 Days to Expire on September 13, 1992;

Eff. June 1, 1992;

Recodified from 21 NCAC 17 .0004 Eff. February 1, 1995;

Amended Eff. December 1, 2011; July 18, 2002; March 1, 1996.



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21 N.C.A.C. 17.0105 (2012)

.0105 EXAMINATION FOR LICENSURE

- (a) The Board approves the examination offered by the Commission on Dietetic Registration (CDR).
- (b) The examination shall be offered by ACT year round at designated ACT testing centers to qualified applicants for licensing.
- (c) The Board recognizes the passing score set by the CDR.

Authority G.S. 90-356; 90-359;

**NOTES:**

History Note:

Filed as a Temporary Adoption Eff. March 19, 1992 for a Period of 180 Days to Expire on September 13, 1992;  
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21 N.C.A.C. 17.0106 (2012)

.0106 GRANTING LICENSE WITHOUT EXAMINATION

If an applicant seeks licensure on the basis that the applicant currently holds a valid license as a licensed dietitian/nutritionist issued by another state, political territory or jurisdiction with equivalent requirements, the applicant shall attach to the application evidence that:

- (1) The applicant currently holds a license in good standing; and
- (2) The requirements of the state, political territory or jurisdiction are equivalent to those of this state.

Statutory Authority G.S. 90-356; 90-360;

**NOTES:**

History Note:

Filed as a Temporary Adoption Eff. March 19, 1992 for a Period of 180 Days to Expire on September 13, 1992;  
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21 N.C.A.C. 17.0107 (2012)

.0107 PROVISIONAL LICENSE

(a) Applicants for a provisional license shall provide evidence of completing academic requirements by:

(1) Submitting transcripts and a verification statement which includes the original signature of the Program Director of a college or university in which the course of study has been approved by the Commission on Accreditation for Dietetics Education as meeting the current knowledge requirements of the ADA; or

(2) Submit sufficient documentation for the Board to determine if the equivalent major course of study meets the ADA requirements as referenced in 21 NCAC 17 .0101(14).

(b) Applicants shall provide evidence of completing a supervised practice program by:

(1) Submitting a verification statement which includes the original signature of the Program Director or Sponsor of a supervised practice program which has been approved by CDR to meet the dietetic practice requirements of ADA; or

(2) Submit sufficient documentation for the Board to determine if the supervised practice program meets the ADA requirements as referenced in 21 NCAC 17 .0101(15).

(c) Applicants shall provide evidence of making application to take the examination.

(d) A provisional license shall be issued for a period not exceeding one year upon the applicant completing the following:

(1) payment of issuance fees;

(2) submission of a completed application as provided by the Board; and

(3) provision of evidence of being under the supervision of licensed dietitian(s)/nutritionist(s).

(e) Following the successful completion of the licensing examination, the provisionally licensed dietitian/nutritionist shall remit completed application for upgrading license, payment of fees, and evidence of passing

## 21 N.C.A.C. 17.0107

examination referenced in 21 NCAC 17 .0105. If the provisionally licensed dietitian/nutritionist successfully completes the licensing examination and obtains a license pursuant to G.S. 90-357 within six months of the date that the provisional license became effective, the provisional license or renewal fee shall be deducted from the issuance fee.

Authority G.S. 90-356; 90-361;

**NOTES:**

## History Note:

Temporary Adoption Eff. March 19, 1992 for a Period of 180 Days to Expire on September 13, 1992;

Eff. June 1, 1992;

Recodified from 21 NCAC 17 .0007 Eff. February 1, 1995;

Amended Eff. December 1, 2011; July 18, 2002; March 1, 1996; February 1, 1995.



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21 N.C.A.C. 17.0108 (2012)

.0108 DISAPPROVED APPLICATION

The Board shall not approve an applicant for licensure if the applicant:

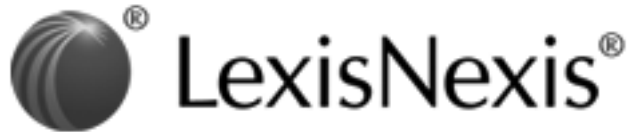
- (1) Has not completed the requirements in G.S. 90-350 through G.S. 90-369 including academic, experience and examination requirements;
- (2) Has failed to remit any applicable fees;
- (3) Has failed to comply with requests for supporting documentation; and
- (4) Has presented false information on application documents required by the Board to verify applicant's qualifications for licensure.

Authority G.S. 90-356; 90-358;

**NOTES:**

History Note:

Filed as a Temporary Adoption Eff. March 19, 1992 for a Period of 180 Days to Expire on September 13, 1992;  
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21 N.C.A.C. 17.0109 (2012)

.0109 ISSUANCE AND RENEWAL OF LICENSE

(a) An applicant shall be issued a license based on compliance with requirements stated in G.S. 90-357 and the rules in this Chapter.

(b) A licensee shall notify the Board of any change in the licensee's personal or professional address within 30 days of that change.

(c) Licenses shall expire on March 31 of every year. Beginning in 1993, the licenses shall be issued for a period of one year beginning April 1 and ending March 31.

(d) At least 60 days prior to the expiration date of the license, the Board shall send the licensee written notice of the amount of renewal fee due, and instructions on how to obtain a license renewal form which must be submitted with the required fee.

(e) A licensee's renewal application must be postmarked prior to the expiration date in order to avoid the late renewal fee. Failure to receive renewal notice is not justification for late renewal.

(f) The Board may not renew the license of a person who is in violation of the Act, or Board rules at the time of application for renewal.

(g) Applicants for renewal of licenses shall provide documentation of having met continuing education requirements by submitting either:

(1) Evidence of completing continuing education hours to maintain certification as a Registered Dietitian by the Commission on Dietetic Registration. These standards are contained in the "Professional Development Portfolio Guide", which is hereby incorporated by reference including subsequent amendments or additions of reference material. Copies of this standard may be obtained at no charge from the Commission on Dietetic Registration's website at: <http://www.cdrnet.org/pdrcenter/>; or

(2) A summary of continuing education on the form provided by the Board documenting completion of 30 hours of continuing education for a two year period. The continuing education hours must meet the standards contained in the

21 N.C.A.C. 17.0109

"Professional Development Portfolio Guide."

(h) A renewal license shall be furnished to each licensee who meets all renewal requirements by the expiration date.

(i) The Board shall renew a license upon the payment of a late fee within 60 days of the expiration date of March 31. If the license has been expired for 60 days or less, the license may be renewed by returning the license renewal form with all appropriate fees and documentation to the Board, postmarked on or before the end of the 60-day grace period.

Authority G.S. 90-356; 90-362; 90-363;

**NOTES:**

History Note:

Temporary Adoption Eff. March 19, 1992 for a Period of 180 Days to Expire on September 13, 1992;  
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21 N.C.A.C. 17.0110 (2012)

.0110 LICENSURE CERTIFICATE

- (a) The Board shall prepare and provide to each licensee a license certificate and license identification card. The identification card shall contain the person's name, license number and date of expiration.
- (b) License certificates shall be signed by the Chair, Secretary and Treasurer and be affixed with the seal of the Board. Identification cards shall bear the signature of the Chair.
- (c) Any certificate or identification card issued by the Board shall remain the property of the Board and shall be surrendered to the Board on demand.
- (d) Licensees shall comply with G.S. 90-640, Article 37, which specifies the wearing of a name badge. The license certificate must be displayed in a public manner as follows:
- (1) The license certificate shall be displayed in the primary place of employment of the licensee; or
  - (2) In the absence of a primary place of employment or when the licensee is employed in multiple locations, the licensee shall carry a current, Board issued license identification card.
- (e) Neither the licensee nor anyone else shall display a photocopy of a license identification card in lieu of the original license certificate or license identification card.
- (f) Neither the licensee nor anyone else shall make any alteration on a license certificate or license identification card issued by Board.
- (g) The Board shall replace a lost, damaged or destroyed license certificate or identification card upon receipt of a written request from the licensee and payment of the duplicate license fee.
- (h) The licensee must submit a written request within 30 days of a name change to the Board who shall re-issue a license certificate and license identification card. Requests shall be accompanied by duplicate license fee and documentation reflecting the change.

21 N.C.A.C. 17.0110

Authority G.S. 90-356; 90-362;

**NOTES:**

History Note:

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21 N.C.A.C. 17.0111 (2012)

.0111 INACTIVE STATUS

(a) A licensee may have a license placed in inactive status by written request to the Board, signed by the holder of the license or the holder's legal guardian.

(b) While a license is in an inactive status, the licensee shall meet the continuing education requirements each year as required by the Board's rules, but is not required to pay the renewal fee.

(c) A license may be withdrawn from inactive status by written request of the holder, completion of a renewal application, compliance with continuing education requirements and payment of the current licensing fee.

Authority G.S. 90-356; 90-362;

**NOTES:**

History Note:

Filed as a Temporary Adoption Eff. March 19, 1992 for a Period of 180 Days to Expire on September 13, 1992;  
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Amended Eff. July 18, 2002.



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21 N.C.A.C. 17.0112 (2012)

.0112 SUSPENSION, REVOCATION AND DENIAL OF LICENSE

(a) The Board may refuse to issue a license, or suspend, revoke or impose probationary conditions and restrictions on the license of a person upon a finding of any of the causes provided in General Statute Chapter 90, Article 25.

(b) When the Board has probable cause to believe that a person, applicant or licensee has violated any part of G.S. 90-350 through 90-369 or the rules of the Board, the Board shall so advise the person in writing as referenced in Rule .0116 of this Chapter and provide the person with the opportunity for a hearing as referenced in Rule .0116 of this Chapter. The Board's final decision or order shall be made in writing as referenced in Rule .0116 of this Chapter.

(c) A suspended license shall be subject to expiration and may be renewed as provided in this Section, but such renewal shall not entitle the licensee to engage in the licensed activity until he/she is reinstated. If a license revoked on disciplinary grounds is reinstated, the licensee must reapply and pay all applicable fees.

Authority G.S. 90-356; 90-363;

**NOTES:**

History Note:

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21 N.C.A.C. 17.0113 (2012)

.0113 FEES

In accordance with the provisions of the Act, the following fees, where applicable, are payable to the Board by check or money order. Fees are nonrefundable, except for the Issuance Fee, if application is not approved.

Application Fee	\$ 50.00
Issuance Fee	125.00
License Renewal Fee	75.00
Late Renewal Fee	75.00
Examination Fee	150.00
Provisional License Fee	35.00
Duplicate License	30.00
Certificate Fee	
Duplicate License	20.00
Identification Card Fee	
Training Program	150.00

0 Recodified from 21 NCAC 17 .0013 Eff. February 1, 1995;

Authority G.S. 90-356(2),(9); 90-361; 90-364;

**NOTES:**

History Note:

Temporary Adoption Eff. March 19, 1992 for a Period of 180 Days to Expire on September 13, 1992;  
 Eff. June 1, 1992;

Amended Eff. July 1, 2003; July 18, 2002; March 1, 1996; February 1, 1995.



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\*\*\* CURRENT WITH RULES RECEIVED THROUGH NOVEMBER 1, 2012 \*\*\*

TITLE 21. OCCUPATIONAL LICENSING BOARDS  
CHAPTER 17. BOARD OF DIETETICS/NUTRITION  
SECTION .0100. LICENSURE

21 N.C.A.C. 17.0114 (2012)

.0114 CODE OF ETHICS FOR PROFESSIONAL PRACTICE AND CONDUCT

(a) Licensees, under the Act, shall comply with the following Code of Ethics in their professional practice and conduct. The Code reflects the ethical principles of the dietetic/nutrition professional and outlines obligations of the licensee to self, client, society and the profession and sets forth mandatory standards of conduct for all licensees.

(1) The licensee shall provide professional services with objectivity and with respect for the unique needs and values of individuals as determined through the nutritional assessment.

(2) The licensee shall conduct all practices of dietetics/nutrition with honesty and integrity.

(3) The licensee shall present substantiated information and interpret controversial information without personal bias, recognizing that legitimate differences of opinion exist.

(4) The licensee shall practice dietetics/nutrition based on scientific principles and current information.

(5) The licensee shall assume responsibility and accountability for personal competence in practice.

(6) The licensee shall inform the public of his/her services by using factual information and shall not advertise in a false or misleading manner.

(7) The licensee shall not exercise undue influence on a client, including the promotion or the sale of services or products. The licensee shall be alert to any conflicts of interest and shall provide full disclosure when a real or potential conflict of interest arises.

(8) The licensee shall not reveal information about a client obtained in a professional capacity, without prior consent of the client, except as authorized or required by law and shall make full disclosure about any limitations on his/her ability to guarantee this.

(9) The licensee shall recognize and exercise professional judgment within the limits of the licensee's qualifications and shall not accept or perform professional responsibilities which the licensee knows or has reason to know that he or she is not qualified to perform.

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(10) The licensee shall take action, with prior consent of the client, to inform a client's physician or other health care practitioner in writing in cases where a client's nutritional status indicates a change in health status.

(11) The licensee shall give sufficient information based on the client's ability to process information such that the client can make his or her own informed decisions. The licensee shall not guarantee that nutrition care services will cause any certain outcome or particular result for the client.

(12) The licensee shall permit use of that licensee's name for the purpose of certifying that dietetic/nutrition services have been rendered only if the licensee has provided or supervised those services.

(13) The licensee shall notify the Board in writing within 30 days of the occurrence of any of the following:

(A) The Licensee seeks any medical care or professional treatment for the chronic or persistent use of intoxicants, drugs or narcotics.

(B) The Licensee is adjudicated to be mentally incompetent.

(C) The Licensee has been convicted or entered into a plea of guilty or nolo contendere to any crime involving moral turpitude.

(D) The licensee has been disciplined by an agency of another state that regulates the practice of dietetics or nutrition.

(14) The licensee shall comply with all laws and rules concerning the profession.

(15) The licensee shall uphold the Code of Ethics for professional practice and conduct by reporting suspected violations of the Code and the Act to the Board.

(16) The licensee shall not interfere with an investigation or disciplinary proceeding by willful misrepresentation of facts to the Board or its representative or by the use of threats or harassment against any person.

(17) The licensee shall not engage in kissing, fondling, touching or in any activities, advances, or comments of a sexual nature with any client or, while under the licensee's supervision, with any student, trainee, provisional licensee or person aiding the practice of dietetics/nutrition.

(18) The licensee shall not invite, accept, or offer gifts, monetary incentives, or other considerations that affect or reasonably give an appearance of affecting the licensee's professional judgment.

(b) Conduct and circumstances which may result in disciplinary action by the Board include the following:

(1) The licensee is a chronic or persistent user of intoxicants, drugs or narcotics to the extent that the same impairs his/her ability to practice dietetics/nutrition.

(2) The licensee is mentally, emotionally, or physically unfit to practice dietetics/nutrition and is afflicted with such a mental, emotional or physical disability as to be dangerous to the health and welfare of a client.

(3) The licensee has been disciplined by an agency of another state that regulates the practice of dietetics or nutrition and at least one of the grounds for the discipline is the same or substantially equivalent to the grounds for discipline in this state.

(4) The licensee has violated any provisions of the Act or any of the rules in this Chapter.

Authority G.S. 90-356(3); 90-356(2);

21 N.C.A.C. 17.0114

**NOTES:**

## History Note:

Temporary Adoption Eff. March 19, 1992 for a period of 180 days to expire on September 13, 1992;  
Eff. July 1, 1992;

Recodified from 21 NCAC 17 .0014 Eff. February 1, 1995;

Amended Eff. April 1, 2010; July 1, 2004; July 18, 2002; March 1, 1996.



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TITLE 21. OCCUPATIONAL LICENSING BOARDS  
CHAPTER 17. BOARD OF DIETETICS/NUTRITION  
SECTION .0100. LICENSURE

21 N.C.A.C. 17.0115 (2012)

.0115 EXEMPTIONS

Authority G.S. 90-356; 90-368;

**NOTES:**

History Note:

Filed as a Temporary Adoption Eff. March 19, 1992 for a Period of 180 Days to Expire on September 13, 1992;  
Eff. June 1, 1992;  
Recodified from 21 NCAC 17 .0015 Eff. February 1, 1995;  
Repealed Eff. July 18, 2002.



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TITLE 21. OCCUPATIONAL LICENSING BOARDS  
CHAPTER 17. BOARD OF DIETETICS/NUTRITION  
SECTION .0100. LICENSURE

21 N.C.A.C. 17.0116 (2012)

.0116 VIOLATIONS, COMPLAINTS, SUBSEQUENT BOARD ACTION, AND HEARINGS

(a) The definitions contained in G.S. 150B-2 (1), (2), (2b), (4a), (4b), (5), (8), (8a), (8b) are incorporated by reference within this Rule. In addition, the following definitions apply:

(1) "Administrative Law Counsel" means an attorney whom the Board has retained to serve as procedural counsel to advise the hearing officer concerning questions of procedure for contested cases.

(2) "Prosecuting Attorney" means the attorney retained by the Board to prepare and prosecute contested cases.

(b) Before the North Carolina Board of Dietetics/Nutrition makes a final decision in any contested case, the person, applicant or licensee affected by such decision shall be afforded an administrative hearing pursuant to the provisions of Article 3A, Chapter 150B of the North Carolina General Statutes. This Rule applies to the conduct of all contested cases heard before or for the North Carolina Board of Dietetics/Nutrition. The following general statutes, rules, and procedures apply and are incorporated by reference within this Rule, unless another specific statute or rule of the North Carolina Board of Dietetics/Nutrition provides otherwise:

(1) the Rules of Civil Procedure as contained in G.S. 1A-1;

(2) the Rules of Evidence pursuant to G.S. Chapter 8C;

(3) the General Rules of Practice for the Superior and District Courts as authorized by G.S. 7A-34 and found in the Rules Volume of the North Carolina General Statutes; and

(4) Canons 1, 2 and 3 of the Code of Judicial Conduct adopted in accordance with G.S. 7A-10.1.

Every document filed with the Board shall be signed by the person, applicant, licensee, or the attorney who prepared the document, if it was prepared by an attorney, and shall contain his name, title/position, address, and telephone number. If the individual involved is a licensed dietitian/nutritionist, the license number shall appear on all correspondence with the Board. An original and one copy of each document shall be filed.

(c) Anyone may complain to the Board alleging that a person, applicant or licensee has committed an action



prohibited by G.S. 90-350 through G.S. 90-369 or the rules of the Board. A person wishing to complain about an alleged violation of G.S. 90-350 through G.S. 90-369 or the rules of the Board may notify the Executive Secretary. A complaint regarding the Executive Secretary, the staff or the Board may be directed to the chair of the Board or any Board member. The initial notification of a complaint may be in writing, by telephone, or by personal visit to the Executive Secretary's office.

Upon receipt of a complaint, the Executive Secretary, unless the health and safety of the public otherwise requires, shall send to the complainant an acknowledgement letter, and request the complainant complete and file a complaint form before further action shall be taken.

(d) An Investigator or other authorized Board staff shall investigate a complaint and shall take one or more of the following actions:

(1) determine that an allegation is groundless and dismiss the complaint;

(2) determine that the complaint does not come within the Board's jurisdiction, advise the complainant and, if possible, refer the complainant to the appropriate governmental agency for handling such complaints;

(3) determine that a nonlicensed person has committed a prohibited action and take appropriate legal action against the violator; or

(4) determine that a licensee has violated the Act or the rules of the Board and propose an enforcement action authorized by law.

(e) Whenever a complaint is dismissed or a complaint file closed, the Executive Secretary shall give a summary report of the final action to the Board, the complainant, and the accused party.

(f) In accordance with G.S. 150B-3(c), a license may be summarily suspended if Board finds that the public health, safety, or welfare requires emergency action. Such a finding shall be incorporated with the order of the Board and the order shall be effective on the date specified in the order or on service of the certified copy of the order at the last known address of the licensee, whichever is later, and shall continue to be effective during the proceedings. Failure to receive the order because of refusal of service or unknown address does not invalidate the order. Proceedings shall be promptly commenced.

(g) The Board, through its staff, shall issue a Letter of Charges only upon completion of an investigation of a written complaint and review with legal counsel or prosecuting attorney. Subsequent to an investigation and validation of a complaint, a Letter of Charges shall be sent on behalf of the Board to the person, applicant or licensee who is the subject of the complaint. The Letter of Charges shall be served in accordance with G.S. 1A-1, Rule 4, Rules of Civil Procedure. The Letter of Charges shall serve as the Board's formal notification to the person that an allegation of possible violation(s) of the Act or the rules of the Board has been initiated. The Letter of Charges does not constitute a contested case. The Letter of Charges shall include the following:

(1) a statement of the factual allegations;

(2) a citation of the relevant sections of the statutes or rules involved;

(3) notification that a settlement conference will be scheduled upon request;

(4) explanation of the procedure used to govern the settlement conference;

(5) notification that if a settlement conference is not requested, or if held, does not result in resolution of the case, a contested case hearing will be scheduled; and

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(6) an offer of voluntary surrender for alleged violations of the Act.

A case becomes a contested case after the agency and the person, applicant or licensee do not agree to a resolution of the dispute through a settlement conference or either the agency or the person, applicant or licensee requests a contested case hearing.

(h) No Board member shall discuss with any party the merits of any case pending before the Board. If a party files in good faith an affidavit of personal bias or other reason for disqualification of any member of the Board, the Board shall determine the matter as part of the record in the case.

(i) A settlement conference, if requested by the applicant or licensee, shall be held for the purpose of attempting to resolve a dispute through informal procedures prior to the commencement of formal administrative proceedings. The conference shall be held in the offices of the Board, unless another site is designated by mutual agreement of all involved parties. All parties shall attend or be represented at the settlement conference. The parties shall be prepared to discuss the alleged violations and the incidents on which these are based. At the conclusion of the day during which the settlement conference is held, a form must be signed by all parties which indicates whether the settlement offer is accepted or rejected. Subsequent to this decision:

(1) if a settlement is reached, the Board shall forward a written settlement agreement containing all conditions of the settlement to the other party(ies); or

(2) if a settlement cannot be reached, the case shall proceed to a contested case hearing by the filing of a petition with the Board by the agency, person, applicant, or licensee.

(j) Informal disposition may be made of a contested case or an issue in a contested case by stipulation, agreement or consent order at any time prior to or during the hearing of a contested case.

(k) The Board shall give the parties in a contested case a Notice of Hearing not less than 15 calendar days before the hearing. The Notice shall be given in accordance with G.S. 150B-38(b) and (c). The Notice shall include:

(1) acknowledgement of service, or attempted service, of the Letter of Charges in compliance with Paragraph (g) of this Rule;

(2) date, time, and place of the hearing;

(3) a short and plain statement of the factual allegations;

(4) a citation of the relevant sections of the statutes or rules involved;

(5) notification of the right of a party to represent himself or to be represented by an attorney;

(6) a statement that, pursuant to Paragraph (n) of this Rule, subpoenas may be requested by the licensee to compel the attendance of witnesses or the production of documents;

(7) a statement advising the licensee that a notice of representation, containing the name of licensee's counsel, if any, shall be filed with the Board not less than 10 calendar days prior to the scheduled date of the hearing;

(8) a statement advising the licensee that a list of witnesses for the licensee shall be filed with the Board not less than 10 calendar days prior to the scheduled date of the hearing; and

(9) a statement advising the licensee that failure to appear at the hearing may result in the allegations of the Letter of Charges being taken as true and that the Board may proceed on that assumption.

(l) Prehearing conferences may be held to simplify the issues to be determined, to obtain stipulations in regards to foundations for testimony or exhibits, to obtain stipulations of agreement on nondisputed facts or the application of particular laws, to consider the proposed witnesses for each party, to identify and exchange documentary evidence intended to be introduced at the hearing, and to consider such other matters that may be necessary or advisable for the efficient and expeditious conduct of the hearing. The prehearing conference shall be conducted in the offices of the Board, unless another site is designated by mutual agreement of all parties. The prehearing conference shall be an informal proceeding and shall be conducted by a Board-designated member. All agreements, stipulations, amendments, or other matters resulting from the prehearing conference shall be in writing, signed by all parties, and introduced into the record at the beginning of the formal administrative hearing.

(m) Prehearing conferences or administrative hearings conducted before a majority of Board members shall be held in the county where the Board maintains its principal office, or by mutual consent in another location which will better promote the ends of justice or better serve the convenience of witnesses or the Board. For those proceedings conducted by an Administrative Law Judge, the venue shall be determined in accordance with G.S. 150B-38(e). All hearings conducted by the Board shall be open to the public.

(n) The Board may issue subpoenas for the Board or a licensee, in preparation for, or in the conduct of, a contested case. Subpoenas for the attendance and testimony of witnesses or the production of documents or information, either at the hearing or for the purposes of discovery, shall be issued in accordance with G.S. 150B-39 and G.S. 1A-1, Rule 45. Requests by a licensee for subpoenas shall be made in writing to the Board and shall include the following:

- (1) the full name and home or business address of all persons to be subpoenaed; and
- (2) the identification, with specificity, of any documents or information being sought.

Subpoenas shall include the date, time, and place of the hearing and the name and address of the party requesting the subpoena. In the case of subpoenas for the purpose of discovery, the subpoena shall include the date, time, and place for responding to the subpoena.

Subpoenas shall be served as in the manner provided by G.S. 150B-39 and G.S. 1A-1, Rule 45. The cost of service, fees, and expenses of any witnesses or documents subpoenaed shall be paid in accordance with G.S. 150B-39(c) and G.S. 7A-314. Objections to subpoenas shall be heard in accordance with G.S. 150B-39 and G.S. 1A-1, Rule 45.

(o) All motions related to a contested case, except motions for continuance and those made during the hearing, shall be in writing and submitted to the Board at least 10 calendar days before the hearing, if any, is to be held either on the motion or the merits of the case. Prehearing motions shall be heard at a prehearing conference or at the contested case hearing prior to the commencement of testimony. The Board-designated hearing officer shall hear the motions and the response from the non-moving party pursuant to Rule 6 of the General Rules of Practice for the Superior and District Courts and rule on such motions. If the prehearing motions are heard by an Administrative Law Judge from Office of Administrative Hearings, the provisions of G.S. 150B-40(e) shall govern the proceedings.

(p) Motions for a continuance of a hearing may be granted upon a showing of good cause. Unless time does not permit, a request for a continuance of a hearing shall be made in writing and received by the office of the Board no less than seven calendar days before the hearing date. In determining whether good cause exists, consideration shall be given to the ability of the party requesting a continuance to proceed effectively without a continuance. A motion for a continuance filed less than seven calendar days from the date of the hearing shall be denied unless the reason for the motion could not have been ascertained earlier. Motions for continuance filed prior to the date of the hearing shall be ruled on by the hearing officer or the Administrative Law Judge. All other motions for continuance shall be ruled on by the majority of the Board members or Administrative Law Judge sitting at the hearing. As used in this Rule:

(1) "Good cause" includes death or incapacitating illness of a party, representative, or attorney of a party; a court order requiring a continuance; lack of proper notice of the hearing; a substitution of the representative or attorney of a

party if the substitution is shown to be required; a change in the parties or pleadings requiring postponement; and agreement for a continuance by all parties if either more time is necessary to complete mandatory preparation for the case, such as authorized discovery, and the parties and the administrative law judge have agreed to new hearing date or parties have agreed to a settlement of the case that has been or is likely to be approved by the final decision maker.

(2) "Good cause" does not include intentional delay; unavailability of counsel or other representative because of engagement in another judicial or administrative proceeding unless all other members of the attorney's or representative's firm familiar with the case are similarly engaged; unavailability of a witness if the witness testimony can be taken by deposition, and failure of the attorney or representative to properly utilize the statutory notice period to prepare for the hearing.

During a hearing, if it appears in the interest of justice that further testimony should be received and sufficient time does not remain to conclude the testimony, the Board shall either order the additional testimony taken by deposition or continue the hearing to a future date for which oral notice on the record is sufficient. In such situations and to such extent as possible, the seated members of the Board and the Board-designated hearing officer shall receive the additional testimony. If new members of the Board or a different hearing officer must participate, a copy of the transcript of the hearing shall be provided to them prior to the receipt of the additional testimony. A continuance shall not be granted when to do so would prevent the case from being concluded within any statutory or regulatory deadline.

(q) All hearings by the Board shall be conducted by a majority of members of the Board, except as provided in this Paragraph. The Board shall designate one of its members to preside at the hearing. The Board shall designate an administrative law counsel as procedural officer to conduct the proceedings of the hearing. The seated members of the Board shall hear all evidence, make findings of fact and conclusions of law, and issue an order reflecting a majority decision of the Board. When a majority of the members of the Board is unable or elects not to hear a contested case, the Board shall request the designation of an administrative law judge from the Office of Administrative Hearings to preside at the hearing. The provisions of G.S. 150B, Article 3A and 21 NCAC 17 .0116 govern a contested case in which an administrative law judge is designated as the Hearing Officer. In the event that any party or attorney at law or other representative of a party engages in behavior that obstructs the orderly conduct of proceedings or would constitute contempt if done in the General Court of Justice, the Board may apply to the applicable superior court for an order to show cause why the person(s) should not be held in contempt of the Board and its processes.

(r) All parties may present evidence, rebuttal testimony, and argument with respect to the issues of law and policy, and to cross-examine witnesses. The North Carolina Rules of Evidence as found in Chapter 8C of the General Statutes applies to contested case proceedings, except as provided otherwise in this Rule and G.S. 150B-41. Sworn affidavits may be introduced by mutual agreement from all parties. All oral testimony shall be under oath or affirmation and shall be recorded. Unless otherwise stipulated by all parties, witnesses are excluded from the hearing room until such time that they have completed their testimony and have been released.

(s) Upon compliance with the provisions of G.S. 150B-40(e), if applicable, and G.S. 150B-42, and review of the official record, as defined in G.S. 150B-42(b) and (c), the Board shall make a written final decision or order in a contested case. The final decision or order shall be rendered by the Board meeting in quorum and by a majority of those present and voting. The decision or order shall be made based on:

(1) competent evidence and arguments presented during the hearing and made a part of the official record in accordance with G.S. 150B-41 and Paragraph (r) of this Rule;

(2) stipulations of fact;

(3) matters officially noticed; and

(4) other items in the official record that are not excluded by G.S. 150B-41 and Paragraph (r) of this Rule.

All final decisions or orders shall be signed by the Executive Secretary and the Chair of the Board. A copy of the decision or order shall be served as in the manner provided by G.S. 150B-41(a). The cost of service, fees, and expenses of any witnesses or documents subpoenaed shall be paid in accordance with G.S. 150B-39(c) and G.S. 7A-314.

(t) The official record of a contested case is available for public inspection upon reasonable request. The official record shall be prepared in accordance with G.S. 150B-42(b) and (c). Contested case hearings shall be recorded either by a magnetic type recording system or a professional court reporter using stenomask or stenotype. Transcripts of proceedings during which oral evidence is presented shall be made only upon request of a party. Transcript costs shall include the cost of an original for the Board. Cost of the transcript or part thereof or copy of said transcript or part thereof which a party requests shall be divided equally among the party(ies) requesting a transcript. Cost shall be determined under supervision of the Executive Secretary.

(u) The Board may recover against a licensee or person found to be in violation of the Act or rules adopted by the Board the following costs of disciplinary actions incurred by the Board for the investigation, prosecution, hearing or other administrative action:

- (1) witness fees and statutorily-allowed expenses for witnesses;
- (2) direct costs of the Board in taking or obtaining of depositions of witnesses; and
- (3) costs incurred by reason of administrative or staff time of employees of the Board directly attributable to the action leading to the final decision or order.

These costs may be assessed by the Board pursuant to final decisions or orders of the Board following an administrative hearing pursuant to Article 3A of Chapter 150B of the North Carolina General Statutes. These costs may be assessed against a person or licensee for an investigation or action in the nature of disciplinary action, other than a final decision or order of the Board, pursuant to the express consent by the person in a consent order approved by the Board.

Authority G.S. 90-356; 90-363; 90-370;

#### **NOTES:**

##### **History Note:**

Temporary Adoption Eff. July 16, 1992 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;

Eff. November 30, 1992;

Recodified from 21 NCAC 17 .0016 Eff. February 1, 1995;

Amended Eff. April 1, 2010; July 18, 2002; January 1, 1996.



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21 N.C.A.C. 17.0117 (2012)

.0117 SUSPENSION OF AUTHORITY AND ESCROW OF FUNDS

Not later than October 31 of each year, the Board shall file the reports required by G.S. 93B-2. In the event the reports required by G.S. 93B-2 are not timely filed and the Board's authority to expend any funds is therefore suspended, the Board shall deposit any fees or funds received during the period of suspension to an escrow account established by the Board solely for this purpose, and shall not expend such fees or funds until such time as the required reports are filed in accordance with G.S. 93B-2.

Authority G.S. 90-356; 93B-2;

**NOTES:**

History Note:  
Eff. April 1, 2010.



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21 N.C.A.C. 17.0118 (2012)

.0118 ARMED SERVICES LICENSEES

Upon receipt of a written request on or behalf of a licensee who is currently in good standing with the Board, is serving in the armed forces of the United States, and to whom G.S. 105-249 grants an extension of time to file a tax return, the Board shall waive or postpone renewal fees, renewal application deadlines, continuing education requirements and any other requirement or conditions related to the maintenance of the license issued by the Board or to the renewal thereof for a period of time not less than the extended period of time to file a tax return that is granted pursuant to G.S. 93B-15.

Authority G.S. 90-356; 93B-15;

**NOTES:**

History Note:

Eff. April 1, 2010.



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SECTION .0200. REVIEW AND APPROVAL OF WEIGHT CONTROL SERVICES

21 N.C.A.C. 17.0201 (2012)

.0201 DEFINITIONS

As used in G.S. 90-368(7) and this Section, the following terms and phrases, which have not already been defined in the Practice Act, G.S. 90-350 through 90-369, have the meanings specified:

(1) A "weight control program or service" means a general program of instruction with food, supplements, food products or a food plan designed for one or more healthy population groups in order to achieve or maintain a healthy weight. A weight control program is not based on an individual nutrition assessment as referenced in G.S. 90-352 and 21 NCAC 17 .0101(11) and is not individualized to provide medical nutrition therapy as defined in 21 NCAC 17 .0101(16) or nutrition care services as defined in G.S. 90-352 to manage, treat or rehabilitate a medical condition, illness, or injury for a specific person or group;

(2) A "review" means the consideration and evaluation of a weight control program or service, in accordance with this Section, which results in either an approval or a disapproval of the program by a reviewer, as defined in this Rule;

(3) "Reviewer" means a person who is:

(a) a licensed dietitian/nutritionist;

(b) a dietitian/nutritionist licensed in another state that has licensure requirements that are at least as stringent as under G.S. 90, Article 25; or

(c) a dietitian registered by the Commission on Dietetic Registration of the ADA;

(4) "Weight control provider" means a person who provides weight control services through a weight control program as referenced in G.S. 90-368(7).

(5) "Written assessment" means a written review and approval by a reviewer of weight control program and weight control services with respect to the following:

(a) the screening process;



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- (b) the weight control food plan, supplements, food, or food products for the program's clients;
- (c) nutritional adequacy and scientific evidence-based nutrition practices;
- (d) materials, which include written nutrition education handouts, recorded education materials, lesson or instructional plans, food plans and screening tools;
- (e) rate of weight change promoted; and
- (f) provision of a maintenance or follow up program.

Authority G.S. 90-356; 90-368;

**NOTES:**

History Note:

Eff. February 1, 1995;

Amended Eff. December 1, 2011; March 1, 1996.



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SECTION .0200. REVIEW AND APPROVAL OF WEIGHT CONTROL SERVICES

21 N.C.A.C. 17.0202 (2012)

**.0202 REQUIREMENT FOR REVIEW**

A person who provides a weight control program or service shall be in compliance with G.S. 90-368 provided that:

(1) The person does not hold himself/herself out to be a dietitian or nutritionist or imply orally or in writing or indicate in any way that he/she is a dietitian/nutritionist; and

(2) The person providing the program follows the program that is reviewed and shall not initiate any program change without prior approval.

Statutory Authority G.S. 90-356; 90-368;

**NOTES:**

History Note:

Eff. February 1, 1995.



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SECTION .0200. REVIEW AND APPROVAL OF WEIGHT CONTROL SERVICES

21 N.C.A.C. 17.0203 (2012)

.0203 REVIEW AND BOARD ACTION

(a) In order to create a presumption of compliance with the exemption provided in G.S. 90-368(7) a weight control provider may submit to the Board the information referenced in Paragraphs (b) and (c) of this Rule. Submission of such information is not a prerequisite for meeting the exemption.

(b) A weight control provider shall be presumed to be in compliance with the exemption if the provider submits to the Board:

(1) a written statement that is signed and dated by the weight control provider that provides and certifies the following information:

(A) the name and address of the weight control provider and physical location of the weight control program;

(B) the name and address of a reviewer that has provided a written assessment and approval of the weight control program and weight control services as provided by this Rule;

(C) that a reviewer has provided a written assessment of the weight control program and weight control services and approved the program and services as provided by 21 NCAC 17 .0201(5);

(D) that no program change can be initiated without prior approval of a reviewer;

(E) that the weight control provider agrees to adhere to the weight control program, including program changes, that has been reviewed and approved by a reviewer; and

(F) that the weight control provider agrees that if the program is changed in relation to any of the elements of the written assessment provided by a reviewer pursuant to this Rule that the weight control provider shall submit to the Board a signed statement of a reviewer indicating a reviewer's approval of the program change;

(2) a copy of a reviewer's written assessment and approval as provided by 21 NCAC 17 .0201(5) that is dated not more than 90 days prior to the date that the weight control provider's written statement referenced in Subparagraph (a)(1) of this Rule is submitted to the Board; and

## 21 N.C.A.C. 17.0203

(3) a copy of a written statement signed by a reviewer that consultation is available to the weight control provider from the reviewer and that states the name and address of that person.

(c) If there is a program change, after a reviewer's written assessment and approval as provided by 21 NCAC 17.0201(5), a weight control provider is presumed to be in compliance with the exemption provided in G.S. 90-368(7) if the provider submits to the Board a written statement that provides and certifies the information required by Subparagraph (b)(1) of this Rule and a copy of a reviewer's written assessment and approval of the program change that is dated not more than 90 days prior to the date the weight control provider's written statement is submitted to the Board.

Authority G.S. 90-356; 90-368;

**NOTES:**

History Note:

Eff. February 1, 1995;

Amended Eff. December 1, 2011.



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TITLE 21. OCCUPATIONAL LICENSING BOARDS  
CHAPTER 17. BOARD OF DIETETICS/NUTRITION  
SECTION .0300. DIETETIC/NUTRITION STUDENTS OR TRAINEES

21 N.C.A.C. 17.0301 (2012)

.0301 DEFINITIONS [REPEALED]

Authority G.S. 90-356(2); 90-368(2);

**NOTES:**

History Note:

Eff. March 1, 1996;

Repealed Eff. July 18, 2002.



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SECTION .0300. DIETETIC/NUTRITION STUDENTS OR TRAINEES

21 N.C.A.C. 17.0302 (2012)

**.0302 REQUIREMENTS**

A student or trainee is exempt pursuant to G.S. 90-360(2) when enrolled in a course of study not to exceed five years. The Board may approve or disapprove a request for an extension of the period of time based upon circumstances beyond the control of the student or trainee.

Authority G.S. 90-356(2); 90-368(2);

**NOTES:**

History Note:

Eff. March 1, 1996;

Amended Eff. July 18, 2002.



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SECTION .0300. DIETETIC/NUTRITION STUDENTS OR TRAINEES

21 N.C.A.C. 17.0303 (2012)

.0303 SUPERVISION

(a) A planned, continuous program in clinical practice pursuant to G.S. 90-357(3)b.2. shall designate a licensed dietitian/nutritionist who shall supervise a student or trainee; and

(1) shall meet the qualifications of the current standards of education as referenced in the most current edition of the "Eligibility Requirements and Accreditation Standards for Dietetic Internship Programs (DI)" which is hereby incorporated by reference including any subsequent amendments and editions of the referenced material. Copies of this manual are available at no charge through the ADA's website at: [http://www.eatright.org/ CADE/ content.aspx?id=57](http://www.eatright.org/CADE/content.aspx?id=57); and

(2) shall meet his/her employment qualifications of the sponsoring institution, if any.

(b) In accordance with the current standards of education referenced in this Rule, a Program Director shall:

(1) provide student/trainee advisement, evaluation, counseling and supervision;

(2) provide academic or supervised practice program assessment, planning, implementation and evaluation;

(3) inform student(s)/trainee(s) of laws, regulations and standards affecting the practice of dietetics/nutrition, including the Dietetics/Nutrition Practice Act and its Rules; and

(4) advise student(s)/trainee(s) on meeting the requirements to be licensed to practice dietetics/nutrition.

Authority G.S. 90-356(2); 90-357;

**NOTES:**

History Note:

Eff. March 1, 1996;

Amended Eff. December 1, 2011; July 18, 2002.



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21 N.C.A.C. 17.0304 (2012)

.0304 RECORDS AND REPORTS

(a) Permanent and current records from approved clinical practice programs shall be available for review by representatives of the Board. The Board may make use of facts supplied in determining compliance with G.S. 90-368 and in approving applications for a license.

(b) The Board may require additional records and reports for review at any time to provide evidence and substantiate compliance with standards of education, the law and the rules of the Board.

Authority G.S. 90-356(2); 90-368(2); 90-357;

**NOTES:**

History Note:

Eff. March 1, 1996;

Amended Eff. July 18, 2002.





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CHAPTER 17. BOARD OF DIETETICS/NUTRITION  
SECTION .0400. UNLICENSED INDIVIDUALS

21 N.C.A.C. 17.0401 (2012)

.0401 INDIVIDUALS AIDING THE PRACTICE OF DIETETICS/NUTRITION

(a) As used in this Section, the following terms and phrases, which have not already been defined in G.S. 90, Article 25, shall have the meanings specified:

(1) "Certified Dietary Manager" means an individual who is certified by the Certifying Board of the Dietary Managers.

(2) "Dietetic Technician Registered" or "DTR" means an individual who is registered by the Commission on Dietetic Registration of the American Dietetic Association.

(3) "Direct supervision" as referenced in G.S. 90-368(4) means that a licensed dietitian/nutritionist shall:

(A) be available for consultation on delegated nutrition care activities being performed by the person being supervised, either through on-site or through electronic communication, and shall be available to render assistance when needed to the unlicensed personnel and patient or client, or shall have arranged for another licensee to be available in the absence of the licensed dietitian/nutritionist; provided that the licensed dietitian/nutritionist shall be on-site at the service delivery site and within audible and visual range of any unlicensed personnel person described in Subparagraph (b)(3) of this Rule for the provision of any nutrition care activities;

(B) directly and personally examine, evaluate and approve the acts or functions of the person supervised; and

(C) meet with the unlicensed personnel in a joint effort to establish, maintain and elevate a level of performance to ensure the health, safety and welfare of clients or patients during the provision of nutrition care activities, and provide sufficient guidance and direction as to enable the unlicensed personnel to competently perform the delegated activity or function.

(4) "Nutrition care activities" means activities performed by unlicensed personnel which are delegated by licensed dietitians/nutritionists in accordance with Paragraphs (c) and (d) of this Rule and which support the provision of nutrition care services as referenced in G.S. 90-352(4). Nutrition care activities include the provision of nutrition care to address and mitigate a medical condition, illness or injury and the provision of weight control programs or services, as well as community nutrition, food service, and nutrition information or education.

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(b) Unlicensed personnel aiding the practice of dietetics/nutrition may include the following:

(1) a Certified Dietary Manager;

(2) a Dietetic Technician Registered; or

(3) an individual who has met the academic requirements as referenced in G.S. 90-357(3)b.1, c.1 and d.

(c) The licensed dietitian/nutritionist may delegate nutrition care activities to unlicensed personnel that are appropriate to the level of knowledge and skill of the unlicensed personnel. The licensed dietitian/nutritionist shall be responsible for the initial and ongoing determination of the competence of the unlicensed personnel to perform any delegated acts or functions. Delegation of nutrition care activities shall be in writing and shall identify the patient or client and the act or function assigned to the unlicensed personnel. The licensed dietitian/nutritionist shall supervise the nutrition care activities of the unlicensed personnel and maintain responsibility for nutrition care activities performed by all personnel to whom the care is delegated. The licensed dietitian/nutritionist shall not delegate the entire spectrum of nutrition care services, but may delegate specific acts and functions which support the licensed dietitian/nutritionist's provision of nutrition care services. The licensed dietitian/nutritionist shall have the responsibility for clinical record keeping, and shall ensure that case notes and other records of services identify whether the licensed dietitian/nutritionist or the unlicensed personnel was the direct provider of the service.

(d) The following variables shall be considered by the licensed dietitian/nutritionist in determining whether or not an activity or function may be delegated to unlicensed personnel:

(1) knowledge and skills of the unlicensed personnel which include both basic educational and experience preparation and continuing education and experience;

(2) the competence of the unlicensed personnel for the activity or function;

(3) the variables in each service setting which include:

(A) the complexity and frequency of nutrition care needed by a given client population;

(B) the acuity and stability of the client's condition; and

(C) established policies, procedures, practices, and channels of communication of the facilities where the delegated activities or functions are being performed which lend support to the types of nutrition care activities being delegated, or not delegated, to unlicensed personnel; and

(4) whether the licensed dietitian/nutritionist has the skills, experience and ability to competently supervise the unlicensed personnel for the activity or function.

Authority G.S. 90-356(2); 90-368(4);

**NOTES:**

History Note:

Eff. March 1, 1996;

Amended Eff. May 1, 2010; July 18, 2002.



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SECTION .0400. UNLICENSED INDIVIDUALS

21 N.C.A.C. 17.0402 (2012)

.0402 INDIVIDUALS PROVIDING NUTRITION INFORMATION

(a) The following terms and phrases shall have the meanings specified:

(1) "Nutrition information" means nonfraudulent nutrition information related to food, food materials, or dietary supplements which is designed for one or more healthy population groups and is based on valid scientific evidence, reports and studies. Nutrition information is not based on an individual nutrition assessment as referenced in G.S. 90-352 or medical nutrition therapy as referenced in 21 NCAC 17 .0101(11) and is not individualized to provide nutrition care services to prevent, manage, treat, cure or rehabilitate a medical condition, illness, or injury for a specific person or group as referenced in G.S. 90-352 and 21 NCAC 17 .0101(12).

(2) "Reported or historical use" means information about food, food materials or dietary supplements which is based on the following:

(A) historical or methodological studies or research conducted by experts in the field using sound scientific methods with randomized controlled clinical trials; or

(B) reports on valid scientific studies published in peer-reviewed medical or dietetics and nutrition journals or publications.

(b) The Board shall deem an individual who provides nutrition information or education to be in compliance with G.S. 90-368(9) when:

(1) The person does not hold himself/herself out to be a dietitian or nutritionist or imply orally or in writing or indicate in any way that he/she is a dietitian/nutritionist;

(2) The person does not provide nutrition care services or nutrition care activities which have not been delegated to him/her by a licensed dietitian/nutritionist;

(3) The person provides nutrition information on or about food, food materials or dietary supplements, and does not provide nutrition information on the nutritional needs of the consumer;

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(4) The person provides nutrition information in connection with the marketing and distribution of the food, food materials, dietary supplements or other goods to be provided or sold, and does not provide nutrition information in connection with the marketing and distribution of nutrition services;

(5) The person provides nonfraudulent nutrition information which is based on scientific reports and studies, is not false or misleading, and is safe; and

(6) The person provides the nutrition information on food, food materials, nutraceuticals, dietary supplements or other goods in accordance with federal, state and local laws, regulations and ordinances, including but not limited to G.S. 90, Article 25.

Authority G.S. 90-356(2); 90-368;

**NOTES:**

History Note:

Eff. March 1, 1996;

Amended Eff. July 18, 2002.



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21 N.C.A.C. 17.0403 (2012)

.0403 ELECTRONIC PRACTICE

Any person, whether residing in this state or not, who by use of electronic or other medium performs any of the acts described as the practice of dietetics/nutrition, but is not licensed pursuant to Article 25 of G.S. 90 shall be deemed by the Board as being engaged in the practice of dietetics/nutrition and subject to the enforcement provisions available to the Board. Among other remedies, the Board shall report violations of this Rule to any occupational licensing board having issued an occupational license to a person who violates this Rule. This Rule does not apply to persons licensed pursuant to, or exempt from licensure pursuant to, Article 25 of G.S. 90.

Authority G.S. 90-356;

**NOTES:**

History Note:

Eff. February 1, 2006.

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

**CERTIFICATE OF COMPLIANCE WITH RULE 32(A)**

Certificate of Compliance with Type-Volume Limitation,  
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

this brief contains 10,777 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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this brief has been prepared in a proportional spaced typeface using Microsoft Word in 14 point Times New Roman.

Dated: December 19, 2012

/s/ W. Clark Goodman

W. Clark Goodman

Counsel for Appellees

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on December 19, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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Paul M. Sherman  
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Arlington, VA 22203

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Raleigh, NC 27601

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

/s/ Melissa A. Dockery  
Melissa A. Dockery  
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