

**Vermont Secretary of State
Office of Professional Regulation**

Sunrise Application Review

Docket No. MT-01-0710

**Massage Therapists
Preliminary Assessment on Request for Licensure
Summary of Testimony and Evidence**

Background

The American Massage Therapy Association (AMTA) in conjunction with its Vermont Chapter and the Associated Bodywork & Massage Professionals (ABMP) submitted a Sunrise Application and proposal asking that the State of Vermont regulate through licensure all massage therapists in the state. The request to regulate massage therapists does not come from members of the public or any governmental entity.

State Policy on Regulation of Professions

Chapter 57 of Title 26 of the Vermont Statutes states: “Policy and Purpose.

It is the policy of the state of Vermont that regulation be imposed upon a profession or occupation solely for the purpose of protecting the public. The legislature believes that all individuals should be permitted to enter into a profession or occupation unless there is a demonstrated need for the state to protect the interests of the public by restricting entry into the profession or occupation. If such a need is identified, the form of regulation adopted by the state shall be the *least restrictive form of regulation necessary to protect the public interest....*” 26 V.S.A. § 3101, (emphasis added).

Vermont statute 26 V.S.A. § 3105(a) provides a detailed set of criteria which must be satisfied before regulation of a profession may occur:

“A profession or occupation shall be regulated by the state only when:

- (1) it can be demonstrated that the unregulated practice of the profession or occupation can clearly harm or endanger the health, safety, or welfare of the public, and the potential for the harm is recognizable and not remote or speculative;
- (2) the public can reasonably be expected to benefit from an assurance of initial and continuing professional ability; and
- (3) the public cannot be effectively protected by other means.”

The legislature delegates responsibility for a preliminary assessment of requests for

regulation to the Office of Professional Regulation (“OPR”). “Prior to review under this chapter and consideration by the legislature of any bill to regulate a profession or occupation, the office of professional regulation shall make, in writing, a preliminary assessment of whether any particular request for regulation meets the criteria set forth in subsection (a) of this section. The office shall report its preliminary assessment to the appropriate house or senate committee on government operations.” 26 V.S.A. § 3105(d). Pursuant to that mandate, the OPR has reviewed the Sunrise Application of Massage Therapists.

Regulation Sought

The AMTA and ABMP’s proposed statutes call for licensing of people who provide massage therapy services for compensation. Their proposal would bar those not licensed from using in their businesses the terms “massage,” “massage therapy,” “massage therapist,” “masseur,” “masseuse,” “certified massage therapist,” or using the words “licensed” or “registered.” Their proposal would bar use of the identifiers, “M.T.” or “L.M.T.” by anyone not licensed by the State of Vermont.

Under their proposal to be eligible for licensure an applicant must be

- (1) at least 18 years of age;
- (2) have a high school diploma, or its equivalent;
- (3) be a graduate of an approved massage school consisting of a minimum of 500 hours of supervised course and clinical work.
- (4) pass a massage therapy competency assessment examination.

The proposed statute leaves to the Director of OPR the tasks of designating by rule how the schools are to be approved and the examination to be used. Providing no specific criteria, the proposal allows the Director to waive training requirements, if the Director determines that an applicant’s training is sufficient.

The proposal permits “grand fathering” for a limited number of practicing massage therapists. Some practitioners who have practiced for years without incident would be unable to become licensed without taking additional courses or meeting active practice requirements.

Background on the Vermont Quest for Regulation

The Vermont Massage Therapists’ Sunrise Application is part of this profession’s well-orchestrated quest for licensure in every state. The pursuit of regulation in Vermont is part of the national organizations’ nation-wide coordinated legislative agenda. They have targeted the remaining states which do not regulate massage therapists. The proponents of regulation have a well-financed and detailed lobbying and legislative agenda. The materials submitted to OPR in support of their efforts toward licensure include their “Grassroots Advocacy Training Manual” which includes a six step path to achieving state regulation.¹ The AMTA provided its Vermont

¹ See Application, Exhibit B on the OPR web site.

Chapter with an eighty-four page step by step guide to influencing government to enact licensure. The group's handbook is available on the OPR website as Exhibit B of their application.² The guide advocates a six step process to achieve success at obtaining state licensure. Among the topics covered: "How to Prepare your Grassroots Advocacy Campaign," "How to Develop an Effective Strategic Plan," "How to Recruit Volunteers at the Grassroots Level," "How to Deliver Your Message," "How to Establish Relationships with Legislators," "How to Participate at the Regulatory Level," and "How to Be Successful." Members of the massage therapists' national organization appeared at the Sunrise Hearing and took an active and prominent role in forwarding the goals of the profession.

The proponents mobilized their supporting members to attend the meetings and write letters to the OPR, and news outlets. They notified the major Vermont media outlets of their quest and the public hearing. The proponents did not have and could not provide OPR a full listing of all Vermont massage therapists or members of related body work professions. They did not notify all Vermont massage therapists of the proposal for licensure.

In Colorado the Department of Regulatory Affairs (DORA) was able send out questionnaires to 4,025 known massage therapists as part of its 2007 Sunrise Review. The Office of Professional Regulation lacks resources to locate and contact each practicing Vermont massage therapist or body work professional who might be affected by this legislative proposal. This office sent notices and requests for comment to all licensed cosmetology and esthetician shops. The "pro-regulation" side was mobilized early and was well represented at the hearing.

From their membership ranks the AMTA organizers rallied their supporters. They engaged in little if any outreach to non-members. At the beginning of October OPR sent out a limited number of invitations soliciting comment at the public hearing to those massage therapists identified through the internet. OPR's admittedly incomplete attempt to get a broader sample of the profession prompted a word-of-mouth effort among those who were not involved in the licensing proposal.

OPR Process and Outreach

The Office of Professional Regulation has evaluated the massage therapists' application and conducted its own limited investigation. As required by the Sunrise Review statutes 26 V.S.A. § 3101 et seq., the Director of the Office of Professional Regulation held a properly noticed hearing on October 29, 2010 at the Office of Professional Regulation Conference Room at the National Life Building in Montpelier. The hearing allowed evidence beyond what was contained in the Application for Sunrise Review to see if the Applicants, massage therapists, satisfy the statutory prerequisites for regulation by the State of Vermont. Some members of other related body work professions also attended the meeting or sent comments to the Office. The Vermont members of the AMTA and chief proponents of the Vermont licensure quest were assisted by AMTA and ABMP officials who flew to Vermont from Florida and Colorado to

² See. [Http://vtprofessionals.org](http://vtprofessionals.org) Sunrise Reports

assist advocating for licensure.

Much of the word of mouth conversation among those not actively supporting the licensure movement occurred after the October 29, 2010 public hearing. The office began to hear more and more from opponents of regulation. During the two weeks allotted for additional public comment, many opponents of regulation voiced their opinions. Opponents included some members of the AMTA and ABMP.

The sentiments expressed in favor of, or in opposition to regulation are deeply held and vehemently expressed. One obvious conclusion: The massage therapy profession is deeply divided over the need for regulation by the State.

Overview of the Profession

The term massage therapist encompasses a broad spectrum of professionals whose practices focus on touch of the human body as a means of providing mental and physical relaxation and relief from soreness. In Vermont the "hands on" disciplines include, what is known generically as "massage," Reiki, cranio-sacral therapy, Esalin massage, Burnham systems facial rejuvenation, the Feldendrais Method, acupressure and shiatsu, body mind centering, foot reflexology, integrated energy therapy, Jim Shin Do, Manual lymph drainage, myotherapy, Neo-Reichian Bodywork, Rolfing, polarity therapy, positional release, resonant kinesiology, sports massage, therapeutic touch several varieties of "body work," oriental massage, Swedish massage, and traditional massage of Thailand. Each has its unique philosophy and approach to body healing. Each has its own training and education.

The AMTA, which nationally has over 56,000 members, works through its 51 member chapters to advance the profession. It is unknown what percentage of Vermont massage therapists are members of the AMTA. Nationally, it is less than one half. OPR has no information on how many practicing massage therapists regularly obtain continuing education. Its efforts include adoption of ethics and standards and promotion of licensing of massage therapists in all 50 states and public education of the benefits of massage. At the hearing the proponents stated that they sought to enhance their profession and advance the profession of massage therapy, in part, through licensure. The organization provides continuing education. Their professional standards include a prohibition on sexual conduct or activities with their clients "in the course of a massage therapy session."

The training of Vermont massage therapists varies widely. Some have attended 500 hour or longer courses. Many are certified by various training organizations. Some massage therapists have attended shorter schools or courses. A few have learned their profession by apprenticing under the direction of experienced massage therapists. Members of all branches of body work attending the Sunrise hearing displayed the pride of belonging to an honorable profession.

Massage therapists differ from medical practitioners, for example nurses or dentists, in

that their clients come to them by choice. Massage therapy clients choose to see a massage therapist selecting one, often via word of mouth recommendations from friends, acquaintances, and health care professionals. The practices of Vermont massage therapists rely to a very large extent on word-of-mouth referral from clients or other professionals. Some individual massage therapists advertise. For individual Vermont practitioners not affiliated with a spa or other facility, an estimated 70 to 100 per cent of all massage clients are referred by others. Some clients of massage therapists select them through printed media advertisements or through the internet. Massage therapists who have been certified by various training programs advertise their certification, e.g. "Certified Massage Therapist" or "Nationally Certified Massage Therapist" for the public to see. Reputation appears to be the predominant criterion for selecting a massage therapist. As one massage therapist wrote, "At my business, we ask each new client who referred them/how they found us. Over 90% came through personal referral. If massage professionals are not doing a good job, their first time clients will not become regulars and they will not have surviving practices." In this respect, the market place works well to weed out any ineffective or bad massage therapists.

Massage therapists frequently state that the difference between a good and effective massage therapist and a bad one is the practitioner's hands. An individual's "feel" as he or she provides massage services, not training or examinations passed, is the most significant factor in their professional therapeutic success.

Arguments in Favor of Regulation

The proponents of regulation have two main arguments: They argue 1) that insufficiently or inadequately trained massage therapists may injure patients, and 2) that regulation will provide a needed avenue for reporting and sanctioning unethical or dangerous practitioners.

At the beginning of the public hearing the proponents stated that their submitted testimonials claiming harm from massage therapists would be "vague" to protect the confidentiality of clients. No claim of harm mentioned at the hearing resulted in a complaint to law enforcement, a suit filed in court, or a complaint to any governmental authority. The complaints range from clients being uncomfortable with inappropriate draping (covering the parts of the body not being massaged) or the lack thereof, to people complaining of pain during or after massages. All reports were second hand. As a result, the veracity of the claims of harm cannot be independently investigated or verified. From the over 50 people attending the Sunrise hearing, only one anecdotal Vermont incident of possible physical harm was reported. The report claimed that a massage therapist used overheated massage rocks on a client. This claim could not be independently verified. If true, this would represent evidence of harm.

Massage therapists suggest a number of conditions or injuries which can be aggravated, or worse, by an untrained or careless massage therapist. After the public hearing the licensure proponents submitted a document "Proof of Harm." It contained testimonials claiming harm caused by massage therapists, and was "taken directly from the September 2010 Legislative Survey." The massage therapists who wrote stated that their massage clients told them of

incidents which occurred with other massage therapists. The most serious report claimed that a client's previous massage therapist had caused bruising without telling the client that bruising could result from massage or how bruising could be avoided. None of the accounts of harm indicates the level of training or experience of the practitioner involved. Testimony at the public hearing reported six calls to the national organization complaining about Vermont massage therapists in five years. All massage therapists were, apparently well-trained. According to the testimony, none would have been suspended from practice based on the complaints against them. All claims of harm appear to come from massage therapists supporting the licensing effort. OPR was not able to independently verify the veracity of the testimonials. Whether regulation of the profession would have prevented any of these claims is open to speculation.

The cost of liability insurance may be seen as a reliable indicator of the risks associated with professional practices. Unlicensed Vermont massage therapists can obtain \$1,000,000.00 liability insurance for \$200 per year. This low cost suggests that the risk of physical harm to clients is recognized to be minimal. AMBA offers insurance coverage to practitioners who have only 100 hours formal training. The Office of Professional Regulation asked the proponents to submit evidence on insurance claims and payments. The AMTA prepared a one page "Professional Liability Insurance Claim Summary." It reports 560 claims made nationally between 2000 and 2010. This averages out to slightly more than one claim per state per year. The AMTA form does not show whether any of those claims resulted in payments. There is no way to independently determine the validity of any harm alleged by reference to the insurance claim summary. The Bureau of Labor Statistics estimates that in 2008 there were 122,400 practicing massage therapists.³ These numbers indicate that harm, if and when it does occur, is rare.

The proponents of licensure also submitted claims of harm which they collected for use in this year's quest for licensure in the State of Kansas. None of the claimed incidents is authoritatively documented. The testimonials spoke of emotionally fragile clients being susceptible to harm from the intimate surroundings of massage, and the risk that untrained massage therapists could cause emotional harm. This suggested harm appears to be both speculative and remote.

There is no documented verified instance of massage therapist caused harm in Vermont. To the extent that harm may have occurred, the risk of this type of harm is remote. Proponents of licensure claim that harm can occur from treating clients whose physical or mental/emotional conditions render them susceptible to injury. They claim that mandated minimum training will prevent that harm. This claimed harm appears to be remote and speculative.

The National Practitioner Data bank reports only 55 instances of action taken by regulatory agencies against massage therapists between 1999 and 2010.

Licensure proponents argue that Vermont has no laws to prevent unethical or

³ See, <http://www.bls.gov/oco/ocos295.htm>

incompetent massage therapists coming to Vermont from other states where they have been disciplined. There is no indication that incompetent or unethical practitioners have sought a regulation-free sanctuary in Vermont. To paraphrase one licensure opponent who testified at the public hearing: Making a living in Vermont as a massage therapist is too hard to make Vermont an attractive haven.

Criminal Conduct by Massage Therapists

Licensure proponents spoke at the public hearing of one Colorado case where a massage therapist was convicted of a sexual offense, went to prison, then resumed his practice in another location. OPR has no independent documentation to confirm the accuracy of this report. This massage therapist reportedly re-offended and was once again incarcerated. On his release he resumed practice in a third location. Vermont's permissible probation and parole conditions can limit an individual's activities and contacts to prevent such a scenario. The Colorado example, if true, is seen as a failure of the criminal justice system, not proof that licensure of an entire profession is needed to protect against sex offenders.

Licensure proponents claim licensure is needed to prevent criminal sexual activity conducted under the guise of massage. Current legal prohibitions on consensual sex for money and non-consensual sexual conduct remain the primary means of curbing these illegal acts. A review of disciplinary actions against licensed massage therapists in New York State is instructive. New York on-line records show that between 1999 and 2010 there were 75 disciplinary actions against licensed massage therapists. Not one resulted from physical harm from improper performance of a massage. Some resulted from admissions of sexual impropriety with clients. A good number followed convictions for sexual offenses.

In states such as New York, where massage therapists are licensed and are required to have over 1,000 hours of training and pass an examination, licensure has not prevented prostitution or criminal sexual activity. The assurance of initial competency is not a factor. As has been seen with other professions currently regulated in Vermont, rigorous training and examinations do not prevent sexual misconduct. Mandatory massage therapy training, ethics courses and examinations do not prevent prostitution.

The relationship between massage therapy and prostitution results from exploitation of the term "massage." OPR has seen no evidence of the public mistakenly engaging illegitimate practitioners. As one person testified at the public hearing, even in states where massage therapists are licensed, advertisements suggesting the availability of illicit sexual activity are easily distinguished from legitimate massage therapy services.

Licensure of massage therapists has not prevented illicit activity. At best, licensure provides a thin curtain for it to hide behind. Existing criminal penalties and controls are sufficient and appropriate to respond to the few who engage in criminal activity. Licensure of an entire profession is seen as an over-broad, expensive, inefficient, and ineffective means to prevent infrequent criminal conduct. Current legal deterrents and remedies are sufficient.

Unethical Practitioners

At the public hearing the proponents read a letter from an anonymous Vermont massage therapy client which described her "sexual victimization" by a massage therapist. She described her contact with the massage therapist as "consensual" and "an apparent affair" which lasted for years. The relationship occurred over ten years ago and was not reported to any legal authority. The validity of this accusation can not be independently verified. It is unclear how licensure would have prevented the relationship. On the scant report presented, it is difficult to conclude that any legal remedy, existing or regulatory, would be available or sufficient.

One witness at the hearing reported that she had heard from two clients that another massage therapist, nationally certified, had hurt them and gotten upset when confronted. It is not clear that licensure would have prevented either complaint. It may have provided an avenue for investigation and regulatory action. If the complaint accurately states that the massage therapist used too much pressure causing pain, word of mouth in the market place apparently did function effectively to limit that practitioner's practice.

Documented Harm in Vermont

The Office of Professional Regulation is recognized as the first place for anyone with a complaint against a professional to turn. The Office has received numerous inquiries about massage therapy practice. All have asked about the regulatory prerequisites to opening a massage therapy practice. The Office of Professional Regulation has received no complaints about misconduct, incompetence, or harm caused by practicing massage therapists.

The Attorney General's Consumer Affairs division reports only one complaint about a massage therapist's practice. The complainant alleged that the massage therapist and her roommate had been involved in a scuffle while the complainant was having her massage. The complainant claims she was hurt, but no specifics were provided. The practitioner's level of training and expertise is unknown. No legal action was taken on the complaint. It cannot be said that regulation of the profession would have prevented this one isolated incident. It cannot be said that available legal remedies were inadequate to address any claimed harm.

Arguments Against Licensure

Once word of the proposal to license massage therapists circulated and appeared in the media, the opponents contacted OPR. Among their arguments against licensure: The massage therapy profession has not harmed the public; that the risk of harm from practitioners is remote and speculative. Opponents argue that the push for licensure is motivated by a desire to enhance the profession and the professional organizations spearheading the effort. The proponents do offer continuing education and do stand to profit from mandatory continuing education. Opponents argue that state regulation will increase the cost of health care; and that the market place functions well to effectively weed out any bad massage therapists. Some proponents of

regulation are concerned that there are “great massage therapists” who “know their stuff” but have trouble with testing. Some practitioners are concerned that licensing of massage therapists will reduce diversity of body work practitioners.

In response to the testimonial about “sexual victimization,” the opponents of licensure noted that several years ago being a victim of improper sexual behavior was felt to be stigmatizing. They point out that now victims of sexual misconduct are more likely now to report it to law enforcement than they were years ago, and that law enforcement is best trained and equipped entity to investigate and prosecute sexual misconduct.

Issues with Licensure

26 V.S.A. § 3101a(2) defines licensure. “‘Licensing’ and ‘licensure’ mean a process by which a statutory regulatory entity grants to an individual, who has met certain prerequisite qualifications, the right to perform prescribed professional and occupational tasks and to use the title of the profession or occupation. Practice without a license is unlawful.” Licensure of massage therapists may create confusion about scope of practice. Licensure raises questions of whether other body work professionals would be considered illegal practitioners of massage therapy.

Massage therapists have been practicing in Vermont unregulated by the State for many years. Licensure restricts entry into the profession to those who meet legislatively set standards. Licensing massage therapists and including other bodywork professionals under the definition of massage may demand extra training of those trained in other body work disciplines. Licensing massage therapists indicates that public protection requires it. At the same time, excluding the many other body work disciplines from licensure implies that licensure is not needed to protect the public from those other practitioners. Creating individual licensure requirements for each discipline falling under the broad title of “massage therapist” would be hugely burdensome for the State.

Licensure may limit employment opportunities. Strict licensing requirements may discourage those who would practice massage therapy as a second job. Licensing is not necessary for employers. Existing professional group certification programs provide employers a reliable means to find massage therapists who have the training they want.

The licensure proposal creates a two year limited window for “grand fathering” current practitioners. These individuals have been practicing for many years with no documented harm to the public. Those who are currently practicing but who do not meet initial or transitional licensing standards will be forced to find time and pay for additional training, or give up their practices.

Conclusions

Following the criteria of 26 V.S.A. § 3105, we conclude:

(1) The applicants have not demonstrated that the unregulated practice of massage therapy can clearly harm or endanger the health, safety, or welfare of the public. The potential for the harm is remote and speculative.

(2) There has been no showing that the public requires a State approved assurance of initial and continuing professional ability. Professional training and certification programs meet this need and are advertised by massage therapists.

(3) The best regulator of this profession remains the market place. In the rare instance where harm may occur, the public is sufficiently protected through existing common law and civil remedies. Where someone posing as a massage therapist violates criminal laws, those laws effectively protect the public.

(4) No stronger civil remedies have been required, tried, or found to be insufficient.

The massage therapist organizations have not shown that entry into their profession should be limited to those who meet AMTA standards. There has been no demonstrated need for the state to protect the interests of the public by restricting entry into the massage therapy profession.

The statutory criteria for regulation of massage therapists have not been met.

Recommendation

Under the sunrise criteria, harm to the public must be real and recognizable, and preventable by regulation. The proponents of regulation have not demonstrated harm or a need to protect the public if the profession remains unregulated. They have not demonstrated that the public will benefit from regulation. Other legal protections and market forces are sufficient to protect the public. Therefore, licensure is not appropriate.

The Office of Professional Regulation recommends that Massage Therapists **not be subject to professional regulation in the State of Vermont.**

Respectfully submitted:



Christopher D. Winters, Director
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