

November 16, 2009 (Legislative Subcommittee)
November 23, 2009 (Legislative Subcommittee)
December 1, 2009 (Full Council)

Background

The Council of Health Boards was charged with the responsibility of reviewing legislative proposals regarding massage therapy (House File 1503 and Senate File 1233), introduced in the 2009 legislative session. The Senate bill was referred to the Health, Housing and Family Security Committee. The House bill was referred to Health Care and Human Services Policy and Oversight, and to the Licensing Division. These bills propose a regulatory system providing for mandatory licensure and creation of a board to regulate the practice of massage therapy.

In the interim since the end of the 2009 legislative session, an alternative to mandatory licensure was prepared by the proponents of the legislation (at the behest of the Legislature). This proposal would offer an alternative system for regulation of voluntary registration through a health-related board, utilizing an advisory council comprised of seven members appointed by the host board. This alternative has not been introduced in the Legislature.

Minnesota Statutes 214.001, Subd. 4, states that the chair of a standing committee in either house of the Legislature may request information from the Council of Health Boards regarding proposals relating to the regulation of health occupations. Minnesota Statute 214.025 states that the health-related licensing boards may establish a Council of Health Boards consisting of representatives of the health-related licensing boards and the Emergency Medical Services Regulatory Board. When reviewing legislation or legislative proposals relating to the regulation of health occupations, the Council shall include the Commissioner of Health or a designee.

The panel reviewed the application through a variety of methods, including discussion at meetings with interested members of the public and the occupation, and review of materials submitted by the proponents, including responses to a questionnaire regarding occupational regulation.

Currently, Massage Therapy is regulated under Minnesota Statutes 146A, the Unlicensed Complementary and Alternative Practices Act (CAM). [Parenthetically, this system, housed within the Department of Health currently has no funding.] Other than CAM, there are no Minnesota state statutes governing massage therapy, although some governmental subdivisions (counties and cities) have ordinances or licenses regarding massage activity. Many of these regulations are primarily directed at deterring prostitution activity. Other than this, Minnesota has no overall regulatory system for massage therapy.

The current language seeks to separate legitimate massage therapists who have acquired an established level of training and who seek to practice as a profession of health care providers, from those who do not have such training.

Role of the Council of Health Boards

The Council received responses to its standard “Questionnaire on New or Expanded Regulation” from proponents of the legislation. Responses were reviewed and evaluated based upon the materials provided with the application by the subcommittee comprised of health-related licensing board executive directors and board members. The worksheets contained 60 items in the general topic areas: Description of the Occupation; Safety and Efficacy; Government and Private Sector Recognition; Education and Training; Practice Model & Viability of Profession; and Regulatory Framework. The proposal submitted by the proponent for this legislative change was reviewed according to these 60 items for thoroughness of response and provision of information. The Council has assessed the degree to which the responses to the questions and information provided supported the application for establishing a system of regulation.

A subcommittee of the Council reviewed the proposals with a view toward providing the Legislature with an objective evaluation of information regarding the proposal and to describe those areas which may or may not support the legislative change. The subcommittee met to organize the review process, review the worksheets and to discuss the proposal on October 7, 2009, October 15, 2009, October 27, 2009, November 10, 2009, November 16, 2009, November 23, 2009, and December 1, 2009 (Full Council).

In its entirety, the questionnaire completed by the proponents of the legislation is designed to respond to legislative issues that may include, but are not limited to:

- review of initial request for creation of new licensing board
- regulation as an advisory committee within a Board
- registration
- reviewing changes to regulation of an existing profession.

An opportunity exists through the Council to review the proposed legislation and the impact of the changes in their entirety, with a goal of clarifying for the Legislature issues that may arise in the course of its consideration of the proposal. It is not the role of this Council to either recommend or to withhold recommendation of proposed legislation, but to analyze submissions pertaining to proposed legislation and to offer factually based conclusions and other possible areas of inquiry in order for the Legislature to determine whether to create a system of regulation, including granting licensure or registration to an occupation.

This report reviews the proposal for licensure, as well as the proposed voluntary registration system. The report is organized in accordance with major topics contained within the “Questionnaire on New or Expanded Regulation”. Because the House and Senate bills differ, and because prospective legislation has been reviewed by the Council which has not yet been introduced, this review included some unique challenges. The House and Senate bills provide for mandatory licensure and creation of a board; prospective legislation would provide for voluntary registration, through a health-related

board, utilizing an advisory council comprised of seven members appointed by the host board.

The legislative intent and in exactly what format these bills will be considered in the future is uncertain. However, the Council reviewed the legislation with a view to providing assistance to the Legislature on overriding issues that may warrant additional legislative consideration.

Overall, this subcommittee found that the responses given to the questionnaire were generally responsive to the questions posed. *There may be additional considerations that are not addressed, for which the Legislature may want to request additional information or clarification.*

An Executive Summary of major issues for legislative consideration may be found at the end of this report. Where the Council of Health Boards suggests specific lines for legislative inquiry, the suggestion is italicized.

A. Description of the Occupation

The profession proposed for state licensure or voluntary registration consists of practitioners of massage or massage therapy as a health care service. The proposal also includes scope of practice language that would exempt other licensed health practitioners and complementary and alternative health practitioners from the provisions of this statute as long as they are operating in accordance with their licensure requirements.

Because there is no current statewide licensing system, massage therapy is unregulated except insofar as regulation by a subdivision of city or county government. Such regulation has historically arisen in the context of zoning or criminal ordinances (e.g., prostitution). Thus, unless regulated by a government subdivision, practitioners may freely practice their occupation without state governmental statutory protections.

The proposed legislation (HF1503 / SF 1233) defines a Massage Therapist as:

Subd. 10. **Massage therapist.** "Massage therapist" means a health care professional who is licensed under this chapter for the practice of massage therapy for compensation.

The proponents of regulation note a clearly circumscribed practice. Unlike some other health-related practices, examinations are not performed, diagnosis is not offered, nor is a prognosis given. However, massage therapists complete assessments and contribute to treatment plans, including collaboration with other health professionals. The licensure bill also places responsibility upon the massage therapist to refer clients for services outside the scope of massage therapy. Among grounds for disciplinary action are failure to refer. A massage therapist is accountable and responsible for operating strictly within their competency and scope of practice.

The Council notes that massage therapy more closely resembles other regulated health occupations than it does unregulated client services. The information provided does not appear to address whether the modalities and therapies provided by this occupation could be provided by members of different occupations. The bills and proposal reviewed provide a clear statement regarding exemptions for other licensed health practitioners.

Ethics for the profession would be developed by rule. The profession does have a standard code of ethics propounded by its national associations. The proposed legislation contains grounds for disciplinary action to be administered by a board.

Under the voluntary system of registration, grounds for disciplinary action are included. By its nature, a voluntary system of registration, however, includes only those practitioners who self-select. There is no regulatory impact on those who do not register. Further, a voluntary registration system may have little or no impact on those who register, commit egregious offenses, lose their registration, and continue practicing.

Massage therapists may practice in a variety of settings, and there is no requirement of structured supervision of the therapist contained in the proposed legislation.

The Legislature may consider whether licensure or voluntary registration of massage therapists offers a level of added public protection and assurance of competency sufficiently above that currently provided by scattered municipal civil ordinances and criminal statutes.

B. Safety and Efficacy

The primary goal of health-related regulation is protection of the public, and public safety. The Council is cognizant that safety is critical, and that the Legislature has authority and responsibility to design a structure that will keep practice safe and minimize risk.

Evidence of efficacy and safety and potential harm for the profession is currently being developed. Enactment of licensure or other regulatory systems would result in collection of data that would assist in evaluating efficacy and safety, as well as provide data for further research.

Physical consequences of incompetent, improperly trained, or unethical practitioners include significant public harm. The Council was provided with evidence of numerous cases of physical, financial, emotional and sexual harm perpetrated by unqualified, improperly trained practitioners. The Minnesota Department of Health also has available data regarding such harm, which is readily available on the Minnesota Department of Health website (Office of Unlicensed Complementary And Alternative health Care Practice Disciplinary Actions):

<http://www.health.state.mn.us/divs/hpsc/hop/ocap/ocapdisp.html>

The Legislature may wish to request and review available evidence of cases of physical, financial, emotional and sexual harm perpetrated by unqualified, improperly trained

practitioners. The Legislature may also consider the role that licensure plays in permitting more readily available collection of data.

Practice of massage therapy is the type of practice that would commonly be subject to mandatory regulation. The Council reviewed information provided by the proponents, and found that the profession recognizes a range of competency. This includes a proposed regulatory system that contains standards of practice, and mechanisms for initial education and training as well as continuing education. Regulation would support standardization of competency and would increase public safety.

Legislation provides for contact hours, competency examination, and continuing education, as would be found for other licensed practitioners.

The Legislature may want to obtain research studies or other information to determine the extent to which potential public hazards exist in regard to this occupation, as well as the most appropriate manner of regulating for such hazards.

The proposed legislation provides for investigation of complaints and disciplinary action based on certain actions of the massage therapist, whether licensed or registered voluntarily.

The mandatory licensure proposal provides for licensure by endorsement for applicants who hold a current massage therapy license, certification, or registration from another state, whose standards are at least equivalent to those of Minnesota. The Council recognizes that because laws vary across jurisdictions, it may be difficult to correlate equivalent licensure. In the case of applicants who are currently working in Minnesota, proposed legislation requires the applicant to establish competency.

The Legislature may wish to consider how the goal of protection of the public would be met by this legislative change, as well as to consider the overall regulatory system proposed.

C. Government and Private Sector Recognition

Massage Therapy is currently regulated under Minnesota Statutes 146A, the Unlicensed Complementary and Alternative Practices Act (CAM) law. In reviewing this proposal, the Council found that in regard to this occupation, Minnesota is lagging behind other states in formally recognizing and regulating this profession. Most states (43) currently have an entry-level massage therapy credential. The proponents also provided information noting that their profession is generally regulated by mandatory regulation, rather than voluntary systems.

Voluntary registration would place Minnesota outside the mainstream for regulation of this occupation. The pending House and Senate bills provide for mandatory licensure. Also under possible consideration is voluntary registration, which would be administered

by the Department of Health. The proposed legislation covers both activities and practitioners. A voluntary system of regulation lends itself to only marginal public safety and public protection. In this case, an absence of mandatory regulation lends itself to a confusing and fragmented structure of municipal regulations with inconsistent standards based on governing entity preferences. At the same time, a state-centered regulatory system offers an initiative to begin driving more uniform standards.

The Council also notes that if a public safety issue warrants oversight, potential harm to the public is likely the primary legislative consideration in determining an appropriate regulatory system.

The Legislature may wish to consider the appropriate apportionment of regulation between governmental entities and subdivisions, the amount of benefit to be obtained from licensing, and whether a sufficient level of public safety is provided by voluntary regulations.

The Legislature has the opportunity, challenge and responsibility to determine the appropriate level of regulation of an occupation.

D. Education and Training

The members of the Council considered several issues pertaining to education and training.

The proposal contains requirements for education in order to obtain licensure. However, there is currently a standardized curriculum, but it is not required as it is not regulated.

Problems regarding a non-standardized curriculum can be resolved through regulation. It is, however, up to the Legislature to determine specific requirements and standards in collaboration with stakeholders. This may include clinical experience, which the Council notes is of significant value in gaining competence.

Similarly, accepted national standards for competent practice of occupations exist in the form of accepted testing. However, as to testing for competence during and at the completion of all didactic and clinical programs, there is great disparity in testing systems. However, such a discrepancy could be addressed if standards regarding accreditation are implemented by legislation.

Whether current educational systems offer sufficient preparation for competency depends on the program attended. If the program is accredited by a national accrediting organization, it is likely that sufficient preparation would be provided. The proponents note that there are a number of schools in the state that offer curricula in massage therapy. If legislation is enacted, schools would likely increase conformance of academic standards, and increased the academic rigor. Accreditation is rightly a matter to include in legislation, as a necessary antecedent for insuring a valid educational curriculum.

Educational opportunities are not currently standardized. There are accepted national or regional standards of education and training for competent practice, and the occupation has standard tests individuals can take to demonstrate knowledge, skills and judgment.

After review, the Council determined that the proposed legislation would have an important impact on the education and training of massage therapists in this state.

The Legislature may wish to consider the extent of practice hours that would be appropriate for both entry-level credentials and post-entry renewals.

The Council notes that continuing education is by no means a guarantee of continuing competency; in some occupations, certification of practitioner hours is a requirement to maintain licensure.

E. Practice Model and Viability of Profession

The occupation has developed and continues to develop recognized guidelines for practice, including in the area of referrals to health practitioners beyond the scope of massage therapist practice. As noted previously, *the practice of massage therapy is regulated in all but a handful of states. A system of regulation reflects a need to place accountability on the practitioner.* In the case of massage therapy, where a practitioner may work in any of a number of venues, and may or may not be supervised, regulation offers consumers a level of protection that does not otherwise exist.

Proposed legislation contains much detail regarding eligibility for licensure as well as criteria for grandparenting current practitioners. It should be noted, however, that the benefits of established criteria for eligibility are not a part of any voluntary regulatory system, in that practitioners who do not or cannot meet eligibility criteria may continue to hold themselves out as practitioners. Individuals not able to meet the proposed eligibility criteria would be able to continue services under a different but related occupational title under voluntary registration, and non-qualified persons could continue to provide services.

F. Regulatory Framework

In reviewing the legislative proposal, the Council finds that the practice of massage therapy is a profession that is recognized, that has a discrete level of knowledge, and a delineated scope of practice. Concomitantly, it is also subject to virtually no State oversight or regulation. Based on historical anomalies, regulation has existed largely in the area of municipal or county zoning or criminal ordinances. The Office of Complementary and Alternative Practices has previously provided a limited measure of oversight of unlicensed practitioners; however, the office is not currently funded, nor does it provide standard credentialing and disciplinary oversight that would often be expected of a profession in which people receive massage therapy from an individual. This could include such serious matters as boundary violations or sexual abuse. Massage

therapy is performed by other health professionals as well; in that instance, the practitioners are regulated by their board.

The Legislature may want to consider whether existing remedies are inadequate to prevent or address the harms that could result from non-regulation. Further, the Legislature may wish to consider whether voluntary registration could cause unintended negative consequences in, for example, client confusion about the knowledge and experience of an unregulated practitioner who uses an occupational-related title (but not identical to) the voluntary massage therapist credential.

Based on experience, history, data, and knowledge of health regulation, the Council of Health Boards acknowledges that voluntary systems of regulation are ineffective in establishing competency standards and protecting public safety.

From a regulatory perspective, advisory council models have been successful as a first step toward greater accountability and public protection. Under such a model, an occupational advisory council would be housed within an established entity, such as a health-related board, but would not initially be fully separate from an established board. In such a system, an opportunity exists to assess the profession's maturation in regard to licensing activities. It has the additional benefit of being able to obtain actual data on professional behavior.

The overall compelling state interest in regulation of massage therapy is the protection of public safety and severity of potential consequences if unregulated practitioners engage in inappropriate conduct, including sexual abuse.

The Council is offering suggestions for review by the Legislature, although it does not wish to impinge on legislative prerogative in ultimately determining an appropriate structure, if any.

Additional Comments

The Council recognizes that quality of care can benefit by regulation. In assessing a health profession, the Legislature will need to determine whether the proposed statutory changes will meet the needs of public safety.

Executive Summary

Description of the Occupation

The Legislature may consider whether licensure or voluntary registration of massage therapists offers a level of added public protection and assurance of competency

sufficiently above that currently provided by scattered municipal civil ordinances and criminal statutes.

Safety and Efficacy

Physical consequences of incompetent, improperly trained, or unethical practitioners include significant public harm. The Council was provided with evidence of numerous cases of physical, financial, emotional and sexual harm perpetrated by unqualified, improperly trained practitioners. The Minnesota Department of Health also has available data regarding such harm, which is readily available on the Minnesota Department of Health website (Office of Unlicensed Complementary and Alternative health Care Practice Disciplinary Actions:

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The Legislature may wish to consider how the goal of protection of the public would be met by this legislative change, as well as to consider the overall regulatory system proposed.

Government and Private Sector Recognition

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The Legislature has the opportunity, challenge and responsibility to determine the appropriate level of regulation of an occupation.

Education and Training

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The Legislature may wish to consider the extent of practice hours that would be appropriate for both entry-level credentials and post-entry renewals.

Practice Model and Viability of Professions

The practice of massage therapy is regulated in all but a handful of states; 43 states have regulation. A system of regulation reflects a need to place accountability on the practitioner.

Regulatory Framework

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