

VERMONT SECRETARY OF STATE
OFFICE OF PROFESSIONAL REGULATION
PRELIMINARY SUNRISE ASSESSMENT: MASSAGE THERAPY (2015/16)

On June 30, 2015, the American Massage Therapy Association, Vermont Chapter (AMTA-VT) and Associated Bodywork & Massage Professionals (ABMP, or collectively, “Applicants”) filed with the Office of Professional Regulation (OPR) an *Application for Preliminary Sunrise Review Assessment* (hereinafter, “Application”).

AMTA-VT is the Morrisville-based Vermont subsidiary of the national AMTA, a membership organization headquartered in Evanston, Illinois. The AMTA describes itself as “the largest non-profit, professional association serving massage therapists, massage students and massage schools. It is the most trusted and respected name in massage therapy.”¹

Headquartered in Golden, Colorado, ABMP is a membership organization that describes its function as “[s]upporting the largest community in massage and bodywork.”² The sale of liability insurance figures prominently in ABMP’s public presentation, and the organization publishes *Body Sense*, a quarterly trade magazine touting the benefits of massage. Both applicant organizations provide dues-based membership to qualified massage professionals, and both assist members in marketing their services by hosting prominent, online massage-therapist search tools that assist consumers in locating nearby member-providers.

I. Legal Standards and Analytical Structure

Vermont law sets clear policies and objective standards for legislative review of proposed licensing statutes. See 26 V.S.A. Chapter 57. In short, the law calls for a structured cost-benefit policy analysis of proposals for new professional regulation. The law places unambiguously upon the proponents of new regulation the burden to demonstrate the genuine necessity of that regulation to the protection of the public.

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. If regulation is imposed, the profession or occupation may be subject to periodic review by the legislature to insure the continuing need for and appropriateness of such regulation.

--26 V.S.A. § 3101 (emphasis added).

“Any new law to regulate [a] profession or occupation shall be based on the relevant criteria and standards in [26 V.S.A. § 3105].” *Id.* § 3102(c). “Prior to review ... and consideration by the General Assembly of any bill to regulate a profession or occupation,” OPR is to prepare for the Legislature a

¹ See <https://www.amtamassage.org/About-AMTA.html>.

² See <https://www.abmp.com/practitioners>.

preliminary, written assessment of whether a “request for regulation meets the criteria set forth in [26 V.S.A. § 3105(a)].” *Id.* § 3105(d). OPR “shall base its written preliminary assessment upon information contained in the request for regulation, oral comments received at the public meeting, written comments submitted after the public meeting, its own budget analysis, and any other information pertinent to the request.” CVR 20-4-1: 2.3.

Section 3105(a) provides:

(a) 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.

If and only if regulation of the profession is found necessary by the Legislature based upon the § 3105(a) criteria “and considering governmental and societal costs and benefits,” then “the least restrictive method of regulation shall be imposed, consistent with the public interest” and the policies set out at *id.* § 3105.

The law establishes five enumerated policies by which to identify the least restrictive regulatory response:

(1) if existing common law and statutory civil remedies and criminal sanctions are insufficient to reduce or eliminate existing harm, regulation should occur through enactment of stronger civil remedies and criminal sanctions;

(2) if a professional or occupational service involves a threat to the public and the service is performed primarily through business entities or facilities that are not regulated, the business entity or the facility should be regulated rather than its employee practitioners;

(3) if the threat to the public health, safety, or welfare including economic welfare is relatively small, regulation should be through a system of registration;

(4) if the consumer may have a substantial interest in relying on the qualifications of the practitioner, regulation should be through a system of certification; or

(5) if it is apparent that the public cannot be adequately protected by any other means, a system of licensure should be imposed.

-- 26 V.S.A. § 3105(b)(1)-(5).

Finally, Chapter 57 requires that proponents of new regulation explain ten factors judged by the Legislature to be relevant to sunrise analysis. These ten factors are substantially incorporated in the

sunrise review application form promulgated by OPR and completed by applicants for regulation. They are:

- (1) *Why regulation is necessary ...*
- (2) *The extent to which practitioners are autonomous...*
- (3) *The efforts that have been made to address the concerns that give rise to the need for regulation...*
- (4) *Why ... alternatives to licensure ... would not be adequate to protect the public interest...*
- (5) *The benefit to the public if regulation is granted...*
- (6) *The form and powers of the regulatory entity...*
- (7) *The extent to which regulation might harm the public...*
- (8) *How the standards of the profession or occupation will be maintained...*
- (9) *A profile of the practitioners in this state, including a list of associations, organizations, and other groups representing the practitioners including an estimate of the number of practitioners in each group.*
- (10) *The effect that registration, certification, or licensure will have on the costs of the services to the public.*

--26 V.S.A. § 3107 (omitting more descriptive subcategories).

II. History; Evaluation of Changed Circumstances

The Applicants previously have sought licensure for Vermont massage therapists. OPR conducted a preliminary sunrise review assessment in 2010 and concluded, “The statutory criteria for regulation of massage therapists have not been met.”³ The 2010 assessment noted that the Applicants’ efforts were part of a well-organized national lobbying effort aimed at achieving nationwide licensure for massage therapists by targeting outlier states with faux “grassroots” efforts that were in fact orchestrated outside Vermont and opposed by many of the proponent organizations’ own Vermont members.⁴ The 2010 assessment found that the Applicants had neither demonstrated real and recognizable harm to the public preventable by regulation, nor demonstrated that the public would benefit from the regulation proposed.⁵

³ Winters, C., *Massage Therapists, Preliminary assessment on Request for Licensure, Summary of Testimony and Evidence*, Docket No. MT-01-0710, December 30, 2010, p. 10 of 10; available at <https://www.sec.state.vt.us/media/411936/massagetherapistsunriserpt-2010-1230.pdf>.

⁴ *Id.*, pp. 2-3. This criticism appeared repeatedly among 2015 public commenters as well. One, an AMTA member, writes: “The Vermont legislature needs to be reminded that the move to impose licensing is part of a very large national organization’s agenda and NOT a grassroots effort to protect the public. Indeed, there is nothing the public needs protecting from in this regard.”

⁵ *Id.*, p. 10.

OPR “may decline to conduct an analysis and evaluation” of a proposal if “(1) the proposed regulatory scheme appears to regulate fewer than 250 individuals and (2) the Office previously conducted an analysis and evaluation of the proposed regulation of the same profession, and no new information has been submitted that would cause the Office to alter or modify” its earlier recommendations. *Id.* § 3105(e).

It does appear to OPR that the proposed regulatory scheme could regulate fewer than 250 individuals⁶; however, the Applicants have offered a reasonable basis to re-visit the propriety of regulation in view of the changing healthcare landscape. Specifically, the Applicants have asserted, “Therapeutic massage is a complementary and alternative treatment that is rapidly becoming integrated into the health care system⁷...Regulating massage therapy is needed to ensure consumers have access to integral health care services that are of a high quality and standard. Failure to regulate massage therapy imposes a barrier to health care.”⁸ Applicants also contend that the Affordable Care Act of 2010, at § 2706, guarantees insurance coverage for massage therapy services, but only if the State offers a license or certificate: “In short,” Applicants say, “any licensed or certified healthcare professional will be covered by insurance under the Act.”⁹

In view of (1) the increasing integration of complimentary providers into community-health-management health care models, and (2) the implementation of the Affordable Care Act, there is reason to conduct a re-analysis and re-evaluation of the Applicants’ proposal for new regulation, notwithstanding OPR’s adverse findings on the same topic in 2010.

III. Outreach and Hearings

To promote a fresh and objective look at the Applicants’ proposal, OPR attorneys and analysts involved in the 2010 sunrise analysis did not participate in the 2015/16 analysis.

Because massage and therapeutic-touch professionals are a diverse group represented only partially by the applicant organizations¹⁰, OPR conducted extensive outreach by electronic mail to hundreds of Vermonters known or suspected by the agency to have interests in the Applicants’ proposal. To reach likely spa operators, OPR employed lists of licensees of the Board of Barbers and Cosmetologists, and

⁶ Applicants estimate that 891 massage practitioners are active in Vermont. Application, p. 17 of 78. A more plausible estimate is found in the Bureau of Labor Statistics *Occupational Employment and Wages* survey of May 2014, which estimated that 360 Vermonters were employed as massage therapists. See, <http://www.bls.gov/oes/current/oes319011.htm#st>. From that number must be deducted the significant ratio of who would opt to be regarded by the proposed licensing statute as exempt bodyworkers. The AMTA’s massage-therapist finder, available at www.amtamassage.org/findamassage, identifies only 79 member therapists in Vermont, though the AMTA reports 193 active members. It is hypothesized that the difference arises from the optional nature of inclusion in the therapist finder. Because of the broad exemptions in the regulatory proposal, OPR estimates that slightly fewer than 250 actually would seek licensure, were the Legislature to enact the statutory language Applicants suggest, though we make this estimate with very low confidence in its accuracy.

⁷ Application, p. 8 of 78.

⁸ *Id.*, p. 11 of 78.

⁹ *Id.*, p. 12 of 78.

¹⁰ Accepting the AMTA’s 891-practitioner estimate, in combination with the 193 active members, leads to the conclusion that the organization’s members constitute fewer than 22% of Vermont massage therapists. Assuming the Bureau of Labor Statistics estimate preferred by OPR would raise the membership ratio to just under 54%.

the Applicants assisted by forwarding outreach letters to their member rosters. OPR created and publicized a dedicated webpage¹¹ publicizing the contents of the Application, explaining the sunrise review process, and inviting interested parties to public hearings on the proposal. OPR also created a dedicated email address to collect public comment, sos.opr.massagetherapists@sec.state.vt.us. We reached out to leaders on both sides of the 2010 debate and asked that they share our invitations to comment as broadly as possible, without regard to recipients' viewpoints.

We believe outreach was successful. Following months of public warning and outreach, two public hearings were convened in Montpelier, the first at 9:00am October 13, 2015, the second at 12:00pm October 29, 2015. The meetings were well attended¹² by a broad range of massage and bodywork professionals who appeared very well informed and who offered thoughtful and deeply-felt testimony as to their experiences and views of the regulatory proposal.

The timing of written commentary can offer a useful barometer of the effectiveness of outreach. Where outreach is incomplete, OPR tends to see late submissions by individuals who learned of a proposal by word of mouth. In this case, however, the address for written comment saw heavy input in July and August, with very few latecomers expressing surprise as the October hearings approached. We are comfortable that most interested Vermonters had a meaningful opportunity to be heard.

IV. Summary and Analysis of Arguments for and Against Regulation

Based upon information contained in the request for regulation, oral comments received at the two public hearings, written comments submitted, and independent legal and public health research, substantive arguments for and against regulation are identified and discussed in separate subcategories below. *Accord*, CVR 20-4-1: 2.3.

a. Prevention of Harm

In answer to the question, "What harm or danger to the health, safety, or welfare of the public can be demonstrated if the practice of [massage therapy] were to remain unregulated?" the Applicants posit that integration of massage into the health-care system places massage professionals in contact with individuals with medical conditions. Inadequately trained massage therapists, the Applicants contend, "are insufficiently educated to effectively treat many of these conditions, and they are often unaware that there are contraindications" to massage.¹³

The Applicants provide no evidence to support the premise that inadequately trained massage professionals in Vermont are providing massage where massage is contraindicated, providing massage in a manner that aggravates clients' medical conditions, or failing to refer clients to medical professionals for the diagnosis and treatment of medical problems.

Despite a strong incentive for proponents of massage regulation to identify Vermonters injured or aggrieved by the performance of unregulated massage therapy or other bodywork, the sunrise review could not identify any specific Vermont consumer harmed by unregulated massage. No consumers or

¹¹ <https://www.sec.state.vt.us/professional-regulation/sunrise-review/massage-therapists.aspx>

¹² Twenty-five individuals signed in to the first meeting; twenty-eight to the second. A small number likely participated without signing in. Approximately half of the attendees at the second hearing had attended the first.

¹³ Application, p. 8 of 78.

consumer-advocacy organization wrote or appeared in favor of regulation. Three non-practitioner consumers of massage services offered written comments, and all three were strongly opposed to regulation, each arguing that it would create pointless and burdensome bureaucracy that was apt to drive practitioners upon whom they rely out of the marketplace.

One hearing participant relayed a troubling story of an unnamed chiropractor hiring untrained “massage therapy” personnel for \$10/hr, providing no training, and tasking the untrained personnel with performing deep-tissue massage, resulting in injury to a client’s ribs. Chiropractors are licensed in Vermont. If true, the described conduct likely would be actionable as unprofessional conduct by the subject chiropractor, pursuant to 3 V.S.A. § 129a(a)(6) (prohibiting inappropriate delegation of professional responsibilities), among several other provisions.

Academic and medical research on the safety and potential harms of massage therapy is scarce, but what credible research can be found tends strongly to suggest massage therapy is very safe.

In a cross-sectional study of 100 massage therapy clients, a group of chiropractors and massage therapists found that “[t]he most common complaint was increased discomfort or soreness ... last[ing] 36 hours or less.” “No major side-effects occurred during the study.”¹⁴

A researcher performing computerized literature searches found only thirty-one published reports of massage-related injury anywhere in the world.¹⁵ As one might imagine, cases tended to be peculiar and included injury from deep-tissue massage of the abdomen; injury by a therapist pressing an elbow into a patient’s arm until it impaired the function of a nerve; spouse-on-spouse injury caused by walking on a back; and the like. The majority of the exotic cases reported nevertheless resulted in full recovery, with the unfortunate exception of a woman strangled to death in her bed by an electric massage device that entangled her blouse. While noting serious methodological limitations, the researcher concluded, “Considering the popularity of massage therapy, the number of reported adverse events seems minute ... [M]assage by non-professional and forceful techniques like shiatsu, urut and Rolfing are relatively often associated with adverse events ... The incidence of adverse events is unknown, but probably low.”¹⁶ Finally, a researcher studying reported cases of significant injury secondary to massage between 1965 and 2003 found only eleven cases among 12 million citations, and corroborated this finding of remarkable safety with liability insurance data demonstrating that a vast majority of claims on massage therapists’ policies resulted not from massage malpractice but from ordinary slip-and-fall-type incidents within and around providers’ offices.¹⁷

Professional liability insurance is readily available to massage therapists for \$100 to \$200 annually. This is consistent with the findings in the 2010 sunrise review and indicates an exceptionally low claims risk.

¹⁴ Cambron, Dexheimer, Coe, & Swenson: “Side-Effects of Massage Therapy A Cross-Sectional Study of 100 Clients”; *The Journal of Alternative And Complimentary Medicine*, V. 13, No. 8, 2007, pp. 793-796.

¹⁵ Ernst, E.: “The safety of massage therapy”; *Rheumatology*, 2003, pp. 1101-1106.

¹⁶ Ernst’s tentative conclusion that “Serious adverse effects were associated mostly with massage techniques other than ‘Swedish’ massage” contrasts awkwardly with the instant proposal, which would regulate traditional Swedish massage but not the alternative techniques that appear relatively—though still trivially—more dangerous.

¹⁷ Grant, K.E.: “Massage safety: injuries reported in Medline relating to the practice of therapeutic massage—1965-2003.” *Journal of Bodywork and Movement Therapies*, V. 7, No. 4, September 10, 2003, pp. 207-212.

In the main, the harms identified by the sunrise process tended to be of the most remote and speculative type, all resting on the supposition that formal education, overseen and verified by the government, is necessary to prevent massage professionals from doing things like massaging open wounds or broken bones, pressing upon the carotid arteries of clients, strangling clients' by the neck, or massaging with such force as to break the xiphoid process of the ribcage or the styloid process of the skull.¹⁸ Fortunately, no evidence was found that such harms actually are occurring in Vermont's unregulated marketplace for professional massage. Also speculative is the supposition that massage education mitigates the risk that an individual devoid of common sense might injure a client in the ways Applicants fear. It emerged at the public hearings that some massage schools that would be recognized gatekeepers under the proposed regulatory regime offer exclusively-online education in anatomy and physiology, with no clinical verification of proficiency.

No evidence was offered or found to show that graduates of formal massage programs are more familiar with human anatomy and physiology than massage professionals who enter the profession through apprenticeship or self-study. No evidence was offered or found to show that graduates of formal massage programs injure clients at a lower rate than massage professionals who enter the profession through apprenticeship or self-study. No evidence was offered or found to show that professional massage therapists and bodyworkers in states with licensing regimes injure clients at a lower rate than their counterparts in states without licensing regimes. The absence of a demonstrable safety gradient between those with and without formal training should be unsurprising, though, because the underlying activity is fundamentally non-dangerous.

b. Assurance of Competence

Regulation may be an effective means of assuring consumers of a practitioner's initial and continuing competence. Proponents of massage regulation point out that the absence of government regulation deprives consumers and referring healthcare providers of an important means of verifying baseline competence.

But the necessity of such assurance is dubious. Assurance by the government, in the form of a license, is particularly important where the consequences of incompetence are substantial and irreversible. As above, the harms occasioned by an incompetent massage generally are transient and eminently repairable.

Licensure is an important social tool where information asymmetry between consumer and provider renders reliance on marketplace indicators of competence unacceptably risky or slow, placing the consumer at a distinct disadvantage. For example, personal experience and experimentation is a poor and possibly fatal way to discover that one's surgeon, dentist, or x-ray technician is not up to the task. Structural engineers whose buildings collapse surely will be identified by the marketplace and dealt with by the tort system, but only after bridges have fallen and lives have been lost. Land surveyors who cannot locate a boundary line may cause million-dollar litigation or impair the marketability of property decades after the fact. Tattoo artists may be driven out of the marketplace after transmitting hepatitis or disfiguring clients, but epidemics take time to detect, and *post hoc* punishment will not cure affected clients. Vermont licenses these dissimilar professions for one consistent reason: the costs of

¹⁸ See, e.g., Application, pp. 8-11 (setting out potential injuries).

encountering incompetence in the unregulated marketplace are substantial, unacceptable, and unjust to those bearing them.

Massage therapy is quite different from medical practice, engineering, land surveying, and tattooing, because critical information about the quality of the massage service is immediately and symmetrically available to the client. The client knows almost everything the provider knows about how things are going, and knows it in the moment. In stark contrast with the overwhelming majority of regulated professions, the massage client may in fact be in a *superior* position to the provider¹⁹ in terms of making an accurate, contemporaneous assessment of quality. A client is apt to detect incompetent massage in the form of discomfort or the absence of relief. Incompetent practice may cause annoyance and inconvenience but rarely or never causes latent harm greater than bruising or transient soreness.²⁰ The primary benefit of massage is the immediate, subjective perception of relaxation, comfort, and relief by the conscious client. If the client does not attain these subjective states contemporaneous to the provision of the professional service, he may terminate the service. For these reasons, the nature of professional massage makes it comparatively more susceptible to efficient, natural, timely regulation by the competitive marketplace, and comparatively less susceptible to substantial quality improvement through regulation.

To the extent an individual or referring healthcare provider may wish to verify in advance the qualifications of a practitioner, the Applicants' online therapist search tools provide an excellent means. For example, a search of the [massagetherapy.com](http://www.massagetherapy.com) tool administered by ABMP allows anyone with an internet connection to identify nearby therapists by specialty, and to distinguish which is ABMP certified. As the tool itself explains, every practitioner listed is thoroughly vetted:

The therapists listed on Massagetherapy.com's Referral Service are all eligible members of Associated Bodywork & Massage Professionals (ABMP). ABMP requires and verifies that each therapist accepted for membership at the Certified, Professional, or Practitioner level has graduated from an approved massage training program and achieved all state certification/licensing requirements and/or met ABMP's eligibility requirements. Each ABMP member agrees to abide by ABMP's Code of Ethics.

-- <http://www.massagetherapy.com/find/> (hyperlinks removed).

No health care professionals other than massage therapists attended the October public hearings, but several were solicited by the Applicants to write letters explaining their hopes for regulation. Typical of these is the argument of a UVM Medical Center medical sociologist that "it would be a tremendous help to have a basic standard of training assured through a statewide regulatory process to help health care facilities, such as ours, hire qualified therapists."²¹ Similarly, a physical therapist opined, "Standardized training helps us to understand the knowledge and skills of the licensed massage therapist."²²

A health care provider wishing to verify the qualifications of massage therapists to whom he or she refers patients easily can do so using credible, third-party referral and certifying services, by collecting

¹⁹ And certainly, to the government.

²⁰ Fn. 14, *supra*.

²¹ Application, p. 60 of 78: Letter of Janet R. Kahn, PhD, LMT. Use of *LMT* in the author's signature line offers a reminder that one easy way for massage therapists to legitimately use such a moniker is to obtain the same from any of the forty-five states offering one, none of which has a residency prerequisite.

²² Application, p. 63 of 78: Letter of Lynn Troy, MS, PT.

resumes and transcripts from formally educated massage professionals wishing to receive referrals, or simply by recommending to patients that they seek massage professionals with particular formal training.

As the AMTA explains:

Massage therapists may choose to become board certified in massage therapy. The board certification is administered by the [National Certification Board for Therapeutic Massage and Bodywork](#) (NCBTMB). Individuals who meet standards of education, training and/or experience and pass the examination are entitled to use the designation Board Certified in Therapeutic Massage and Bodywork and its initials, BCTMB. Board certification indicates that these massage therapists possess skills, abilities, knowledge and attributes to practice, as determined by the National Certification Board.²³

The sunrise review revealed no evidence of massage professionals pretending to certifications or educational qualifications they do not possess. Were it to occur, fraudulent misrepresentation of education, training, and experience most likely would be actionable under the existing Vermont Consumer Fraud Act, 9 V.S.A. § 2453.

In a sense, health care-provider appeals for massage therapist licensure illustrate a degree of moral hazard inherent to government licensure: the dominant reason institutions and referrers wish to see massage therapists licensed is that they feel licensure would relieve them of responsibility and accountability for whom they are referring and hiring. To the extent providers may wish the government to excuse them from responsibility for referral and hiring by legislating credential-based fungibility throughout the professional ranks, it is not clear that granting the wish would serve the public.

c. Enhanced Professional Esteem; Acceptance; and Marketability

Possibly the most common argument heard from massage professionals who favor regulation is that licensure will enhance public esteem for the profession. This sentiment is expressed as the hope that licensure will “elevate” the profession, will signify acceptance, or will bring the profession into the mainstream of therapeutic services. Proponents reason that the imprimatur of state approval may confer dignity and seriousness and thereby encourage more consumers to try professional massage services.

The sunrise criteria set out in Chapter 57 of Title 26 do not countenance regulation for the purpose of legitimation. And among the scores of outstanding massage professionals who participated in the sunrise process, we detected no deficit of dignity, seriousness, or legitimacy. Participants for and against regulation exhibited justified pride in their work; demonstrated self-directed interest in continuous learning and improvement; derived great personal satisfaction from bringing safe and effective relief to clients; and understandably hoped that more consumers would try and therefore benefit from professional massage.

²³ See <https://www.amtamassage.org/findamassage/credential.html>. More information about the National Certification Board for Therapeutic Massage and Bodywork is available at <http://www.ncbtmb.org/ncbtmb-faq#why-was-ncbtmb-created>.

Among the sample of massage therapists who participated in the sunrise hearings, certain demographic patterns appeared. Esteem-based appeals for licensure tended to come from younger massage therapists with more formal education, and tended to be accompanied by concern that the State would stand by and allow downmarket competition from individuals without formal education. Older and more established practitioners tended to oppose regulation. The latter group were less concerned about unregulated marketplace competition because they had encountered it and thrived.

Interestingly, Bureau of Labor Statistics data tend to falsify the premise that licensure makes massage therapy more appealing to the public.²⁴ Vermont is the only New England State that does not regulate massage therapy. But far from discouraging the provision of professional massage, this characteristic correlates remarkably with *increased* massage therapy employment by comparison to our regulated neighbors. New England and New York employment-per-1,000 ratios are: (1) CT, 0.71; (2) RI, 0.45; (3) MA, 0.45; (4) NH, 0.53; (5) ME, 0.44.; (6) NY, 0.47; (6) VT, 1.20.²⁵

Non-regulation also does not correlate with depressed earnings by massage therapists. Although Vermont is conspicuous for employing twice as many massage therapists by ratio as its regional neighbors, massage-therapist annual mean wages in Vermont are the highest in New England, excepting Massachusetts, where outlying Boston wage scales bring the state median annual wage only \$1,280 higher than Vermont's \$50,000. Our neighbors in New Hampshire license massage therapists based upon a 750-hour minimum-formal-training requirement and certification by the National Certification Board of Therapeutic Massage and Bodywork.²⁶ New Hampshire requires continuing education to maintain licensure. Yet New Hampshire employs fewer than half as many massage therapists as Vermont by ratio, and at \$37,630, regulated New Hampshire massage therapists earn an average \$12,370 less annually than unregulated Vermont massage therapists.

Federal employment data fail to support the premises that regulation (a.) encourages public acceptance of massage or (b.) improves earnings by massage therapists. In fact, Vermont massage therapists clearly outperform their regulated regional peers in terms of generating demand for services and individual earnings.

d. Promotion of Ethics and Prevention of Crime

Proponents of regulation hope that licensure might deliver the profession from an unfortunate historical association with illicit sex work. Additionally, proponents hope licensure might prevent or provide a means to address inappropriate boundary transgressions by massage providers.

The sunrise process did not identify any Vermonter who sought legitimate massage but found himself or herself offered undesired sexual services, though one participant suggested such a scenario may have been the manner in which a suspected Colchester brothel came to be raided in early October.²⁷ Another participant relayed a third-hand story about a Caledonia County resident allegedly placing signs in a

²⁴ Fn. 6, *supra*; see <http://www.bls.gov/oes/current/oes319011.htm#st>.

²⁵ *Id.*

²⁶ See <http://www.dhhs.nh.gov/OOS/blc/massage/index.htm>.

²⁷ See Dover, Haley: "Colchester: Police, Homeland Security Investigating Spa," Burlington Free Press, October 5, 2015, available at <http://www.burlingtonfreepress.com/story/news/crime/2015/10/05/colchester-police-homeland-security-investigating-spa/73396156/>.

roadway defaming a local massage therapist with the suggestion that the therapist's services were sexual in nature.

To be sure, massage is unique among professional activities because it places providers behind closed doors with clients who are in a state of partial or complete undress.²⁸ For this reason, the “massage parlor” is an infamous front for prostitution, sexual exploitation, and human trafficking. In response, massage professionals have developed codes of conduct and standards of ethics expressly disallowing sexual misconduct. The AMTA, for example, promulgates and expects of its members compliance with *Principles of Ethics* and *Rules of Ethics*.²⁹ These include commitment to excellence, non-discrimination, respect for client privacy, and “[r]efrain[ing] from engaging in any sexual conduct or sexual activities involving their clients in the course of a massage therapy session.”³⁰

In Vermont, the criminal justice system is amply empowered to deter and punish sexual assault, prostitution, assignation, lewdness, and human trafficking. Any person who “engage[s] in a sexual act with another person and compel[s] the other person to participate ... without the consent of the other person” is guilty of sexual assault in violation of 13 V.S.A. § 3252(a) and may receive an indeterminate life sentence of incarceration pursuant to *id.* § 3271. “A person who attempts to commit” sexual assault “and does an act toward the commission thereof, but by reason of being interrupted or prevented fails in the execution ... shall be punished as the offense attempted to be committed is by law punishable.” *Id.* § 9(a). Where one occupies a place, structure, or building for the purpose of prostitution, lewdness, or assignation; or knowingly permits a place or building or conveyance under his ownership to be used for those purposes; or transports a person for those purposes; or aids or abets those purposes “by any means whatsoever,” he may be imprisoned for one year for a first offense and three years for a second offense. 13 V.S.A. § 2632. A person who “accept[s], receive[s] or lev[ies,] or appropriates money or other valuable thing[s] from the proceeds or earnings of a person engaged in prostitution” is regarded by Vermont statute as having engaged in slave traffic and “shall” be imprisoned not more than 10 years nor less than one year for each offense. 13 V.S.A. §§ 2637, 2635. There is no reason to believe criminal actors willing to risk the existing threat of imprisonment for decades or the remainder of their natural lives will be deterred by the threat of administrative licensing actions.

Hearing participants of all views generally agreed on the significant practical limitations on the administrative state's ability to act against unscrupulous or criminal conduct behind closed doors, or between consenting adults.

Finally, although the Applicants' regulatory proposal is described as a licensure program,³¹ it is critical that policy makers understand the *de facto* effect of the proposal would not be genuine licensure—restricting the performance of an act to a class of approved licensees—but rather the protection of a marketing title through certification.³² The Applicants' 2010 licensing proposal met broad resistance

²⁸ Application, p. 12 of 78.

²⁹ See <https://www.amtamassage.org/About-AMTA/Core-Documents/Code-of-Ethics.html>; Application, p. 40 of 78.

³⁰ *Id.*

³¹ “‘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.” 26 V.S.A. § 3101a(2).

³² “‘Certification’ means a voluntary process by which a statutory regulatory entity grants to an individual, who has met certain prerequisite qualifications, the right to assume or to use the title of the profession or occupation, or

from Vermont's diverse community of bodywork practitioners and alternative healing arts providers, because it threatened to put them out of business unless they hewed to what they saw as a narrow, traditional, and homogenized model of what constitutes massage. To their credit, the Applicants responded to these insuperable concerns by proposing a broad exemption in their 2015 statutory proposal:

Nothing in this article prohibits or requires a massage therapy license for ... [p]ersons providing alternative methods that employ contact or touch and do not hold himself or herself out as a massage therapists," including without limitation "reflexology, the Feldenkrais method, the Trager approach ... body-mind centering ... reiki, shiatsu, touch for health kinesiology ... Asian or polarity bodywork therapy ... [s]tructural integration practices such as Rolting and Hellerwork[,] and ... muscle activation techniques.³³

This tended to pacify critics of the 2010 proposal, but at a distinct cost to potential regulatory efficacy.

Consequent to the vague definition of *massage therapy* and the broad exemptions to licensure requirements necessary to win acceptance from the bodywork community, an unethical, unscrupulous, or criminal actor could avoid any accountability to regulators under the proposed statute simply by identifying his practice by words other than *massage therapy*. Indeed, OPR could revoke the license or deny the application of a massage therapist for any number of serious reasons, and nothing in Vermont law would prohibit the subject of such revocation or denial from going immediately into business as a practitioner of an alternative method. This characteristic of the proposed regulatory regime means there is much less practical protection in the proposed regulation than meets the eye, and could in fact lead consumers and referrers to unwarranted confidence in the security afforded by the appearance of a massage-therapy license.

e. Integration into the Medical System; Access; the Affordable Care Act

The Applicants contend, "Regulating massage therapy is needed to ensure consumers have access to integral health care services that are of a high quality and standard. Failure to regulate massage therapy imposes a barrier to health care."³⁴ Proponents of regulation contend that a non-discrimination provision in Section 2706 of the Federal Affordable Care Act of 2010³⁵ effectively guarantees that massage services must be covered by health insurance, but only in states where massage therapy is regulated.³⁶ Applicants say, "In short, any licensed or certified healthcare professional will be covered by insurance under the Act. Absent licensing or certification of massage therapists, patients cannot access insurance coverage and therefore must have other financial resources to seek such care- a significant barrier to patient access of an important treatment option. The benefits of regulating massage therapy are clear."³⁷

the right to assume or use the term 'certified' in conjunction with the title. Use of the title or the term 'certified,' as the case may be, by a person who is not certified is unlawful. 26 V.S.A. § 3101a(1).

³³ Application, pp. 73-74 of 78.

³⁴ Application, p. 11 of 78.

³⁵ The Patient Protection and Affordable Care Act, PL 111-148, March 23, 2010, 124 Stat 119.

³⁶ Application, p. 13 of 78.

³⁷ *Id.*

Concern about health care integration and insurance coverage most distinguishes the 2010 sunrise application from the 2015 sunrise application. For that reason, OPR specifically asked participants in the sunrise process to focus on ACA and access-to-care issues. OPR considered that it may be necessary to define *harm*, which is not expressly defined in Chapter 57, more broadly than simply as affirmative injury or damage, to include failure to realize optimal social benefits available from licensure. In this respect, we considered that lack of insurance coverage or access to care could represent a *harm* for sunrise purposes.

The relevant ACA provision, now codified at 42 U.S.C.A. § 300gg-5, provides:

(a) Providers

A group health plan and a health insurance issuer offering group or individual health insurance coverage shall not discriminate with respect to participation under the plan or coverage against any health care provider who is acting within the scope of that provider's license or certification under applicable State law. This section shall not require that a group health plan or health insurance issuer contract with any health care provider willing to abide by the terms and conditions for participation established by the plan or issuer. Nothing in this section shall be construed as preventing a group health plan, a health insurance issuer, or the Secretary from establishing varying reimbursement rates based on quality or performance measures.

The Applicants' assertions grossly overstate the effect of the ACA on access to massage therapy.³⁸ Although the excerpted section prohibits insurers from excluding from coverage any specific subcategory of health care provider capable of providing a covered health care service within his or her scope of practice, nothing about the ACA requires that health insurers cover services that are not medically necessary.

The proposition that all massage providers will be covered by insurance if licensed—though widely believed among proponents of regulation—is legally dubious to the extent it is not simply false. A more prudent interpretation of the relevant text is that, *in those circumstances where massage is medically necessary to the treatment of an illness or its symptoms such that massage by any provider would be covered by an insurance plan*, the absence of state regulation plausibly may allow a health plan to exclude competent massage therapists from coverage while still covering massage therapy by a medical doctor, registered nurse, chiropractor, or other licensed professionals acting within his scope of practice.

The ACA does not mandate coverage of massage at all. What it does is provide that *where massage or any other health care modality already is covered*, insurers may not arbitrarily exclude state-certified providers capable of performing the task within their scopes of practice.

Importantly, insurers are, and always have been, free to cover all manner of services found to be effective at community health management. For example, no mandate compels insurers to subsidize

³⁸ Understandably. Internet message boards and trade magazines dedicated to complementary and alternative medical services are littered with wishful thinking, folklore, and outright deception about the import of the ACA. In fact, the excerpted provision is unaccompanied by any provision for enforcement, and the United States Department of Health & Human Services has declined repeated invitations to wade into the political rapids with a clarification, asking insurers simply to implement the provision in good faith. OPR's independent research finds nothing in the Act ordaining that massage is *per se* an essential health benefit or otherwise medically necessary, and we find no reason to expect more insurance coverage of massage after the ACA than before it.

their insureds' gym memberships, or yoga classes, but many do because promoting health among the insured tends to reduce morbidity and therefore to reduce claims. If the Applicants' claims of broad community health benefits and cost savings from massage are borne out in practice, massage therapists have nothing to fear from insurance discrimination, because exclusion by insurers would be fundamentally irrational even if legal.

Unregulated Vermont massage therapists could be arbitrarily excluded from insurance coverage where they otherwise would be protected by 42 U.S.C.A. § 300gg-5 if state-regulated. But according to consistent testimony at the sunrise review hearings, the prevailing compensation for one hour of massage therapy is approximately \$60-75/hr and may be lower where insurers exert their considerable bargaining leverage against massage therapists, as worker compensation insurers have. Although an insurer notionally could refuse to cover massage therapy provided by massage therapists while covering the same service at the hands of a more expensive provider, insurers have every reason to contract with massage therapists, with or without a federal law prohibiting their arbitrary exclusion.³⁹

Although several proponents of licensure felt they could not “get a foot in the door” to receive medical referrals, and attributed this to the absence of regulation, no participant in the sunrise process claimed to have been denied insurance reimbursement that would have been available to another health care provider performing massage. Many vocal opponents of regulation reported working with health insurers for years. We heard pointed criticism of the regulatory proposal from a highly experienced massage therapist in the employ of a prominent Vermont cancer center. In written commentary, the same individual, who appeared to have the most extensive experience among all commenters working directly in a health care setting, commented: “My resume, references, experience were perfectly adequate for bringing me on board. I am now in my fourth year at the [cancer center]. They are happy and I am happy. Not having a Vermont license has never been an issue ... the bottom line remains the same: that the public is not being harmed with the present un-regulated state of affairs.”

Claims that the absence of regulation prevents reimbursement appear purely notional at this juncture, and most appear to rest upon inaccurate folklore about the ACA.

f. Homogenization and Medicalization

Opponents of regulation express concern that the proposed regulatory regime unjustifiably privileges a narrow and traditional form of massage over the scores of diverse bodywork subspecialties practiced safely in Vermont for decades. Opponents noted that high-pressure, high-intensity practices such as Rolfing and shiatsu would be expressly exempt from licensure while light-touch practices such as craniosacral therapy are not as clearly exempt.⁴⁰ More established practitioners tended to dislike overt efforts to “clinicalize” and “medicalize” practices they viewed as more art than science.

The potential for direct homogenization of bodywork practices is much less troubling in the 2015 application than it was in the 2010 application, because the more recent proposal includes a broad

³⁹ Notably, the same statute expressly does not require take-all-comers contracting, and expressly permits differential compensation among providers based on quality or performance. All-provider participation is not guaranteed, nor is an acceptable rate of compensation.

⁴⁰ OPR's preliminary understanding of the proposed exemption, found at Application p. 73 of 78, is that craniosacral therapy *is* exempt from licensure so long as the provider does not describe the practice as massage.

exemption, described above in pp. 11 & 12, excepting from licensure “[p]ersons providing alternative methods that employ contact or touch and do not hold himself or herself out as a massage therapist.”⁴¹ One may nonetheless question whether there is any evidence to justify extending the imprimatur of State approval to classical massage and the specific “mainstream” massage modalities countenanced by the Applicants⁴², while denying similar recognition to other therapeutic-touch providers, presumably placing the latter at a legislated competitive disadvantage in the broader marketplace, if only by effectively prohibiting them from describing their services as massage.

g. Expense and Regulatory Burden

Opponents of regulation express that the proposed regime raises expensive barriers to entry to a profession that can be—and historically has been—accessed by self-study and apprenticeship, and does so in the absence of evidence that regulation improves safety or efficacy. Opponents of regulation expressed concern that the cost of entry-level massage therapy education can run from \$7,000 to \$15,000, hindering entry to the profession by persons of limited means.

A well-established Washington County massage therapist explained that he entered the profession through apprenticeship and self-study because he did not have the means or time to enroll in a formal program. He has since found massage therapy a rich and fulfilling career. Aware that he would be protected by the grandfathering provision in the proposed regulation, the therapist commented that he was not concerned for himself, but deeply concerned for young people in similar starting positions to his, who under the proposed regime would find it much more difficult to enter the marketplace and succeed based on merit.

An in-built deficiency in the sunrise process is that it is susceptible to participation only by individuals presently aware of their interests in the subject field. The parties most heavily burdened by the proposed massage therapy regulation, however, may not yet have graduated high school. A primary effect of occupational regulation is to raise significantly the costs of entering the profession by demanding expensive formal prerequisites.

In the case of massage therapy, the unregulated *status quo* makes it notionally possible for a young person of limited means, or an individual seeking a mid-career change, to enter the profession without incurring significant expense or debt, by identifying and apprenticing under an experienced massage professional and then competing in the marketplace on the basis of merit and referral. The proposed regulation would end that avenue—which is highly valued by some experienced practitioners, and which likely has contributed to the rich diversity of bodywork practice in Vermont—and instead channel aspiring massage therapists into a structured system with up-front entry costs easily exceeding \$10,000, replete with non-dischargeable student loans and high sunk-cost risks for those who may begin training they are unable to complete.

Incumbent practitioners will be grandfathered; alternative practitioners will be exempted; it is the young and the new who stand to incur the greatest expense from regulation, and they cannot be heard in the sunrise process because they will not become aware of the burdens of regulation for years to come.

⁴¹ Application, p. 73 of 78.

⁴² Which are, according to the limited research available, the safest types. See fn. 15 & 16, *supra*.

V. Application of Statutory Criteria

Applying the policy set out by 26 V.S.A. § 3101, there is not a demonstrated need for the State to protect the interests of the public by restricting entry into the profession of massage therapy.

The Applicants have not shown “that the unregulated practice” of massage therapy “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.” 26 V.S.A. § 3105(a)(1). The available evidence shows that massage is remarkably safe and requires no particular training to ensure safety. The potential for harm proffered by the Applicants is remote, speculative, and unsupported by real-world data. Proponents of regulation worry that inadequately trained massage professionals may injure patients in a variety of ways that would require disregard of common sense and tolerance by clients of distinctly uncomfortable and unlikely practices. What academic literature is available on the topic of massage safety tends to show that a Vermonter is more likely to be injured walking into or about a massage therapist’s office than he is to be injured by a massage.

The Applicants have not shown that the public can “reasonably be expected to benefit from an assurance of initial and continuing professional ability.” *Id.*, §3105(a)(2). Professional incompetence by a massage therapist presents little risk of harm and generally can be identified immediately by the client. Where a massage professional is incompetent, that incompetence generally is manifest to the client in the form of temporary discomfort, easily brought to an end.

Massage therapists consistently report that referrals from existing clients are their dominant means of encountering new clients, suggesting that the competitive marketplace is working well to match consumers with qualified practitioners. It is unnecessary for the government to assure initial and continuing professional ability where deficiencies in competence present little risk and where a competitive, referral-based marketplace enables even a relatively naïve consumer to distinguish competent practitioners from their less competent peers.

The unregulated marketplace for massage and bodywork services is flourishing in Vermont. Those massage consumers who offered public comment during the sunrise process unanimously opposed regulation of the profession. Federal labor statistics show that Vermont employs more than twice as many massage therapists per capita than its regional neighbors, all of whom regulate the profession. Vermont massage therapists earn more than their counterparts in all the New England states except Massachusetts. Vermont massage therapists make 25% more annually than their counterparts in New Hampshire, where massage is tightly regulated and far fewer massage therapists are employed per-capita.

The applicants have not shown that “the public cannot be effectively protected by other means.” *Id.*, § 3105(a)(2). There appears little risk of harm from which to protect the public. Further, because the statutory language proposed necessarily exempts from licensure alternative providers who are careful not to use the term *massage therapy*, the statutory proposal sums to little more than a protected-title regime, leaving the State to police who calls himself a massage therapist, but without authority to reach unscrupulous or dangerous actors who do not self-identify as massage therapists.

Marketplace competition, non-governmental certifications, and Vermont's stringent criminal laws respecting sexual exploitation and human trafficking work together to protect the public from massage-related risks, big and small, ordinary and extraordinary, in a manner that is not only effective but superior in efficacy to anything that might be expected from administrative licensing regulation.

To the extent potential harms exist in the form of incompetence or inadequate training, Vermont's tightknit communities and culture of word-of-mouth referral have served very well to mitigate these risks by connecting consumers with competent, respected, caring massage professionals. Marketplace competition is working well to ensure that massage professionals succeed or fail based on merit. Consumers and referring health-care professionals who wish to vet potential massage therapists based on formal training easily can do so using a variety of online tools, including massage-therapist search tools and certification identifiers administered by the Applicants on behalf of their member massage therapists.

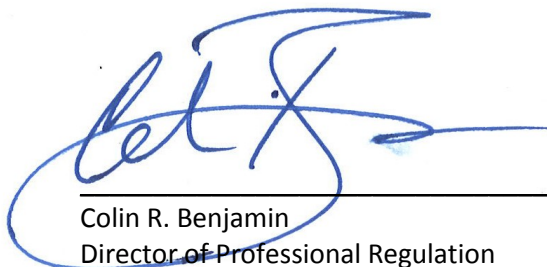
The absence of governmental regulation in no way prohibits those massage therapists who wish to obtain formal education or certifications from credible non-governmental organizations from doing so and marketing their services on that basis. Likewise, the absence of governmental regulation does not prohibit health care institutions from setting their own hiring or referring standards, such as requiring a transcript from a massage school or requiring any number of non-governmental certifications of competence.

For the foregoing reasons, the request for regulation does not meet the criteria set forth in § 3105(a). The least restrictive method of regulation consistent with the public interest is no regulation.

OPR recommends that the Legislature continue to monitor carefully the rapidly changing health care landscape generally, and the implementation of the Affordable Care Act particularly, with an eye toward implications for occupational licensing; however, no reason is found at this time to recommend regulation of massage therapists as a necessary means of facilitating access to massage as a professional service or otherwise protecting the public.

Respectfully submitted to the House and Senate Committees on Government Operations.

STATE OF VERMONT
SECRETARY OF STATE
OFFICE OF PROFESSIONAL REGULATION



Colin R. Benjamin
Director of Professional Regulation

January 5, 2016

Date