

A Review of Issues in Massage Governance

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Executive Summary

While this paper mainly discusses the governance of the therapeutic use of massage, it starts out motivating the contexts of such use. The staggering social and economics costs of workplace and life stress urge the use of massage to ameliorate such stress. Issues of stress-management can effectively be addressed economically and therapeutically by basic massage requiring only 100-150 hours to learn. Because there is no documented evidence of any pattern of significant or lasting harm from massage, the ability to provide benefit to clients forms a sufficient criterion for entry into the profession. Because of the pervasiveness and high costs of unaddressed stress, agencies over regulating massage in a manner that discourages its availability and/or increases it's cost, are inadvertently acting in a manner detrimental to the public health, welfare, and quality of life. Moving beyond the amelioration of stress, massage techniques have responded to social trends towards serving a simultaneously "graying" population and one with greater overall exercise participation and greater involvement of girls and women in such participation.

Within California, the power to govern the therapeutic practice of massage has been delegated to local agencies. This delegation has included specific delegation via Government Code Sections 51030-51034 [[Appendix A](#)] and implicit delegation via the "home rule" powers of charter cities and counties derived from Article 11, Section 5(a) of the State Constitution [[Appendix B](#)]. Unfortunately, such local agencies have shown little inclination to regulate therapeutic massage as a personal and health care trade and profession.

In order to be exempted from onerous and inconsistent local regulations focused on control of massage parlors, many practitioners of therapeutic massage have considered pursuing state occupational regulation of massage. State legislative intent for such regulation, as encoded in sunrise and sunset review practices, considers the purpose of such regulation to be protection of the public from harm that is apparent and not remote and stemming directly from the practice of the profession itself. Since the practices of massage have been repeatedly assessed by a number of review agencies to be nonharmful, a conclusion supported by extremely low rates for liability insurance claims, therapeutic massage does not meet this hurdle [[4](#), [22](#), [24](#)]. Moreover, there are state requirements for demonstration that the proposed occupational regulation is both necessary and that there are not less invasive sufficient remedies.

The majority of proposals for state massage regulation have looked only at licensing by practice acts. The less invasive option of creating exemptions for massage therapists by an implicit or explicit title act has largely been ignored. The Colorado massage parlor law is an example of an implicit act in its definition and exemption of the profession of massage therapist based on a criterion to be used by local agencies in evaluating applicants [[15](#)]. The local evaluation implied by such an act could also be moved to an independent private agency that both verifies an applicant's documentation and provides consumer protection via complaint tracking in a

manner similar to the Better Business Bureau. Alternatively, an explicit title law could be used, moving such functions to a state agency. Title acts and practice acts both can address issues of definition of an allowable scope of practice. Unlike a title act, a broad allowable scope of practice defined in a practice act stands to restrict synergistic unlicensed practices. Given the numerous touch, movement and energy based therapies in use and being developed, explicit exclusion of such practices has become increasingly problematic and contentious[27].

Apart from the moot issue of harm via technical incompetence, there still can be concerns about unethical exploitation of the professional relationship with clients. Unfortunately, such ethical abuses are prevalent among the licensed health professions, indicating that consumer protection is not a matter of training but of following complaints and enforcing disciplinary actions. Moreover, boards of professional peers appear less effective in taking appropriate action than might be hoped. A 16 June 1998 ABC News report noted that "40% of physicians punished for sex offenses continue to practice" [14]. The same report quoted Minneapolis psychologist Gary Schoener in saying "You've got some real clever predators out there. You have to be smart to get through medical school." **If issues of harm from mal intent are sufficient to motivate state regulation of therapeutic massage, strong consideration should be given to establishment of an independent board under the Department of Consumer affairs.** Since the issues are ethical rather than technical, such a board could both provide better consumer protection and substantially reduce costs by serving multiple complementary and alternative professions.

Proposals for regulation often contain entry criteria that are arbitrary in terms of educational basis and public benefit – essentially a syndrome of requiring some number of "round hours" without basis of needed content or ultimate benefit to the consumer. These do not constitute "standards" in that they neither set particular performance criteria for practice nor provide a necessary and sufficient means by which criteria could be implemented and measured. Instead, they simply set hour requirements as arbitrary hurdles. Although the NCTMB (National Certification in Therapeutic Massage and Bodywork) process administers a psychometrically valid exam, it can only test the ability of applicants to recognize correct physiological and technique questions in an academic setting. There can be little correlation to the ability to use this information in actual practice [5, 11, 12, 19]. Moreover, the NCTMB does not address conceptual content of communication and empathetic skills necessary for successful practice and trusts the teaching of kinesthetic techniques to the same schools for which the NCTMB acts as a redundant check for memorized content.

As a criterion for governance of entry into the practice of therapeutic massage, I propose using the criterion of a *preponderance of information*. The use of the preponderance of evidence is well-established for the burden of proof in civil trials. There have been judicial rulings that that defining adult entertainment by a "preponderance of material" is not unconstitutionally vague [40]. There is thus a basis for concluding that verifying that a person's intent and capability are consistent with the practice of therapeutic massage by a "preponderance of information" would similarly be considered to be legally well-defined. The information so considered could include education and training, membership in professional organizations, possession of professional liability insurance, and history of practice.

Foremost, we should remember that massage, like musicianship, is primarily a kinesthetic skill coupled with supporting skills of communication, rapport building, observation, and entrepreneurship.

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1. Introduction

The paper is a review of information pertaining to the governance of therapeutic massage. In some particulars, it focuses on governance within the State of California but in others it is general. I attempt to first set a context for the potential contributions from massage, looking at both the staggering costs of stress and the relief basic therapeutic massage can bring and the more orthopedic uses of advance massage to facilitate sports participation and bring relief from minor injuries. From there I move into issues of local regulation and state governance.

My treatment of local regulation includes discussions of:

- the legal basis for regulating,
- problems of local regulation that is onerous or demeaning to those who practice therapeutic massage,
- options for requiring that massage therapy be locally regulated on parity with other personal and health care professions, and
- use of a third-party private agency to verify applicant documentation and check complaint history (Better Business Bureau model)

In consideration of proposals for state occupational regulation of massage, I cover:

- legislative intent to protect the public from harm that is apparent and not remote stemming directly from the practice of the profession to be regulated,
- legislative review requirements to explore mechanisms other than regulation,
- lack of a state mechanism or intent to protect a profession from onerous local regulation or to apply a state acknowledgement of the credibility of a profession,
- advantages of title acts over practice acts in dealing with nonharmful, synergistic professions that are both licensed and unlicensed and have overlapping scopes of practice,
- interaction of state entry mandates with federal provisions of instructional program eligibility to participate in financial assistance programs

As issues that effect the context of both local and state regulation, I consider in some depth:

- criteria for entry into the practice of therapeutic massage,
- diversity in training and entry level criteria,
- concepts of how people learn and use information related to massage training,
- lack of any documented pattern of harm from massage due to incompetence, and
- protecting the public from harm of mal intent – ethical violations of the client therapist relationship prevalent in all health care professions

Ultimately, all effects of governance on the cost and availability of services are borne by the consumer [13]. Where it can shown that therapeutic massage provides a substantial societal benefit, governance that discourages the use and availability of massage also incurs costs to families, communities, and businesses; effects detrimental to the public health and welfare [5]. Governance that has not been thought through from a systems point of view can have negative impacts on issues of learning differences and cultural diversity [§ 5.3]. For those who continue to enter the profession, the initial and continuing costs simply transfer to the costs of a client session. Where this is not or cannot be done effectively, as with any small business, the practice fails. Others, who might practice effectively part-time, will simply find the economics

and time scales to begin working with clients to be too great and will divert their energies into other endeavors.

As both an instructor and practitioner of massage and as a research scientist, this paper is my reaction to a situation regarding governance in which too many unexamined assumptions are being made and propagated and in which too many vague and generally unmeasurable statements about "standards" are being voiced. Too often this situation acts to preclude meaningful discussion of measurable specifics. As a consequence, actions taken ostensibly to further public health and welfare may actually be causing harm by reducing the availability and raising the cost of massage services [13]. Similarly, actions taken with an aim to improving massage training are being made without looking at collateral effects and are flying contrary to recent cognitive research on how people learn and make use of knowledge. This paper is my attempt to counteract these conditions and thus to further dialog and discussion that is more knowledgeable and less postural.

2. Social and Economic Benefits of Massage

While most of what follows focuses on issues of governance, I believe that it is important to initially mention several broad contexts affecting the recent development and importance of therapeutic massage:

- increased use of Complementary and Alternative Medicine (CAM) and therapies;
- staggering costs of stress incurred by businesses, communities, families, and individuals;
- increased participation in sports and exercise and, in particular since the advent of Title IX, of the participation and attitudes of girls and women within these endeavors;
- increased average age (i.e. graying) of the U.S. population.

In 1997, out-of-pocket expenditures related to complementary and alternative therapies were conservatively estimated at \$27.0 billion. This was a 45.2% increase between 1990 and 1997, primarily attributable to an increase in the proportion of the population seeking such therapies [18]. In 1998, the U.S. Congress established the National Center for Complementary and Alternative Medicine (NCCAM) at the National Institutes of Health (NIH) to "stimulate, develop, and support research on CAM for the benefit of the public". Therapeutic massage is listed by NCCAM under the category of "Manipulative and Body-Based Methods" [36].

2.1 Massage for Relaxation and Stress Management

Communities, businesses, families, and individuals are incurring staggering costs from ignoring the effects of stress in life and on the job [16, 39, 49]. The effects of stress include: lowering of the perceived quality of life, lowered involvement as parents and community participants, increased frequency and severity of illness, increased likelihood of injuries, increased health care costs, increased job absenteeism, loss of productivity, increases in domestic and on the job violence, increases in family dissolutions, and increased litigation costs [30]. The cost of work-place violence to employers is estimated to be between \$6.4 billion and \$36 billion in lost productivity, diminished image, insurance payments and increased security [16]. A number of further costs were succinctly summarized by Toni Knott, director of the Organizational Behavior Program at CSPP, Fresno [28]:

According to current figures, stress-related claims now cost the nation's companies nearly 10% of their annual earnings. However, since the adverse effects of stress are often disguised in a

number of illnesses and behavior patterns, the real costs of mismanaged stress are hard to pinpoint. Still, there are some startling statistics which are beginning to provide a more complete picture of what stress is costing U.S. companies. Annually, \$26 billion are paid out in disability claims related to stress. Other conditions that result from occupational stress incur health care costs that are compounded by the cost of lost work time. For example, four percent of all work hours are lost to absenteeism, which costs millions of dollars annually. Heart disease is related to the loss of 135 million work days each year. Alcoholism costs U.S. industry approximately \$20 billion each year. Mental illnesses such as depression – which can result from workplace stress – cost the U.S. economy about \$30 million each year.

Perhaps the biggest cost of occupational stress, and the one which is most difficult to calculate, is the effects of errors made by workers who are impaired but still working. The industrial accidents caused by on-the-job stress -- which account for 75-85% of all accidents are estimated to cost American companies \$32 billion annually. Other estimates suggest that annually, over 2 million workers suffer disabling injuries, and 15,000 people lose their lives, due to work-related accidents.

In conjunction with other modalities such as exercise, meditation, and biofeedback, massage is highly effective therapeutically and economically in ameliorating the conditions of stress leading to the economic and human losses described above. **Moreover, the style of massage most effective for this type of stress-management intervention is very basic. It is relaxation-oriented work that can be effectively taught and learned within a framework of 100-150 hours of instruction, including basic considerations of business and communication skills.** It does not require the detailed anatomical knowledge or neuromuscular understanding necessary for more advanced injury/orthopedic interventions. There is no documented pattern of massage causing physical harm to clients, a fact that is reflected in very low liability rates and one that I will explore in some depth in [§ 4.1](#). Thus, the ability to effectively create benefit for clients constitutes a sufficient criterion for entry into the profession.

Note that beginning practice at a relaxation/ stress-management level of entry in no way precludes continued learning and subsequent movement to more advanced levels of practice. In fact, recent understandings from cognitive science and situational learning imply that practical experience is a prerequisite to effective use of later instruction and to moving knowledge from an academic setting to use in clinical practice [\[5, 11, 12, 19\]](#). Modular learning segments interspersed with clinical practice and mentoring create the greatest and most cost effective benefits for massage students and ultimately for their clients.

2.2 Sports and Orthopedic Massage

Statistics on sports participation indicate that one of the most important trends to begin in the 1960's was “a new focus on self-fulfillment and a heightened awareness in self-improvement – an outgrowth of which was a budding awareness of personal health and physical fitness” [\[1\]](#). This shift in attitude entered the mainstream in the 1970's, resulting in the running boom at the end of that decade with a subsequent spread into other activities. The overall growth of physical activity participation flattened in the 1990's, with activities in health clubs growing at the expense of other venues. In short, during the 1990's there was a shift towards seeking external motivation and facilitation, a shift synergistic with increased utilization of massage. This couples with the observation that 23% of current health club members are at least 55 years old, a

growth of 379% since 1987 [2]. Partly, therapeutic massage is serving the needs of a graying population committed to remaining healthy and active.

There were two other concurrent cultural themes that I believe changed attitudes in ways that had major positive impacts on massage utilization in the United States. The first was that U.S. athletic organizations were forced to respond, however reactively, to the widespread use of massage by foreign competitors. The second was the dramatic increase in sports participation by girls and women following the 1972 enactment of Title IX [45, 52]. To a great extent, growth in massage has ridden on the groundswell of the increasing number of women with a positive history of physical activity and the shift in expectations and attitudes that they have created.

While stress-management and relaxation massage are the starting points, the high-end techniques of massage have evolved to meet the trends of client needs. Such techniques are much more anatomically precise than stress-management work, applying longitudinal or cross-fiber friction and pressure to specific muscular and connective tissue structures. They also make use of more sophisticated neurological factors, such as the relaxation and increase in length that can be obtained in a muscle following a resisted isometric contraction. Additionally, precise friction applied in a massage framework is used to stimulate healing at a cellular level [25, 26]. Thus massage has grown to participate in a diverse set of needs from stress management to prevention and rehabilitation of minor injuries within muscles, tendons, and ligaments. **As an instructor, I note that most students are better able to learn advanced concepts and techniques after gaining experience in actual practice, an observation in accord with recent developments in cognitive and educational research [5, 11, 12, 19].**

3. Local Regulation

Within California, the power to govern the therapeutic practice of massage has been delegated to local agencies. This delegation has included specific delegation via Government Code Sections 51030-51034 [Appendix A] and implicit delegation via the "home rule" powers of charter cities and counties derived from Article 11, Section 5(a) of the State Constitution [Appendix B]. Unfortunately, such local agencies have shown little inclination to regulate therapeutic massage as a personal and health care trade and profession.

The major focus of massage regulation at the local agency level has been on controlling the activities and proliferation of massage parlors (adult entertainment) and in discouraging prostitution. The authority of local agencies to regulate adult businesses to further the public health and welfare has withstood numerous court tests. Often, however, there is little or no differentiation in regulation for therapeutic massage. This may in practice be leading to conditions detrimental to public health and welfare [§ 2.1]. Tactics by local agencies include high fees, long delays in license application processing, requirements for annual STD testing, zoning not on a par with that used for other personal and health care businesses, and the arbitrary requirement of specified hours of training as a hurdle.

In considering relief from onerous local regulation, it is worthwhile to consider the legal basis relative to state laws. In general, the state by some mechanism grants local agencies the right to regulate municipal and county affairs for the furtherance of public health and welfare. There are two basic approaches: general law, in which state laws grant explicit rights, and "home rule" in which the state constitution grants local agencies broad powers to regulate local affairs.

California combines both approaches, having general law cities and charter cities. The legal distinction between general law and charter cities is that powers of the latter are established by provisions of its charter subject to any limitations imposed by federal or state law. A general law city, on the other hand, may exercise only those powers authorized by state law. However, these powers are sufficiently broad to meet the needs of most municipal entities.

About 20 percent of California's 400 cities are charter cities including most of the larger ones. There is a list of California charter cities available [8]. One potentially important distinction between general law and charter cities is that the latter may possess an implicit right to regulate therapeutic massage, even if such massage were regulated by the state, unless the state title or licensing law explicitly preempts such local regulation. Such overlap of state and local licensing exists in several states [46].

The California Government Code Sections 51030-51034 giving local agencies the power to regulate massage does so with few restraints [Appendix A]. In contrast, Colorado has a massage parlor law that provides a template for local agencies to regulate adult entertainment massage and also creates a specific exemption from such regulation for massage performed by a massage therapist. In this latter respect, the Colorado law is essentially an implicit title act, since it specifies a training criterion that defines a massage therapist and provides privileges for those satisfying the criterion without otherwise prohibiting practice beyond the allowance of local regulation. This concept and potential variations of it are worth exploring in considering how one might modify California Code Sections 51030-51034 to require the regulation of therapeutic massage to be done on parity with other personal and health care professions.

One variation would be to move to an explicit title registration with meeting of criteria checked by the state rather than by local agencies. Another variation would be to move to a criterion for defining a massage therapist that looks at a preponderance of available information [§ 5.4]. **If authority for verification of requirements is kept at the local level, the actual process could be moved to an independent private agency that would both verify the validity of applicant's documentation and provides consumer protection via complaint tracking in a manner similar to the Better Business Bureau.** A requirement of local regulation to be on parity in zoning and licensing with other personal and health care professions was previously implemented within Texas and Iowa State licensing laws [46].

4. State Regulation

4.1 Harm From the Practice of Massage

Many states, including California [Appendix C, Appendix D], consider that the motivation for occupational regulation (OR) is to protect the public from harm that is *recognizable and not remote*. Moreover, there is generally a requirement in a sunrise or sunset act reviewing the need for proposed or current OR, that OR to be the most effective method of limiting such harm. Without likely harm, there are fundamental rights for a person to be free to choose a profession [33, 35]. Motivations of legitimizing or recognizing the credibility of a profession are notably missing from state statutes defining the purpose of OR. So the key question becomes *what is the likelihood of harm occurring at a level of practice that licensing would prevent?*

In 1997, the Georgia Occupational Regulation Review Council concluded that there was minimal potential for harm from massage [22]. More recently, the British Columbia Health

Professions Council concluded that there were no massage practices that warranted being declared as restricted acts [4]. These conclusions, coupled with extremely low liability insurance rates [24], indicate that harm from massage is remote. My personal searches of the Medline index for correlation between injury and massage failed to reveal any pattern from the very rare and random injuries reported. Clearly, from the evidence available, the assumption that client harm results from unlicensed massage or massage by under-trained practitioners is a dog that won't hunt.

Beyond the evidence of documentation, there is corollary evidence that, despite claims that have been made, the profession of massage itself has identified few specific mechanisms that exhibit high potential for harm. Certainly, few of the potential mechanisms of which I am aware of as an instructor of sports and orthopedic massage are likely to be addressed by the unspecific requirements normally associated with entry level OR.

Where the likelihood of harm exists, protection requires identifying the hazard's existence, noting specifically the mechanism of harm, modifying training and procedures to eliminate the hazard, and, finally, observing the response and adjusting the training to insure its success. These are basic concepts of industrial Integrated Safety Management (ISM). Training to prevent harm has to be both specific and of sufficient quality and form that the recipient will be able to recognize a situation and avoid the hazard. The only case in which I have seen this protocol actually applied in massage therapy was in articles published by Doug Alexander, editor of the Journal of Soft Tissue Manipulation, on deep vein thrombosis. In the far preponderance of what I've seen, there is no identifiable pattern of harm and no talk of the need for specific training to make harm unlikely. I thus have had to conclude that no harm has been identified and that discussion of harm is advanced to further underlying agendas for requiring general coursework or for lobbying.

4.2 Consumer Protection from Harms of Mal Intent

Apart from the moot issue of harm via technical incompetence, there still can be concerns about unethical exploitation of the professional relationship with clients. Unfortunately, such ethical abuses are prevalent among licensed health professions, indicating that consumer protection is not a matter of training but of following complaints and enforcing disciplinary actions.

Moreover, boards of professional peers appear less effective in taking appropriate action than might be hoped. A 16 June 1998 ABC News report noted that "40% of physicians punished for sex offenses continue to practice" [14]. The same report quoted Minneapolis psychologist Gary Schoener in saying "You've got some real clever predators out there. You have to be smart to get through medical school."

The National Psychologist, an independent newspaper for practitioners ran a story about a six-month investigation done by The Plain Dealer, a Cleveland, OH newspaper. The investigation revealed that nearly 200 psychologists who "were found to have committed serious ethical violations in the last 18 years nationwide were allowed to continue their practice without ever serving any suspension" [50]. The article went on to say,

The nearly 200 psychologists who were not suspended for even a day were found to have engaged in sexual misconduct with patients, convicted of criminal offenses or committed other major ethical violations. The Plain Dealer looked at records from all 50 state licensing boards

and created a data base containing the names of 2,218 psychologists who have been disciplined or denied licensure as a result of ethics violations. The study went back to 1971, although 80 percent, or 1,754, of the disciplinary actions were taken after Jan. 1, 1990 and reported that 27 states have revoked five or fewer licenses. West Virginia, Rhode Island, North Dakota and Montana, which license a total of 1,500 psychologists have taken a combined 15 disciplinary actions, but have never revoked a license. New York, the paper said, has about 14,000 psychologists, and has revoked 12 licenses. In Ohio, where there are 3,900 licensed psychologists, the Ohio Board of Psychology has revoked 16 licenses."

Clearly, such professional boards have created a history of having as much or more interest in preserving professional careers as they do in taking actions aimed at protecting the public. **Although the rate of abuse claims against massage professional liability insurance is extremely low [23], if issues of harm from mal intent are sufficient to motivate state regulation of therapeutic massage, strong consideration should be given to establishment of an independent board under the Department of Consumer affairs.** Since the issues are ethical rather than technical, such a board could both provide better consumer protection and substantially reduce costs by serving multiple complementary and alternative health care professions. Such a consolidated board would be similar in scope to that recently created in Minnesota under the MN Complementary and Alternative Health Care Freedom of Access Act [34].

In the context of ethics, however, the 1997 State of Georgia sunrise review of proposed massage regulations noted that there were private sector ethics codes to aid the consumer [22]. The review board, in recommending against state regulation concluded, "*The practice of massage therapy requires specialized training but the general public can identify qualified practitioners by existing mechanisms. First, there is a voluntary national certification program administered by an independent, non-profit organization through which massage practitioners may obtain professional certification. Second, there are at least two professional organizations which qualified massage practitioners may join. Both organizations have an impressive code of ethics to which members must adhere. By confirming that a practitioner is certified by the nonprofit organization and/or is a member of one of the professional associations, a prospective client currently can select a qualified massage practitioner*".

4.3 Practice Acts versus Title Acts

If we believed in the myth of direct harm from massage, we would likely pursue regulation in the form of a *practice act*, restricting the unlicensed practice of techniques within the scope the practice the act defines. This, however, implies that other bodywork or movement practitioners with overlapping scopes of practice can only practice if specifically exempted by our act or if they have a governing act of their own. Recent articles in Massage Magazine discussed the contention a broadly worded practice act can create for others unwillingly caught in its net [56, 57]. With an increasing proliferation of complementary and alternative health care, exercise, and movement facilitation practices gaining popularity, this situation relative to practice acts will continue to get more troublesome.

In contrast, if we believe there to be little intrinsic danger of harm, then we will be more comfortable with a *title act* that defines of scope of practice and criteria for eligibility and restricts the use of a professional title and its abbreviation. A title act can thus serve to differentiate those practicing under the act from those practicing outside of the act, but there is not restriction within the act itself on those not under it. Thus a title act, unlike a practice act,

does not collide with other professions or those practicing under local regulations. It was in this context that the British Columbia Health Professions Council recommended that *massage therapist* be made a restricted title without any restricted practices [4].

4.4 Potential Overlap Between Local and State Regulation

As noted under §3, about 20 percent of California's 400 cities are charter cities including most of the larger ones. There is a list of California charter cities available [8]. One potentially important distinction between general law and charter cities is that the latter may possess an implicit right to regulate therapeutic massage, even if such massage were regulated by the state, unless the state title or licensing law explicitly preempts such local regulation. Such overlap of state and local licensing exists in several states [46].

By way of example, a recent draft ordinance by Santa Rosa, a northern California charter city, contained the following wording exempting some licensed professions from its scope:

WHEN A PERMIT IS NOT REQUIRED

The provisions of this Chapter shall not apply to the following classes of individuals or businesses while engaged in the performance of their duties:

A. Physicians, surgeons, chiropractors, osteopaths, nurses or any physical therapists (state licensed professions or vocations) who are duly licensed to practice their respective professions in the State of California. The exemption provided by this section shall not apply to massage therapists.

It is obvious from the last sentence that there was intent within this law not to defer to a state law, unless required to by the state, should massage therapists become licensed. There was no such intent apparent relative to other professions. Licensing in this context would likely include both practice and title acts. There seems an obvious need to explicitly require parity of treatment within any act creating state regulation for therapeutic massage.

4.5 Scope of Practice Issues

For massage in California there is a problem of not having a legally allowed scope of therapeutic practice. Under the current California medical practices act, if a facilitation is therapeutic or preventative, and not covered by an explicit scope of practice in another section of code, it is technically considered to be practicing medicine without a license. **Since one can't legally claim to be doing therapy and since insurance reimburses for therapy, there is an obvious disconnect in dealing with reimbursement by insurance companies. Working within the standards of the massage profession but in technical violation of broad state practice acts could also have potential negative implications in tort litigation and claims against professional liability insurance.**

The technical violation of providing therapy as well as the loopholes of being an aide to a PT or Chiropractor were noted in an article in fall of 2000 in California Currents, the newsletter of the AMTA-CA. The article was by Michael J. Schroeder, Esq. on "Understanding the billing Rules for Using CPT Codes". Schroeder is listed as counsel for the law firm of Hart, King & Coldren and as having 18 years experience representing acupuncture and chiropractic associations. Schroeder said:

"Thus a massage therapist working independently cannot hold himself or herself out as treating any conditions or disease without violating a least one of these [medical & chiropractic] licensing acts. This creates a dilemma because most health insurance policies only provide for reimbursement for the treatment and diagnosis of a condition or disease. Thus, if a massage is not tendered for purpose of treating a condition or disease, that massage will not be covered under the patient's health insurance policy. On the other hand, if the massage was rendered for the purpose of treating a condition or disease, it may be covered by insurance but probably violates California's healthcare licensing statutes. Similarly, in the personal injury system, an insured party can only sue for the cost of care intended to treat an injury."

There are two ways to go about mending this problem. The traditional way has been to cut a title or practice regulation act for each occupation that explicitly defines a scope of practice for that occupation. With noninvasive complementary and alternative health care practices proliferating, this is becoming an increasingly less desirable option. In a recent book, Mirka Knaster lists *"more than fifty mind-body practices that can relieve pain, reduce stress, and foster health, spiritual growth, and inner peace"* [27].

The paradigm under which the current health care practice acts were created is becoming dated. The underlying assumption has been that of professions having practices (i.e. types of treatment) that had high potential for physical harm and corresponding needs of being restricted to highly trained practitioners. Along with that, there was an underlying assumption that the number of different occupations was small and the overlap in practices minimal. Thus there are in place a few health care practices acts of very sweeping scope. In modern experience, there are a growing number of therapies or interventions with different emphasis on the particulars of touch, movement, and neuromuscular training. Many of the therapies, such as massage, are noninvasive and don't require the protection of practice acts, yet can be in collision with broad scope practice acts such as medical, PT, and Chiropractic.

A more recent and rational approach to approaching this problem of scope, pioneered in Minnesota, is to narrow the scope of conflicting health care practice acts to create an implicitly allowed scope of noninvasive therapeutic practice. The created scope of practice is implicit in that there is a general width for practice without mention of specific occupations. There is currently a bill in the California legislature, SB577, which would make this change within the medical practices act.

It one were to start afresh, it is more likely that the more invasive health care professions would be defined broadly by title acts giving an allowed scope of practice and that the restricted practices within such professions would be limited to the invasive and potentially harmful practices. Therapeutic interventions having no aspects that were invasive would require neither practice act nor title act. This does not preclude private certifications by training groups such as Pilates, Rolfing®, Feldenkrais®, Ideokinesis, Polarity, Reflexology, Qigong, Shen®, ... to attempt standardization of particular names and styles of somatic intervention.

4.6 Program Eligibility for Federal Financial Assistance Programs

There has been a sometimes not so subtle interplay between federal financial assistance programs and lobbying for particular hour requirements within state occupational regulation (OR). To understand this better, I'll provide brief outlines of federal educational program eligibility requirements. There are complexities within these for which one should consult the

source documents [53, 54, 55]. Note that there are also state vocational education grant programs (e.g. Cal Grant C Awards [9]) for which financial aid is administered at the state level. Private sector financing, although at higher rates than federal programs, may also be available and cost effective for shorter instructional programs. **Finally, short programs are more amenable to a pay-as-you-go approach, particular for those involved as part-time learners while holding another job.**

There are roughly three different conditions applicable to postsecondary education:

- eligibility for short-term programs and applicable only to Direct Loan (DL) and Federal Family Education Loans (FFEL),
- general eligibility
- eligibility for Pell Grants as a full-time student

The short-term program eligibility requirements, applicable only to the DL and FFEL programs, require an educational program to supply 300-599 clock hours of instruction over a minimum of 10 weeks. This eligibility class also requires the program to admit some participants with less than an AA degree, have 70% completion and placement rates, and not be more than 50% longer than the hours explicitly set via a state or federal minimum entry requirement [53, 55].

The general requirement for an eligible program is that the program must be a minimum of 600 clock hours extending over a minimum of 15 weeks. Programs that meet this requirement are not subject to the additional quality requirements placed on the shorter programs. It would appear the programs qualifying at the 600 clock hour level are also eligible to participate in the DL and FFEL programs as well as in other federal loan and grant programs.

The requirements to receive Pell grant support as a full-time student are a minimum program of 30 weeks and 24 clock hours of instruction per week. A 720 hour program requirement follows from the math [54, 55].

Schools with 720 clock hour programs are shooting for the whole ball of financial assistance wax, including full Pell grant distributions. States proposing or enacting 720-hour practice acts are almost undoubtedly responding to lobbying by such schools. Such regulations allow schools participating in the Pell grant program access without having to compete with lower hour programs, even 600 clock hour ones. The numbers are too coincidental. Contrary to often heard claims, the net effect is not to increase the quality of training or the competence of practitioners or to protect the public, but to decrease the ability of students to seek the best providers of modules of information, particularly as tax-deductible continuing education.

4.7 Governance of Massage Training and Education

Within the state of California, state approved programs of massage training fall under the jurisdiction of the Bureau for Private Postsecondary and Vocational Education (BPPVE) under the Department of Consumer affairs [6]. The BPPVE maintains a list of approved schools on its web site. Between, 1989 and 1998, administration was under the independent Council for Private Postsecondary and Vocational Education (CPPVE) following passage of the Private Postsecondary and Vocational Education Reform Act. Prior to 1989, governance was under the Department of Education. The "reform act" is also available at the BPPVE web site. The pre-1989 regulations contained specific requirements unique to massage schools that were intentionally omitted in favor of uniform regulation under the reform act [Appendix E].

5. Criteria for Entry into the Practice of Therapeutic Massage

5.1 Hours of Training and Education

Proposals for regulation often contain entry criteria that are arbitrary in terms of educational basis and public benefit – essentially a syndrome of requiring some number of "round hours" without basis of needed content or ultimate benefit to the consumer. These do not constitute "standards" in that they neither set particular performance criteria for practice nor provide a necessary and sufficient means by which criteria could be implemented and measured. Instead, they simply set hour requirements as arbitrary hurdles.

Unless you can state what specifically is being added by the requirement and how that specifically benefits the consumer then you aren't increasing the standards of practice, just raising the requirements to be able to practice. The Boston Marathon has clear entry standards based on a prior performance in another marathon. For the 18-34 age group the required finishing times are: Men – 3 hours 10 minutes, Women – 3 hours 40 minutes. The conditions are measurable and unambiguous. They don't specify how many hours you have spent training, but they do specify what the result of that training must be. By comparison, massage is left without a standard to fly. It is meaningless to talk about "high standards" apart from a specific context and a well-defined measure of attainment.

While there is one area in which a standard does exist, its meaning to practice is often misconstrued. Although the NCTMB (National Certification in Therapeutic Massage and Bodywork) process administers a psychometrically valid exam, it can only test the ability of applicants to recognize correct physiological and technique questions in an academic setting. There can be little correlation to the ability to use this information in actual practice [5, 11, 12, 19]. These comments are pursued further in § 5.2.

If we are looking at training from an educational perspective, the question simply becomes how much and what specific education is needed for someone to begin to practice effectively? This has different aspects. The first is how much training is needed to be able to produce a result that clients are willing to purchase? The second question asks if there are specific safety issues that need to be addressed by training. Beyond requirements for teaching basic hygiene, the second question has been addressed in § 4.1 with the resulting conclusion that therapeutic massage does not cause harm. We are free to pursue the first question on bringing benefit to clients.

There is substantial clinical experience indicating that most people can perform a competent relaxation massage with 100-150 hours of training. Depending on their background, some may want additional small business training, particularly if they are aiming to go into individual practice. If we are simply being reasonable, it makes good educational sense to start people gaining practical experience as soon as possible. They can determine if they actually like the work without undue expenditures of time and tuition cost. With an average professional lifetime of about 3 years, this consideration is significant. Despite initial excitement and expectations, many entering the massage profession have discovered in practice that they are poorly matched for running a one-person business, are not cut out for the relative solitude of practicing massage, and/or had not anticipated the physical demands of the occupation. Once in practice, additional education becomes tax deductible. Moreover, there is considerable

educational research demonstrating that gaining an experience base provides both the motivation and context necessary for further learning to be effective.

While there are those advocating increasing up-front hour requirements for entry into the occupation of massage, industry has been moving in the opposite direction [29]. Faced both with the explosion in new information exemplified by increasingly thick and specific technical journals and the corresponding fast pace of technical change, research and industry increasingly use "just in time" learning coupled with short-courses and interactive teaching technologies. In considering learning options for employees, corporate training managers must question the relevancy of content to immediate needs, the quality of presentation and packaging, and the cost. Such managers are aware that material "learned" but never used will soon be forgotten and rapidly become part of technical history. While the developments in therapeutic massage are not quite so rapid, the lessons of need, use, and presentation are applicable if we are to respect the massage student's time and money. These observations are particularly true in that massage is often a part-time occupation and/or an occupation that is entered in mid-career by those with considerable life and work experience. While long-hour, single-package programs should be available and may be a good choice for those entering massage as a first career, more modular options should be available. Such decisions are better handled as marketplace choices than by occupational regulation.

If the motivation for advocating an increasing number of hours of training is to produce corresponding increases in practitioner competency, then such requirements are of sadly limited benefit. Educational research over the past 20-30 years compellingly demonstrates that learning in the classroom context often leads, not to usable understanding, but only to the ability to successfully answer test questions [3, 12, 19, 20, 32]. Study after study has found that, by and large, even the best students in the best schools can't take knowledge learned in one setting and apply it appropriately in a different setting [3, 5, 32].

Within the academic setting, students can learn to be successful with short-term memorization and use of "right-answer" cues. Educational psychologist Howard Gardner notes both this aspect and the negative impacts an unnecessary use of academic context can produce given a diversity of learning styles.

Those students who exhibit the canonical (in our terms "scholastic") mind are credited with understanding, even when real understanding is limited or absent; many people – including at times the author of this book and his daughter – can pass the test but fail other, perhaps more appropriate and more probing measures of understanding. Less happily, many who are capable of exhibiting significant understanding appear deficient, simply because they cannot readily traffic in the commonly accepted coin of the educational realm [19].

In contrast, actual practice requires very limited memorization of facts. The massage practitioner must have the deeper understanding required to find information as needed and then to be able to use it to make therapy decisions in the face of ambiguity. Research indicates that the environment that seems best able to foster the understanding leading to usability has much in common with traditional apprenticeships [19, 20]. In the modern *cognitive apprenticeship*, however, it is not just the tasks but the thinking underlying them that must be made "visible" and reflected upon [11].

Such apprenticeships can be created within the context of traditional schools. A modular, tiered program can move the student into early practice, while providing resources for the ongoing training and dialog that passes the context of expertise from teacher/mentors to increasingly skillful practitioners. There should be a progression of successively more difficult tasks within the conceptual scaffolding and coaching provided by the mentors. Testing should not be concerned with memorization and regurgitation but with the student's ability, on being presented with the relevant data, to choose between conclusions that can be drawn from it [20]. Within the profession of massage, it is time that we base our training requirements on 21st century insights into how people learn.

If we taught music the way we try to teach engineering, in an unbroken four-year course, we could end up with all theory and no music. When we study music, we start to practice from the beginning, and we practice for the entire time, because there is no other way to become a musician. Neither can we become engineers just by studying a text book, because practical experience is needed to correlate the so-called theory with practice. — Charles F. Kettering, Inventor, 1941 (<http://www.kettering.edu/kettermu/kettbio.htm>).

5.2 Limitations of using the NCTMB

Although the NCTMB [37] (National Certification in Therapeutic Massage and Bodywork) process administers a psychometrically valid exam, it can only test the ability of applicants to recognize correct physiological and technique questions in an academic setting. There can be little correlation to the ability to use this information in actual practice [5, 11, 12, 19]. Moreover, the NCTMB does not address conceptual content of communication and empathetic skills necessary for successful practice and trusts the teaching of kinesthetic techniques to the same schools for which the NCTMB acts as a redundant check for memorized content.

The NCE (National Certification Exam) is not a competency exam. If it were, it would not be surrounded with the considerable prerequisites that are in place. Thus, it could be used as a challenge exam to demonstrate competency given any reasonable basis for being able to pass it. As it stands, the NCE is necessary to meet NCCA stipulations for the NCTMB to be accredited as a certifying agency and is otherwise largely redundant [38]. That the NCE is a psychometrically valid test means that the test is a valid measure of the body of knowledge that it claims to be measuring and that slight variations in the test won't create large variations in scores — i.e. the test is reliable [17, 51]. Measurement in this case indicates that you can recognize information and respond with correct answers within the context of such a test.

The NCE does verify that an applicant is able to recognize correct answers to questions within the academic framework of the test (also see § 5.1). This framework has been established by job survey to include information commonly known to many practicing massage therapists. However, to the best of my knowledge, this information is limited to anatomy and physiology, styles of bodywork practices, and basic questions of ethics and business. In this it does not cover, even at the conceptual level, issues of verbal and nonverbal communication essential to establishing professional rapport with clients, basic issues of working with those experiencing grief or trauma, or the entrepreneurial issues of running a one-person business. These uncovered areas are likely to have at least as great an impact on the success of those entering the massage profession, as do the areas covered.

The NCTMB process relies on the schools to determine that an applicant has demonstrated sufficient kinesthetic and communications skills to be capable of practice, yet implies that the schools may be incapable of conveying the much simpler matters of relatively rote learning. Thus, the NCE essentially verifies that the schools are enforcing the memorization of this body of material by including it in the curriculum and insisting that the students aren't asleep in class. Given the context and prerequisites, an extremely high pass rate is the expected and the observed result. From a consideration of systems theory, the schools and the balance of outlook and capabilities of incoming students change to match what is explicitly emphasized and required [41]. As is noted in § 5.1 and § 5.3, an unnecessarily academic orientation can also have negative effects on students otherwise suited for practice but with dyslexia or other differences in learning style and comprehension.

The likely impetus for the creation of the NCTMB certification was to facilitate greater access for massage in interfacing with the U.S. health care industry, an area in which such certifications are the traffic of the realm. As such, the availability and voluntary use of NCTMB for those directing their practice towards the medical model is a worthwhile effort at pacing the expectations of the industry. For those moving in this direction, however, the NCE is notably lacking in rigorous concepts of orthopedic assessment that might be expected for these pursuits. Correspondingly, and despite marketing to the contrary, the NCTMB is likely of little or no benefit to those entering massage to do stress-management and spa work. I believe that this disconnect of being neither fish nor fowl follows from simple economics. The NCTMB has been organized, marketed, and lobbied as an entry -level certification simply because the pool of those whom it would most benefit was insufficient to sustain the costs of the process.

Finally, the prerequisite structure imposed for the NCTMB limits the flexibility of using the NCE as a arbitrary knowledge hurdle by local agencies. One cannot in practice, for example, require 200 hours of training and the NCE, something that may be quite possible from the pedagogical view but disallowed from the administrative view. Moreover, tying practice requirements to the NCE is tying them to a shifting target. The NCTMB board updates NCE emphasis to match results from new job surveys and could as easily modify prerequisite hours.

5.3 Regulation and Diversity

California is a state with many layers of diversity. Reports, based on the 2000 census, note great diversity in ethnicity and first language [7, 10]. Intermixed with this more obvious diversity, there is another layer of differences in how individuals learn and process information. Educational Psychologist Howard Gardner, along with his colleagues at Harvard University's Project Zero, has pioneered understanding of the different brain-based differences that Gardner refers to as "multiple intelligences" [21, 43, 44].

A recent article by Wired Magazine on Asperger's syndrome and autism in the Silicon Valley notes a likely genetic background for the observed differences in brain organization. These differences in brain wiring are observed to be associated with greatly enhanced aptitudes in certain ways of processing information accompanied by deep deficiencies in other areas [48]. It is the depth and personal frustration that such learning differences can produce, particularly when faced by inflexible expectations and methods, that led pediatrician Mel Levine to establish "All Kinds of Minds" [31]. Levine and others working in this area of learning differences were featured in a recent PBS special on "Misunderstood Minds" [42]. Similarly, financial broker Charles Schwab's own difficulties with dyslexia and reading prompted him to found the

Schwab Learning Organization, an organization that promotes diversity in teaching in its program of "teach each" [47].

We must look at the effects of the regulation of massage within the context of such diversity. There is every reason to expect that there will be those who are highly competent in interpersonal and kinesthetic intelligences [43] yet fair poorly when force unnecessarily into the verbal-linguistic paradigm of the academic world. It is this observation that I believe is the basis for Howard Gardner's statement quoted more fully in § 5.1, "*Less happily, many who are capable of exhibiting significant understanding appear deficient, simply because they cannot readily traffic in the commonly accepted coin of the educational realm*" [19]. In continuing to unnecessarily push massage entry requirements into areas of psychometric testing and increased hours of book-based anatomical and physiological training to satisfy a medical model of massage, we are likely doing untold harm to those who would otherwise be highly competent practitioners from a more kinesthetic, experiential approach.

In insisting on long monolithic school-based programs, we are ignoring the opportunities to use massage for community outreach and self-help. I would envision that, in the absence of regulation that would block such efforts, nonprofit organizations could implement massage apprenticeship/training programs within disadvantaged, at risk communities, with those trained serving their own communities to reduce stress and violence and increase nurturing through positive touch.

Finally, there are issues of current local regulation and diversity. Much of local regulation seems to be founded on the assumption that those engaging in prostitution cannot or will not be trainable in massage, as more hours and academic content are required. The only logical basis for this assumption is that by increasing hours and academic content, that those who are not fluent in English will be increasingly disadvantaged, as there are fewer books and schools available in other languages. If true, such regulation is blatantly discriminatory, preventing those with a legitimate interest in massage from entering the occupation and benefiting their ethnic communities via their practice. The costs of such over-regulation were discussed in § 2.1.

5.4 Preponderance of the Information

As a criterion for governance of entry into the practice of therapeutic massage, I propose using the criterion of a *preponderance of information* for several reasons. The use of the preponderance of evidence is well-established for the burden of proof in civil trials. There have been judicial rulings that that defining adult entertainment by a "preponderance of material" is not unconstitutionally vague [40]. There is thus a basis for concluding that verifying that a person's intent and capability are consistent with the practice of therapeutic massage by a "preponderance of information" would similarly be considered to be legally well-defined. The information so considered could include education and training, membership in professional organizations, possession of professional liability insurance, and history of practice. In not setting entry requirements in terms of minimum numbers of hours, this criterion would avoid potential conflicts with eligibility of massage instructional programs to participate in federally financed assistance to students as set under the code of federal regulations 34 CFR 668.8. In particular, eligible programs must be at least as long as the federally required minimum hours but may not exceed by more than 50% qualifying hours explicitly set by a state. Civil laws suits contain the concept of having the plaintiff show that the "preponderance of evidence" supports their claim. This same concept could be used in defining a criteria for

allowing the massage therapist exemption: namely, that the preponderance of information available and presented indicate that the intent and capability of the petitioning therapist is to provide a legitimate service of therapeutic massage.

The code could further suggest that criteria should include but not be limited to considerations of training and education, experience, certifications, membership in professional organizations, and possession of professional liability insurance.

A North Carolina court ruled that defining adult entertainment by a "preponderance of material" is not unconstitutionally vague [40]. The ruling notes that "*The word 'preponderance' is reasonably specific and sufficiently precise as to be readily understood.*"

6. Conclusions

In reviewing issues of massage governance, I have noted that massage has the potential for substantially decreasing the social costs of stress, particularly within our current contexts of rapid technological change, economic downturns, and world spanning terrorism. Massage should be viewed as a benefit to the community and society with some problematic areas of governance.

Much of what has been proposed or implemented in terms of massage regulation has been done on unfounded claims about the likelihood of creating harm. There is no documented pattern of harm from massage via lack of training, a conclusion supported by searches of the medical literature, reviews by several agencies, and by extremely low rates for professional liability insurance. If issues of harm from abuse of the professional relationship are sufficient to motivate state regulation of therapeutic massage, strong consideration should be given to establishment of an independent board under the Department of Consumer affairs, serving multiple professions. In the absence of likely harm, the ability to benefit clients is a sufficient criterion for entry into the profession.

Much of what is considered to be improving the quality of massage education flies contrary to recent concepts of optimum educational methods. Cognitive research indicates that learning occurs most effectively in contexts of formal learning interspersed with practical experience and in situations of apprenticeship and mentoring. Modular programs that push students into practice with motivations to return for continued learning effectively create such conditions within the school framework.

Efforts by those having a medical/clinical model of massage to use legislation to foster an academic orientation for their goals have been made at the expense of educational and cultural diversity in teaching and learning styles. Those interested in this path should be redirected towards voluntary certifications appropriate to the domain of endeavor being entered.

Reforming harmful excesses in local regulation is not simply a question of licensing versus not licensing. A plethora of options exists. These include adding an exemption for therapeutic massage, based on the concept of a preponderance of information, to the state government code granting local agencies the right to regulate massage. Such an exemption could be furthered either by registration with a private agency or with the state as an explicit title act.

Issues of scope of practice could be addressed either by revision of existing health care practice acts, an approach benefiting multiple complementary and alternative health care practices, or by a title act.

Foremost, we should remember that massage, like musicianship, is primarily a kinesthetic skill coupled with supporting skills of communication, rapport building, observation, and entrepreneurship.

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Appendix A: California Government Code Sections 51030-51034

<http://www.leginfo.ca.gov/cgi-bin/displaycode?section=gov&group=51001-52000&file=51030-51034>)

51030. The legislative body of a city for incorporated areas or county for unincorporated areas may enact an ordinance which provides for the licensing for regulation of the business of massage when carried on within the city or county.

51031. The ordinance may condition the issuance of a license to engage in the business of massage upon proof that a massage business meets the reasonable standards set by the ordinance, which may include, but need not be limited to, the following areas:

- (a) Age of massage personnel.
- (b) Education and experience of massage personnel.
- (c) Passage by massage personnel of a practical examination of competence.
- (d) Sanitary conditions of the massage establishment.
- (e) Hours of operation of the massage business.
- (f) Prohibition of the sale or serving of food or beverage or the conducting of nonmassage business on the premises of the massage business. In the event that the business premises in which such massage business is conducted possesses or is qualified to possess a certificate of occupancy issued by such city or county, the prohibition of this subdivision shall apply only to the portion of the premises exclusively devoted to the conduct of the massage business.

51032. The ordinance may also provide that a license to engage in the business of massage may be denied upon a showing by the licensing authority of any of the following:

- (a) Proof that the massage personnel and the owners or operators of a massage business have been convicted of a violation of Section 266i, 315, 316, 318, or subdivision (b) of Section 647 of the Penal Code, proof that the massage personnel or the owners or operators of a massage business have been convicted in any other state of any offense which, if committed or attempted in this state, would have been punishable as one or more of the above-mentioned offenses of this subdivision, or proof that the massage personnel or the owners or operators of a massage business are required to register under the provisions of Section 290 of the Penal Code.
- (b) Proof that the massage personnel and the owners or operators of a massage business have been convicted of any felony offense involving the sale of a controlled substance specified in Section 11054, 11055, 11056, 11057, or 11058 of the Health and Safety Code or proof that the massage personnel or the owners or operators of the massage business have been convicted in any other state of any offense which, if committed or attempted in this state, would have been punishable as one or more of the above-mentioned offenses of this subdivision.

51033. This chapter does not apply to cosmetologists, barbers, or to persons licensed to practice any healing art under the provisions of Division 2 (commencing with Section 500) of the

Business and Professions Code when engaging in such practice within the scope of his or her license.

51034. The Legislature in enacting this chapter recognizes the existing power of a city or county to regulate a lawful massage business pursuant to Section 37101, or pursuant to Section 16000 or 16100 of the Business and Professions Code, or under Section 7 of Article XI of the California Constitution. Nothing contained in this chapter shall be a limitation on that existing power or on the existing authority of a city to license for revenue purposes, nor shall anything contained in this chapter authorize a city, county, or city and county to prohibit a person of one sex from engaging in the massage of a person of the other sex.

Appendix B: California Constitution Sections Pertinent to Local Regulation of Massage

Article 11: Local Government

http://www.leginfo.ca.gov/.const/.article_11)

SEC. 5. (a) It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

SEC. 7. A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.

Appendix C: California Government Code on Formation of a Board

Title 2, Div. 2, Part 1, Chapter 1.5, Article 8. Legislative oversight of state board formation and licensed professional practice. Secs. 9148.4 - 9148.10.

<http://www.leginfo.ca.gov/cgi-bin/displaycode?section=gov&group=09001-10000&file=9148-9148.10>

9148. Any state board proposed for creation by the Legislature on or after January 1, 1991, or any category of licensed professional proposed for creation by the Legislature on or after January 1, 1995, shall be subject to this article.

9148.2. For purposes of this article, "state board" means any administrative or regulatory board, commission, committee, council, association, or authority consisting of more than one person, whose members are appointed by the Governor, the Legislature, or both. For purposes of this article, "state board" does not include any commission created by the Legislature pursuant to Part 2 (commencing with Section 58601) of Division 21 of the Food and Agricultural Code.

9148.4. Prior to consideration by the Legislature of legislation creating a new state board or legislation creating a new category of licensed professional, a plan for the establishment and operation of the proposed state board or new category of licensed professional shall be developed by the author or sponsor of the legislation. The plan shall include, but not be limited to, all of the following:

- (a) A description of the problem that the creation of the specific state board or new category of licensed professional would address, including the specific evidence of need for the state to address the problem.
- (b) The reasons why this proposed state board or new category of licensed professional was selected to address this problem, including the full range of alternatives considered and the reason why each of these alternatives was not selected. Alternatives that shall be considered include, but are not limited to, the following:
 - (1) No action taken to establish a state board or create a new category of licensed professional.
 - (2) The use of a current state board or agency or the existence of a current category of licensed professional to address the problem, including any necessary changes to the mandate or composition of the existing state board or agency or current category of licensed professional.
 - (3) The various levels of regulation or administration available to address the problem.
 - (4) Addressing the problem by federal or local agencies.
- (c) The specific public benefit or harm that would result from the establishment of the proposed state board or new category of licensed professional, the specific manner in

which the proposed state board or new category of licensed professional would achieve this benefit, and the specific standards of performance which shall be used in reviewing the subsequent operation of the board or category of licensed professional.

- (d) The specific source or sources of revenue and funding to be utilized by the proposed state board or new category of licensed professional in achieving its mandate.
- (e) The necessary data and other information required in this section shall be provided to the Legislature with the initial legislation and forwarded to the policy committees in which the bill will be heard.

9148.6. Prior to consideration by the Legislature of legislation creating a new state board, which is advisory only, a plan for the establishment and operation of the proposed state board shall be developed by the author or sponsor of the legislation. The plan shall include, but not be limited to, all of the following:

- (a) A description of the problem that the proposed advisory state board would address.
- (b) A listing of those currently established state advisory and administrative entities addressing the same or similar problems.
- (c) The necessary data and other information required in this section shall be provided to the Legislature with the initial legislation and forwarded to the policy committees in which the bill will be heard.

9148.8.

- (a) The Committee on Rules of either house of the Legislature, acting pursuant to a request from the chairperson of the appropriate policy committee, may direct the Joint legislative Budget Committee to evaluate a plan prepared pursuant to Section 9148.4 or 9148.6.
- (b) Evaluations prepared by the Joint Legislative Budget Committee pursuant to this section shall be provided to the respective Committee on Rules and the policy and fiscal committees of the Legislature pursuant to rules adopted by each committee for this purpose.

9148.10. Any state board or category of licensed professional under this article shall be subject to the following:

- (a) The Joint Legislative Budget Committee shall establish criteria and review processes for the operational review of each state board or category of licensed professional. The criteria and review processes shall include, but not be limited to, all of the following:
 - (1) An assessment of whether the initial problem or condition which led to establishment of the state board or category of licensed professional being reviewed still exists to such a degree as to require the continued existence of that agency or category of licensed professional.

- (2) An assessment of other similar conditions which have arisen and the manner in which they have been addressed.
 - (3) An assessment of the agency's or licensing category's current and original scope of authority and functions, and the justification for any change.
 - (4) A full cost-benefit analysis of the state board's or licensing category's operation on a year-by-year basis since its establishment or prior review under this article.
- (b) The committee shall identify all state boards or categories of licensed professionals subject to review under this article and establish a schedule for review of these state boards or categories of licensed professionals. In no case shall any state board or category of licensed professional be allowed to operate for more than eight years after the initial date of its enactment without being subject to review under this article.

Appendix D: Business and Professions Code Section 473.4

Criteria for Sunset Review

<http://www.leginfo.ca.gov/cgi-bin/displaycode?section=bpc&group=00001-01000&file=473-473.6>

473.4. (a) The Joint Legislative Sunset Review Committee shall evaluate and determine whether a board or regulatory program has demonstrated a public need for the continued existence of the board or regulatory program and for the degree of regulation the board or regulatory program implements based on the following factors and minimum standards of performance:

- (1) Whether regulation by the board is necessary to protect the public health, safety, and welfare.
- (2) Whether the basis or facts that necessitated the initial licensing or regulation of a practice or profession have changed.
- (3) Whether other conditions have arisen that would warrant increased, decreased, or the same degree of regulation.
- (4) If regulation of the profession or practice is necessary, whether existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms, and whether the board rules enhance the public interest and are within the scope of legislative intent.
- (5) Whether the board operates and enforces its regulatory responsibilities in the public interest and whether its regulatory mission is impeded or enhanced by existing statutes, regulations, policies, practices, or any other circumstances, including budgetary, resource, and personnel matters.
- (6) Whether an analysis of board operations indicates that the board performs its statutory duties efficiently and effectively.
- (7) Whether the composition of the board adequately represents the public interest and whether the board encourages public participation in its decisions rather than participation only by the industry and individuals it regulates.
- (8) Whether the board and its laws or regulations stimulate or restrict competition, and the extent of the economic impact the board's regulatory practices have on the state's business and technological growth.
- (9) Whether complaint, investigation, powers to intervene, and disciplinary procedures adequately protect the public and whether final dispositions of complaints, investigations, restraining orders, and disciplinary actions are in the public interest; or if it is, instead, self-serving to the profession, industry or individuals being regulated by the board.
- (10) Whether the scope of practice of the regulated profession or occupation contributes to the highest utilization of personnel and whether entry requirements encourage affirmative action.
- (11) Whether administrative and statutory changes are necessary to improve board operations to enhance the public interest.
 - (b) The Joint Legislative Sunset Review Committee shall consider alternatives to placing responsibilities and jurisdiction of the board under the Department of Consumer Affairs.
 - (c) Nothing in this section precludes any board from submitting other appropriate information to the Joint Legislative Sunset Review Committee.

Appendix E: Massage Instruction Regulations Prior to 1989¹

TITLE 5. Education

Division 1. State Department of Education

Chapter 21. Private Postsecondary Education Instructions

Subchapter 3. Standards for Evaluating the Institution

Article 3. Institutions Approved Under Education Code Section 94311(d)

§18818. Standards Applicable to Courses of Instruction in Massage.

(Available at <http://ccr.oal.ca.gov/>)

Before the superintendent [of education] issues any approval of a course or courses of instruction in massage, the following standards shall, in addition to any other applicable standards established by Title 5, California Administrative Code, be met and maintained.

- (a) A school of massage shall not permit class or practice sessions of any type to continue later than 10:30 p.m. nor start earlier than 7:00 a.m.

A school of massage shall not, at the same time, operate as a massage parlor or studio. However, a school of massage may be operated simultaneously with and in the same or a contiguous building with a massage studio or parlor, provided that the facilities of the school and studio or parlor are totally separate, clearly delineated and there is neither a sharing of any portion of those respective facilities nor a direct access between them. For purposes of this paragraph, each school shall file with the superintendent a combined detailed floor plan of the school and the massage studio or parlor.

A school of massage may share facilities with a massage studio or parlor at any time, provided that a school so sharing such facilities files with the superintendent a schedule of hours during which it offers classes or practice sessions of any kind, and posts such schedule at the school entrance in full view of anyone who enters. Classes and practice sessions shall not be held at any other time.

- (b) Any owner, director, officer, administrator, employee or student of a school, or any other person, is prohibited from performing massage of any kind upon a member of the general public while on the school premises. Students of the school may practice massage only upon an instructor or other student. A “dummy” body maybe used.
- (c) Correspondence courses of instruction or a combination of correspondence and residence courses of instruction in massage shall not be approved.
- (d) An application for approval shall include evidence that a business license or signed statement of exemption has been obtained by the school from the appropriate local authority.

¹ Prior to 1989, Private Postsecondary and Vocational Education was regulated under the Dept. of Education.

- (e) School records shall reflect actual and verifiable attendance and progress in any massage course for its entire length.
- (f) A course of massage shall not be approved for less than 100 hours of instruction, which shall include, but not be limited to Anatomy, Physiology and Hygiene, Massage Theory and History, Ethics of Massage, Business Practices, and a minimum of 75 hours of Demonstration and Practice of Massage Techniques.
- (g) No more than 50 percent of the total hours of massage course may be granted for previous equivalent education or training.