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MEMORANDUM

To: Rick Rosen, Executive Director
Federation of State Massage Therapy Boards (FSMTB)

From: Dale Atkinson, General Counsel, FSMTB

Date: December 19, 2005

Re: Delegation of Authority for Competency Assessment

Introduction

This memorandum is intended to address the complex issues surrounding the relationship between the Federation of State Massage Therapy Boards (FSMTB) and its Member Boards of massage therapy, the reliance by Member Boards on the programs of FSMTB, and legal implications of statutory and/or regulatory delegation of authority to private, non-governmental entities regarding criteria for licensure of massage therapists.

In short, legislative reliance on the private sector through the enactment of statutes which specifically name examinations and/or accrediting entities over which there is no governmental oversight or public accountability undermines the foundation of the regulatory process. In addition, such delegation of authority for determinations of mandatory criteria in a licensure process is fraught with legal and practical implications. The rationale for these conclusions is contained in this memo.

As you know, our firm has a wealth of experience in the regulatory community through our representation of numerous associations of regulatory boards, including FSMTB, as well as similar associations in the fields of social work, chiropractic, pharmacy, optometry, veterinary medicine, and others. We also represent various accrediting organizations that accredit the schools and programs of certain professions and that are recognized by the United States Department of Education.

I have purposefully prepared this memo without formal citations to legal references and case law in anticipation of distribution to FSMTB membership and other interested stakeholders. As a reminder, massage therapy boards are represented by their respective attorney general's office or other legal counsel and are advised to seek and rely upon such advice. However, we offer the following on behalf of the FSMTB and will be happy to supplement or provide citations to you or any requesting Member Boards.

Overview

FSMTB, like other similar associations of regulatory boards was incorporated for the purpose of serving its Member Boards in public protection through the regulation of the profession. Article II of the FSMTB Bylaws specifically addresses the mission and functions of the association. The FSMTB mission and functions are similar to other associations of boards which emphasize collaboration, communication, and uniformity in regulation through the development of programs and services to assist constituent boards in fulfilling the statutory public protection mandates through the licensure process.

Accordingly, FSMTB operates in conjunction with and through collaboration with its Member Boards which comprise the only entities that qualify for membership within the association. FSMTB has qualified for recognition by the Internal Revenue Service as exempt from taxation under Section 501(c)(3) of the Internal Revenue Code (IRC). Section 501(c)(3) status is conferred on associations which operate exclusively for "charitable" purposes. Charitable has been interpreted by the IRS as lessening burdens on state government -- which is the primary purpose of FSMTB as evidenced by the services it intends to provide to its Member Boards.

The mission and functions of FSMTB, along with its 501(c)(3) recognition by the IRS provide a basis for state boards of massage therapy to seek and maintain membership in the association. Once massage therapy boards become members, FSMTB will be "governed" by such boards through an election process for its Board of Directors and through resolutions that can be introduced, discussed, and voted upon by appointed delegates of Member Boards at official meetings.

It is this resolution process that acts as a basis for policy setting and provides the Board of Directors and staff with guidance in development, implementation, administration and maintenance of programs and services. Member Boards are empowered at the state level to regulate the profession in the interest of public protection and it is this mandate that will guide delegates to the FSMTB in the election and policy setting processes. Empowerment of Member Boards to set and direct policy, programs and services of the organization provides accountability to the global public protection mission of FSMTB and its Member Boards.

Regarding terminology and for consistency of reference, this memo will use *licensure* and *certification* as defined below. In the context of this memo, references to “licensure” refer to a mandatory, governmental recognition of authority to practice based upon standards established through the enactment of law by elected representatives. Generally, practice of the regulated professions without a license (or governmental authority) triggers both administrative and criminal consequences. It is noted that several states may use certification and/or registration as the term to signify governmental authorization to practice massage therapy. This use of synonymous terminology exists in many of the regulated professions. Again, for purposes of clarity, the use of “certification” in this memo refers to a voluntary, private sector recognition based upon a set of standards established by the entity which offers the credential with no oversight by the public sector.

It is worthwhile to distinguish professional and trade associations from FSMTB and similar associations of regulatory boards. As mentioned, national associations of boards exist to assist state agencies in fulfilling a statutory mandate to protect the public through the regulation of a particular occupation. On the other hand, professional membership associations consist of individual practitioners and are organized and operated to advance the common business interests of its members through lobbying efforts, assessment of economic/financial issues, and general promotion and protection of the professionals themselves. These trade association activities typically cannot be undertaken by the regulatory boards. Professional associations may be recognized under the IRC as exempt from taxation under Section 501(c)(6), an IRC section specifically recognizing trade associations and their unique professional promotional activities.

In addition to associations of regulatory boards and professional associations, numerous private sector certification programs also exist. These programs are built upon either a set of criteria regarding practice or an advanced standing through a specialty certification. The standards of such programs are developed by the credentialing organization without direct public accountability. Again, the primary purpose of such entities is the promotion of the individual practitioners through a certification recognition bestowed upon applicants who voluntarily choose to apply. This structure is quite distinguishable from FSMTB-type associations.

Associations of regulatory boards, professional associations, and private sector certifying entities each have recognized purposes. Communications between the groups can be beneficial; however, their missions are separate and distinct. Regulatory boards, based on prohibitions from undertaking lobbying and professional promotional activities cannot belong to professional associations. Our experiences indicate that the distinguishing factors between the public protection purpose of FSMTB and its Member Boards may be difficult to embrace by professionals appointed to the state board who are accustomed to promoting the profession through trade association activities. This is true of all the professions, but especially emphasized in occupations that are “new” to the process of professional regulation.

Examples of some of the services and programs provided by associations of boards to their membership include; a uniform licensure examination, licensure transfer programs, practitioner databanks, disciplinary databanks, a credentials and document registry, foreign education equivalence programs and many others. Perhaps most important, the uniform licensure examination program provides a psychometrically sound, defensible program relied upon by member boards to establish minimum competence as an essential criterion in the licensure process.

Exam development, statistical analysis, validation, administration, maintenance and defense on a uniform basis clearly lessen burdens on the state boards (or departments/agencies) while at the same time creating uniformity for purposes of recognition by additional member boards in the event of movement by licensees from state to state. It is our opinion that the state boards must have direct authority over these processes for legal and practical reasons. The principles that allow state regulatory boards to “belong” to an association of boards also dictate state board involvement in decision making and use of such programs in a licensure process. The rationale is contained below.

Delegation of Authority

As a service to their member boards, most associations of regulatory boards like FSMTB draft, adopt and continually update model legislation and rules regulating the profession. Sometimes referred to as a “practice act”, these state-based licensure schemes create and empower a regulatory board, establish a licensure system based upon criteria set forth in statute, and generally authorize the board to enforce the legislative mandates. A review of the model practice acts of many of the associations will reveal an empowerment in the state board to determine the examination used in the licensure process. Based upon the same legal and practical rationale, authority to recognize additional mandatory criteria is also vested with the board (i.e. educational programs, continuing education providers and programs, and the like). Certain model legislation was discussed at the FSMTB organizational meeting in September 2005 and was distributed to state board representatives.

Based upon legal principles regarding delegation of authority, the authority for decision making is properly vested in the board, rather than legislatively “delegating” authority to an outside, private entity over which the board has no control. Legislation that designates a particular private entity or examination may be susceptible to legal challenges under constitutional arguments relating to delegation of authority. In short, constitutional principles vest the authority in a House and Senate which are made up of individuals elected by constituents. Through the enactment of legislation, such a congress cannot vest assessment of mandatory licensure criteria in a private entity, except under very stringent circumstances related to control of criteria, oversight, and public accountability.

Delegation of authority is a complex legal topic that warrants an in-depth analysis. While it may be argued that a number of states maintain in their practice acts and/or regulations references to a specific exam provider, such as the National Certification Board for Therapeutic Massage and Bodywork (NCBTMB) or the recognition of the National Commission for Certifying Agencies (NCCA) of the National Organization for Competency Assurance (NOCA), such statutory or regulatory references (or, for that matter, any arguments related to "the long-standing practice") do not provide a sound legal basis for the delegation of obligatory criteria to private entities.

The United States Constitution and most state constitutions reserve the power to promulgate laws to the legislature. While the legislative branch may lawfully delegate certain authority to a statutorily-created regulatory body, such delegation must be accompanied by parameters or standards by which the regulatory body will be judged. It is axiomatic that a legislature cannot delegate authority to an outside private entity. Any such legislation which gives unfettered control to an outside private body will be suspect, if subjected to constitutional scrutiny under a delegation analysis.

More specifically and under these circumstances, the legal analysis will examine several issues in determining the constitutional validity of an alleged improper delegation to an outside private entity. Generally, judicial consideration will examine:

1. Whether the actions of the private delegate are subject to the full review by a branch of government;
2. Whether the persons affected by the delegate's actions are adequately represented in decision-making;
3. Whether the delegate's power is limited to making rules or do the delegates apply laws to individuals;
4. Whether the delegate has a financial or personal interest that may conflict with public function;
5. Whether the delegate is empowered to define criminal acts or imposes criminal sanctions;
6. Whether the delegation is narrow in duration, extent and subject matter;
7. Whether the delegate possesses special qualifications to meet the mandate of public protection; and
8. Whether the legislature provided standards to guide the delegate.

It is our opinion that an analysis of these criteria may well lead to a judicial ruling which strikes down a legislative attempt to delegate the examination authority to NCBTMB or to name a specific examination or private sector examination or accrediting entity in statutes.

This conclusion is based upon the facts that: NCBTMB is not subject to full review by any branch of government; the applicants seeking licensure are not adequately represented in decision making process of NCBTMB; its power is not limited; NCBTMB has a financial and personal interest which conflicts with public functions; the failure to gain licensure in most jurisdictions subjects unlicensed individuals practicing the profession to criminal sanctions; the delegation to NCBTMB is unfettered and contains no narrow scope nor extent and subject matter; and finally, that the legislature provides no standards to guide NCBTMB.

It is this delegation theory which provides the legal basis for questioning the involvement of NCBTMB or the professional associations in the affairs of licensure and licensing boards. This legal analysis is supported by numerous cases and, in our opinion, will not be overcome by reference to history or the long-standing practice of the involvement of NCBTMB in the process. Numerous professions have seen the involvement of outside certification organizations and the professional associations erode over time based upon an evolution of these legal theories, as well as a continued focus on accountability to the public -- the constituents for whose benefit the practice acts are adopted.

An example of suspect legislation in pertinent part related to licensure criteria may read as follows:

Applicants for licensure as a _____ must meet the following criteria:

1. file an application;
2. pay all applicable fees;
3. pass the XYZ examination. ...

This example assumes the XYZ is a private entity which develops the examination and the regulatory board has no control over the examination development and validation process (which includes, among the many facets of the exam processes, setting the passing standard). By virtue of the fact that successful completion of the exam is required as a prerequisite to licensure, the legislature has delegated through statute an obligatory element of licensure to an entity over which neither the legislature nor the board have any oversight or control.

Based upon the potential for constitutional claims premised upon improper delegation of authority, it is recommended that legislation vest exclusive authority in the regulatory board to determine the exam to be used in the licensure process. Thus, the legislation might read as follows:

Applicants for licensure as a _____ must meet the following criteria:

1. file an application;
2. pay all applicable fees;
3. pass an examination approved by the board. ...

Once empowered by the statute, the board can adopt the exam criteria to be used through administrative rules or regulations. Under such an arrangement, the decision making authority is properly vested in and undertaken by the legislatively created and empowered board that is mandated to regulate in the interest of public protection.

In determining the exam to use, the essential issue for the boards to consider on both legal and practical grounds is involvement and control. A licensure process is legislatively determined based upon a need for regulation in the interest of protecting the public health and welfare. Historically, criticism of the regulatory process has been premised upon professionals regulating themselves. Regulatory boards, although comprised mostly of practitioners in a particular occupational field, are governmental entities cloaked with protections such as immunity in order to allow for enforcement and regulation in the interest of the public. Thus, regulatory board involvement and control (with attendant oversight from the legislature) of the components of the licensure process are critical legal and practical components.

Involvement and control over the exam, for instance, confer authority in the board to access information and provide input regarding exam development, validation, statistical analysis, administration, scoring, passing standard setting, exam attempts, fees, access to data, and many other important elements to operating a defensible program. Involvement and control are not only essential under the constitutional theories of delegation of authority, but are critical to additional legal arguments as the board (or state) is ultimately responsible for the licensure decisions. That is, in the event of an adverse decision of an applicant for licensure, the board and state are the targets as defendants. Both a legally tenuous and embarrassing defense by the state would be that the exam was prepared by another entity and the state is not responsible. Such a position would likely fail under a legal analysis and portray the board as being out of the loop in assessment of minimum competence determinations to qualify applicants to practice.

A similar analysis exists regarding other licensure issues set in statute, such as accredited or recognized educational programs, continuing education providers, licensure verification services and the like.

Many additional issues exist regarding the involvement of the state regulatory boards in programs used in the assessment of applicants for licensure. Involvement and control are essential elements that provide a legal and practical basis for regulatory boards in massage therapy to belong to FSMTB. It is our opinion that the examinations used by the boards cannot be delegated to an outside private entity over which the boards have no control without risk of successful attack under constitutional and other legal principles.

Legislative reliance on private sector entities for mandatory determination related to licensure criteria implicates not only legal consequences, but undermines the very foundation for which regulatory schemes are statutorily enacted. Compelling arguments can be made that vesting in the private sector essential decision making determinations

related to satisfaction of licensure criteria defeats the purpose of governmental oversight and the existence of the state regulatory boards. Regulatory processes can delegate themselves out of existence to the detriment of vital public protection purposes. Numerous cases exist to support these legal conclusions which can be provided to you should you so desire.

Conflict of Interest

Without an exhaustive analysis of the conflict of interest principles, the above-referenced criteria used in determining delegation issues also illustrate the conflict of interest position of legislative or regulatory board reliance upon an outside organization and/or the professional association in an unfettered manner to determine the eligibility of candidates for licensure. The examination component of the licensure process is mandatory and those individuals who do not comply with the statutes will not be licensed by a particular jurisdiction. The conflict of interest clearly arises when the regulatory boards and/or licensure laws rely upon outside private entities involved in the economics and professional promotion to exercise uncontrolled discretion. It is not only the *actual* existence of a conflict which is troubling to the law, but also the *potential* for manipulation or taking advantage of a situation which runs afoul of legal principles.

Antitrust Implications

Finally, involvement of outside private entities and/or professional associations in the licensure process may implicate antitrust issues. Private sector entities that possess the ability to determine satisfactory completion of criteria as a prerequisite to licensure and ultimate entry into a profession are placed in the unique position of acting as gatekeeper to practice. Entities which are relied upon in a licensure scheme that do not share the public protection mission of the regulatory boards, but are incorporated to promote the profession or credential individuals are susceptible to legal challenge under applicable market share or conspiracy theories. Allegations of improper use of an examination, including potential manipulation of passing standards, for example, may give rise to colorable antitrust claims creating serious additional legal implications. This memo is not intended to provide an analysis of the antitrust issues. However, should you need further analysis regarding the antitrust issues, please let me know.