



Dora
Department of Regulatory Agencies

Office of Policy, Research and Regulatory Reform

2012 Sunset Review: Massage Therapy Practice Act

October 15, 2012





Executive Director's Office

Barbara J. Kelley
Executive Director

John W. Hickenlooper
Governor

October 15, 2012

Members of the Colorado General Assembly
c/o the Office of Legislative Legal Services
State Capitol Building
Denver, Colorado 80203

Dear Members of the General Assembly:

The mission of the Department of Regulatory Agencies (DORA) is consumer protection. As a part of the Executive Director's Office within DORA, the Office of Policy, Research and Regulatory Reform seeks to fulfill its statutorily mandated responsibility to conduct sunset reviews with a focus on protecting the health, safety and welfare of all Coloradans.

DORA has completed the evaluation of the regulation of massage therapists. I am pleased to submit this written report, which will be the basis for my office's oral testimony before the 2013 legislative committee of reference. The report is submitted pursuant to section 24-34-104(8)(a), of the Colorado Revised Statutes (C.R.S.), which states in part:

The department of regulatory agencies shall conduct an analysis of the performance of each division, board or agency or each function scheduled for termination under this section...

The department of regulatory agencies shall submit a report and supporting materials to the office of legislative legal services no later than October 15 of the year preceding the date established for termination....

The report discusses the question of whether there is a need for the regulation provided under Article 35.5 of Title 12, C.R.S. The report also discusses the effectiveness of the Division of Professions and Occupations in carrying out the intent of the statutes and makes recommendations for statutory changes in the event this regulatory program is continued by the General Assembly.

Sincerely,

Barbara J. Kelley
Executive Director





John W. Hickenlooper.
Governor

Barbara J. Kelley
Executive Director

2012 Sunset Review: Massage Therapy Practice Act

Summary

What Is Regulated?

The Massage Therapy Practice Act (MTPA) provides regulatory oversight for massage therapists. In general, the term “massage therapist” encompasses a broad spectrum of professionals whose practices focus on touch of the human body as a means of providing mental and physical relaxation and relief from soreness.

Why Is It Regulated?

The purpose of the MTPA is to provide protection to consumers by requiring massage therapists to register (and meet certain statutory requirements) with the Director of the Division of Professions and Occupations (Director) within the Department of Regulatory Agencies.

Who Is Regulated?

In fiscal year 10-11, there were 10,217 registered massage therapists in Colorado.

How Is It Regulated?

The MTPA is enforced by the Director, in what is commonly referred to as a director model program. The Director is responsible for, among other duties, registering massage therapists and imposing discipline when warranted. To register as a massage therapist, a person must possess a degree, diploma or other evidence of the successful completion of a massage therapy program consisting of at least 500 hours of course and clinical work from an approved massage school; pass an approved examination and pass a criminal history record check.

What Does It Cost?

In fiscal year 10-11, the total expenditures for the oversight of massage therapists were \$503,252. There were 1.05 full-time equivalent employees associated with this regulatory oversight.

What Disciplinary Activity Is There?

In fiscal year 10-11, there were 23 enforcement actions imposed on registered massage therapists by the Director: 11 cease and desist orders, 9 stipulations and 3 revocations.

Key Recommendations

Continue the MTPA for nine years, until 2022.

Regulation of a profession or occupation performs two important functions that enhance consumer protection. First, regulation measures the competency of individuals to practice. Second, regulation exists to receive consumer complaints against practitioners. In those instances when a practitioner has violated the law, disciplinary action may be taken. Since the enactment of the MTPA in 2008, the Director received 54 complaints against massage therapists, 22 of which alleged sexual misconduct. During this same period, the Director took disciplinary action against 23 massage therapists. Thus, it appears that the regulation of massage therapists has accomplished what the General Assembly intended: restriction of entry into the occupation to those who meet prescribed requirements and creation of an effective complaint processing mechanism that results in discipline by the state of practitioners who violate the law.

Repeal registration requirements and implement licensing of massage therapists.

The General Assembly enacted the MTPA as a means to address two issues: prostitution and human trafficking. Since the MTPA was enacted, the Director has received a number of complaints that have been classified as sexual misconduct but that have more to do with inappropriate draping. Although this is not a competency issue, it is a standard of care issue and, as such, is more indicative of the types of issues that arise in licensing, as opposed to registration, programs.

Update and improve the grounds for discipline of massage therapists.

Because the MTPA was created as a registration scheme, a number of needed grounds for discipline are missing. The General Assembly should authorize the Director to take disciplinary action against practitioners who are disciplined in another state, who are convicted of any crime related to the practice of massage therapy and who commit acts that do not meet the generally accepted standards of massage therapy care.

Major Contacts Made During This Review

American Massage Therapy Association – Colorado Chapter
Association of Bodywork and Massage Professionals
Colorado Division of Professions and Occupations

What is a Sunset Review?

A sunset review is a periodic assessment of state boards, programs, and functions to determine whether or not they should be continued by the legislature. Sunset reviews focus on creating the least restrictive form of regulation consistent with protecting the public. In formulating recommendations, sunset reviews consider the public's right to consistent, high quality professional or occupational services and the ability of businesses to exist and thrive in a competitive market, free from unnecessary regulation.

Sunset Reviews are Prepared by:
Colorado Department of Regulatory Agencies
Office of Policy, Research and Regulatory Reform
1560 Broadway, Suite 1550, Denver, CO 80202
www.askdora.colorado.gov



Table of Contents

Background.....	1
Introduction.....	1
Types of Regulation.....	2
Sunset Process.....	4
Methodology.....	4
Profile of the Profession.....	4
Legal Framework.....	6
History of Regulation.....	6
Program Description and Administration.....	10
Registration.....	11
Complaints/Disciplinary Actions.....	11
Analysis and Recommendations.....	14
<i>Recommendation 1 – Continue the Massage Therapy Practice Act for nine years, until 2022.....</i>	<i>14</i>
<i>Recommendation 2 – Repeal registration requirements and implement licensing of massage therapists.....</i>	<i>15</i>
<i>Recommendation 3 – Update and improve the grounds for discipline of massage therapists.....</i>	<i>16</i>
<i>Recommendation 4 – Authorize the Director to issue letters of admonition and confidential letters of concern.....</i>	<i>18</i>
<i>Recommendation 5 – Amend the MTPA to facilitate the registration of applicants trained outside of Colorado.....</i>	<i>18</i>
<i>Recommendation 6 – Require massage therapists who have been denied registration, have had their registration revoked, or who have surrendered their registration in lieu of disciplinary action, to wait two years to reapply.....</i>	<i>20</i>
<i>Recommendation 7 – Revise the MTPA so that failure to act within the limitations created by a physical or mental condition or disability is grounds for discipline and authorize the Director to enter into confidential agreements with</i>	

practitioners to address conditions that may impact the practitioner's ability to practice..... 21

Background

Introduction

Enacted in 1976, Colorado's sunset law was the first of its kind in the United States. A sunset provision repeals all or part of a law after a specific date, unless the legislature affirmatively acts to extend it. During the sunset review process, the Department of Regulatory Agencies (DORA) conducts a thorough evaluation of such programs based upon specific statutory criteria¹ and solicits diverse input from a broad spectrum of stakeholders including consumers, government agencies, public advocacy groups and professional associations.

Sunset reviews are based on the following statutory criteria:

- Whether regulation by the agency is necessary to protect the public health, safety and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less or the same degree of regulation;
- If regulation is necessary, whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms and whether agency rules enhance the public interest and are within the scope of legislative intent;
- Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures and practices and any other circumstances, including budgetary, resource and personnel matters;
- Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively;
- Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates;
- The economic impact of regulation and, if national economic information is not available, whether the agency stimulates or restricts competition;
- Whether complaint, investigation and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession;
- Whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action;
- Whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest.

¹ Criteria may be found at § 24-34-104, C.R.S.

Types of Regulation

Consistent, flexible, and fair regulatory oversight assures consumers, professionals and businesses an equitable playing field. All Coloradans share a long-term, common interest in a fair marketplace where consumers are protected. Regulation, if done appropriately, should protect consumers. If consumers are not better protected and competition is hindered, then regulation may not be the answer.

As regulatory programs relate to individual professionals, such programs typically entail the establishment of minimum standards for initial entry and continued participation in a given profession or occupation. This serves to protect the public from incompetent practitioners. Similarly, such programs provide a vehicle for limiting or removing from practice those practitioners deemed to have harmed the public.

From a practitioner perspective, regulation can lead to increased prestige and higher income. Accordingly, regulatory programs are often championed by those who will be the subject of regulation.

On the other hand, by erecting barriers to entry into a given profession or occupation, even when justified, regulation can serve to restrict the supply of practitioners. This not only limits consumer choice, but can also lead to an increase in the cost of services.

There are also several levels of regulation.

Licensure

Licensure is the most restrictive form of regulation, yet it provides the greatest level of public protection. Licensing programs typically involve the completion of a prescribed educational program (usually college level or higher) and the passage of an examination that is designed to measure a minimal level of competency. These types of programs usually entail title protection – only those individuals who are properly licensed may use a particular title(s) – and practice exclusivity – only those individuals who are properly licensed may engage in the particular practice. While these requirements can be viewed as barriers to entry, they also afford the highest level of consumer protection in that they ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

Certification

Certification programs offer a level of consumer protection similar to licensing programs, but the barriers to entry are generally lower. The required educational program may be more vocational in nature, but the required examination should still measure a minimal level of competency. Additionally, certification programs typically involve a non-governmental entity that establishes the training requirements and owns and administers the examination. State certification is made conditional upon the individual practitioner obtaining and maintaining the relevant private credential. These types of programs also usually entail title protection and practice exclusivity.

While the aforementioned requirements can still be viewed as barriers to entry, they afford a level of consumer protection that is lower than a licensing program. They ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

Registration

Registration programs can serve to protect the public with minimal barriers to entry. A typical registration program involves an individual satisfying certain prescribed requirements – typically non-practice related items, such as insurance or the use of a disclosure form – and the state, in turn, placing that individual on the pertinent registry. These types of programs can entail title protection and practice exclusivity. Since the barriers to entry in registration programs are relatively low, registration programs are generally best suited to those professions and occupations where the risk of public harm is relatively low, but nevertheless present. In short, registration programs serve to notify the state of which individuals are engaging in the relevant practice and to notify the public of those who may practice by the title(s) used.

Title Protection

Finally, title protection programs represent one of the lowest levels of regulation. Only those who satisfy certain prescribed requirements may use the relevant prescribed title(s). Practitioners need not register or otherwise notify the state that they are engaging in the relevant practice, and practice exclusivity does not attach. In other words, anyone may engage in the particular practice, but only those who satisfy the prescribed requirements may use the enumerated title(s). This serves to indirectly ensure a minimal level of competency – depending upon the prescribed preconditions for use of the protected title(s) – and the public is alerted to the qualifications of those who may use the particular title(s).

Licensing, certification and registration programs also typically involve some kind of mechanism for removing individuals from practice when such individuals engage in enumerated proscribed activities. This is generally not the case with title protection programs.

Regulation of Businesses

Regulatory programs involving businesses are typically in place to enhance public safety, as with a salon or pharmacy. These programs also help to ensure financial solvency and reliability of continued service for consumers, such as with a public utility, a bank or an insurance company.

Activities can involve auditing of certain capital, bookkeeping and other recordkeeping requirements, such as filing quarterly financial statements with the regulator. Other programs may require onsite examinations of financial records, safety features or service records.

Although these programs are intended to enhance public protection and reliability of service for consumers, costs of compliance are a factor. These administrative costs, if too burdensome, may be passed on to consumers.

Sunset Process

Regulatory programs scheduled for sunset review receive a comprehensive analysis. The review includes a thorough dialogue with agency officials, representatives of the regulated profession and other stakeholders. Anyone can submit input on any upcoming sunrise or sunset review via DORA's website at: www.askdora.colorado.gov.

The regulatory functions of the Director of DORA's Division of Professions and Occupations (Director and Division, respectively), formerly the Division of Registrations, through Article 35.5 of Title 12, Colorado Revised Statutes (C.R.S.), shall terminate on September 1, 2013, unless continued by the General Assembly. During the year prior to this date, it is the duty of DORA to conduct an analysis and evaluation of the licensure of massage therapists pursuant to section 24-34-104, C.R.S.

The purpose of this review is to determine whether the currently prescribed regulation of massage therapists should be continued for the protection of the public and to evaluate the performance of the Director. During this review, the Director must demonstrate that the regulation serves to protect the public health, safety or welfare, and that the regulation is the least restrictive regulation consistent with protecting the public. DORA's findings and recommendations are submitted via this report to the Office of Legislative Legal Services.

Methodology

As part of this review, DORA staff interviewed Division staff, reviewed records including complaint and disciplinary actions, interviewed officials with state and national professional associations, interviewed healthcare providers, reviewed Colorado statutes and reviewed the laws of other states.

Profile of the Profession

In Colorado, the statutory definition of massage therapy may be found at section 12-35.5-103(7), C.R.S.:

"Massage" or "massage therapy" means a system of structured touch, palpation, or movement of the soft tissue of another person's body in order to enhance or restore the general health and well-being of the recipient.

In general, the term “massage therapist” encompasses a broad spectrum of professionals whose practices focus on touch of the human body as a means of providing mental and physical relaxation and relief from soreness.

Massage therapists work in a variety of settings, including private offices, spas, hospitals, fitness centers and shopping malls. Some massage therapists also travel to clients’ homes or offices.²

Massage therapy is a popular form of complementary and alternative medicine (CAM), especially as a supportive therapy to help manage symptoms such as pain, sleep problems and the negative effects of stress. In the 2007 National Health Interview Survey (NHIS), massage was the fifth most used CAM therapy.³

The NHIS also found that Americans paid about \$4.18 billion out of pocket for roughly 95.3 million visits to massage practitioners in the year before the survey.⁴

There are over 10,000 massage therapists presently registered in Colorado and, according to the United States Bureau of Labor Statistics, employment of massage therapists is expected to grow by 20 percent from 2010 to 2020, faster than the average for all other occupations. Continued growth in the demand for services will lead to new openings for massage therapists.⁵

² Bureau of Labor Statistics, U.S. Department of Labor. *Occupational Outlook Handbook, 2012-13 Edition, Massage Therapists*. Retrieved on May 2, 2012, from www.bls.gov/ooh/healthcare/massage-therapists.htm

³ Patricia Barnes, Barbara Bloom and Richard Nahin, “Complementary and Alternative Medicine Use Among Adults and Children: United States, 2007,” *National Health Statistics Reports*, No. 12 (December 10, 2008), p. 3.

⁴ Richard Nahin, Patricia Barnes, Barbara Stussman and Barbara Bloom, “Costs of Complementary and Alternative Medicine (CAM) and Frequency of Visits to Cam Practitioners: United States, 2007,” *National Health Statistics Reports*, No. 18 (July 30, 2009), p. 6.

⁵ Bureau of Labor Statistics, U.S. Department of Labor. *Occupational Outlook Handbook, 2012-13 Edition, Massage Therapists*. Retrieved on May 2, 2012, from www.bls.gov/ooh/healthcare/massage-therapists.htm

Legal Framework

History of Regulation

The Colorado General Assembly passed legislation regulating massage therapists in 2008 following a sunrise review conducted by the Department of Regulatory Agencies (DORA) in 2007. As of April 1, 2009, massage therapists in Colorado were required to register with DORA's Division of Professions and Occupations (Division), formerly the Division of Registrations.

Massage Therapy Practice Act

The legislative declaration of the Massage Therapy Practice Act (MTPA) states that the registration of massage therapists is necessary because proper and safe massage therapy is of statewide concern.⁶

The MTPA protects the titles of "massage therapist", "registered massage therapist", "massage practitioner", "masseur", "masseur", the letters "M.T.", "R.M.T." and any other generally accepted terms, or letters that indicate that the person is a massage therapist.⁷ The MTPA also:⁸

- Establishes requirements that an applicant must meet in order to register to practice as a massage therapist;
- Requires a degree or diploma or other evidence of the successful completion of a massage therapy program consisting of at least 500 hours of course and clinical work from an approved massage school;
- Requires the passage of an approved examination; and
- Requires applicants to submit to a criminal history record check.

Registered massage therapists are required to carry professional liability insurance of at least \$50,000 per claim and an aggregate liability limit for all claims during one year of at least \$300,000.⁹

Massage therapists are prohibited from performing:

- The practice of medicine;
- The practice of physical therapy;
- The practice of chiropractic; and
- Any other form of healing art not authorized by MTPA.

⁶ § 12-35.5-102, C.R.S.

⁷ § 12-35.5-104, C.R.S.

⁸ § 12-35.5-107, C.R.S.

⁹ § 12-35.5-116, C.R.S.

Colorado law contains numerous exemptions from the requirement to register including:¹⁰

- Massage therapy performed as part of a program of study by students at an approved massage therapy school;
- Massage therapy performed by a person who is employed by the United States government or any federal government entity while acting in the course and scope of that employment;
- Practices that manipulate only the soft tissue of a person's hands, feet or ears;
- Practices using touch, words and directed movements to deepen a person's awareness of movement patterns in his or her body;
- Structural integration practices, such as Rolfing and Hellerwork;
- The process of muscle activation techniques;
- Practices using touch to affect the human energy systems, such as reiki, shiatsu and Asian or polarity bodywork therapy;
- Animal massage; and
- Practice of massage therapy by a resident of another state who is in Colorado temporarily under specific circumstances such as:
 - traveling with and administering massage therapy to members of a professional or amateur sports organization, dance troupe or other such athletic organization; or
 - providing massage therapy, without compensation, at public athletic events such as Olympic games, special Olympics, youth Olympics, or marathons, if the massage therapy is provided no earlier than 48 hours prior to the commencement of the event and no later than 24 hours after the conclusion of the event.

¹⁰ § 12-35.5-110, C.R.S.

The Director of the Division (Director) is authorized to take disciplinary action against any registrant on a number of grounds, including:¹¹

- Advertising, representing, or holding himself or herself out as a registered massage therapist after the expiration, suspension, or revocation of his or her registration;
- Engaging in a sexual act with a client while a therapeutic relationship exists;
- Failing to refer a patient to a general healthcare practitioner when required;
- Falsifying of any application or attempting to obtain a registration by fraud, deception or misrepresentation;
- Obtaining or furnishing a massage therapy registration through fraudulent means or aiding or abetting any such acts, including the renewal or reinstatement of a registration, diploma, certificate or record;
- Being dependent on or being addicted to alcohol or any habit-forming drug;
- Having a physical or mental condition or disability that renders the registrant unable to provide massage therapy with reasonable skill and safety or that may endanger the health or safety of clients receiving massage services;
- Refusing to submit to a physical or mental examination when ordered by the Director pursuant to statutory requirements;
- Failing to provide notification in writing of the entry of a final judgment by a court of competent jurisdiction in favor of any party and against a licensee for malpractice of massage therapy or any settlement by the licensee in response to charges or allegations of malpractice of massage therapy;
- Being convicted of a felony or entering a plea of guilty or nolo contendere to a felony or the commission of any act specified in the disciplinary section of the MTPA;
- Advertising, representing, or holding oneself out in any manner, or using any designation in connection with his or her name as a massage therapist without being registered or exempt pursuant to the MTPA;
- Violating or abetting in the violation of any provision of the MTPA or any rule adopted under the MTPA, or any lawful order of the Director; and
- Being convicted of or entering a guilty plea to a charge of unlawful sexual behavior as defined in the Colorado Sex Offender Registration Act.

¹¹ § 12-35.5-111, C.R.S.

The Director, based upon credible evidence as presented in a written complaint, may issue an order to cease and desist any activity that is an imminent threat to the health and safety of the public or to a person who is acting or has acted without the required registration. A person who is issued a cease and desist order under these provisions may request a hearing on the question of whether acts or practices in violation of the MTPA have occurred.¹²

Practicing massage therapy or offering or attempting to practice massage therapy without an active registration is a Class 2 misdemeanor for the first offense and a Class 1 misdemeanor for any subsequent offenses.¹³

¹² § 12-35.5-113(1), C.R.S.

¹³ § 12-35.5-115, C.R.S.

Program Description and Administration

The Massage Therapy Practice Act (MTPA) vests the authority to regulate massage therapists in the Director of the Division of Professions and Occupations (Director and Division, respectively), formerly the Division of Registrations, within the Colorado Department of Regulatory Agencies (DORA). There is no massage therapy regulatory board. Rather, the Director oversees the program with support from Division staff. This type of regulatory program is often referred to as a director model program.

As of October 2011, the full-time equivalent (FTE) employees for fiscal year 11-12 is 0.98. The breakdown is as follows:

General Professional VII	0.05
Administrative Assistant III	0.03
General Professional VI	0.20
Technician IV	0.20
Administrative Assistant III	0.50

FTE listed above does not include staffing in the centralized offices of the Division. Centralized offices include the Director's Office, Office of Investigations, Office of Examination Services, Office of Expedited Settlement, Office of Licensing and Office of Support Services. However, the cost of those FTE is reflected in the Total Program Expenditures. The Division pays for those FTE through a cost allocation methodology developed by the Division and DORA's Executive Director's Office.

Table 1 illustrates, for the three fiscal years indicated, the Division's overall expenditures in regulating massage therapists.

**Table 1
Agency Fiscal Information**

Fiscal Year	Total Program Expenditure	FTE
08-09	\$293,262	1.80
09-10	\$232,806	1.05
10-11	\$503,252	1.05

One factor that can significantly impact a regulatory program's budget is the handling of complaints and the imposition of discipline. The information depicted above highlights a large increase in program expenditures from fiscal year 09-10 to fiscal year 10-11. Part of this increase is a reflection of increased legal costs incurred by the agency in fulfilling its statutory duty to enforce the MTPA.

Registration

Colorado has a mandatory practice act, meaning that all individuals wishing to practice as massage therapists (with the exception of statutory exemptions) must register with the Director and meet statutory requirements.

Table 2 illustrates the number of active massage therapists in Colorado for the three fiscal years indicated.

Table 2
Registration Information

Fiscal Year	Grandfather	Examination	Endorsement	Total New Registrations	Renewals	Reinstated	Active Registrations as of June 30
08-09	7,536	0	0	7,536	N/A	N/A	7,536
09-10	2,393	162	47	2,602	N/A	N/A	10,121
10-11	46	1,117	348	1,511	8,968	53	10,127

The 2006 sunrise review of massage therapists estimated the number of massage therapists in Colorado to be approximately 6,000. Today there are more than 10,000 registered massage therapists in Colorado.

The MTPA contains what is commonly referred to as a grandfather clause. This allowed massage therapists who had been practicing before enactment of the MTPA and who did not otherwise satisfy the registration requirements to obtain a registration. These individuals are reflected in the column entitled "Grandfather" in Table 2.

Table 2 also shows that one may register as a massage therapist in Colorado by passing an examination, which is the traditional route to registering, or through a process known as endorsement. Endorsement refers to a process through which a massage therapist licensed or registered in another state may register in Colorado if the licensing or registration requirements in the other state are substantially equivalent to Colorado's.

Massage therapists renew their registrations on January 31 of odd-numbered years, and they pay fees that support the cost of the regulatory program. In fiscal year 10-11, the fee for a new registration was \$80. That same year, the fee for reinstatement was \$59, and it was \$44 to renew a registration.

Complaints/Disciplinary Actions

Anyone, a hospital, a medical practitioner or other healthcare provider, or a client, may file a complaint against a registered massage therapist.

Table 3 shows the number of complaints and the nature of complaints against registered massage therapists during the three-year review period. Practicing without a registration and sexual misconduct are the most common complaint allegations against massage therapists.

**Table 3
Complaint Information**

Nature of Complaints	FY 08-09	FY 09-10	FY 10-11
Practicing w/o a License	1	4	8
Standard of Practice	0	0	0
Fee Dispute	0	0	0
Scope of Practice	0	1	1
Sexual Misconduct	0	10	12
Substance Abuse	0	0	2
Theft	0	0	0
Felony Conviction	0	4	3
Denial of registration if applicant committed any action that would be grounds for disciplinary action	4	0	0
A physical or mental conditional that renders registrant unable to provide massage therapy with reasonable skill or safety or that may endanger the health or safety of clients receiving massage therapy	0	1	0
Violated or aided or abetted a violation of any provision of the MTPA, any rule adopted under the MTPA, or any lawful order of the Director	0	1	1
Falsified information in any application or attempted to obtain or obtained a registration by fraud, deception, or misrepresentation			1
TOTAL	5	21	28

Final agency actions represent the outcome of complaints filed against registered massage therapists. A practitioner's registration may be revoked, the most stringent final agency action, or the complaint may be dismissed if there is no evidence of a violation of the MTPA.

Table 4 illustrates the total number of final agency actions taken against massage therapists.

Table 4
Final Agency Actions

Type of Action	FY 08-09	FY 09-10	FY 10-11
Revocations	0	1	3
Suspensions	0	2	0
Revocations/Suspensions Held in Abeyance or Stayed or Stayed Suspended	0	0	0
Stipulations	0	3	9
Other - Cease and Desist	0	3	11
TOTAL DISCIPLINARY ACTIONS	0	9	23
Dismiss	5	10	9
TOTAL DISMISSALS	5	10	9

Analysis and Recommendations

Recommendation 1 – Continue the Massage Therapy Practice Act for nine years, until 2022.

Regulation of a profession or occupation performs two important functions that enhance consumer protection. First, state regulation measures the competency of individuals to practice the regulated profession. Only applicants who can demonstrate competency are allowed to practice in Colorado.

Second, the state regulatory authority exists to receive consumer complaints against regulated practitioners and determine if a practitioner has violated state law. In those instances, the state has the authority to discipline the practitioner including revocation of the practitioner's ability to practice.

In 2011, 43 states and the District of Columbia regulated massage therapy. Although not all states licensed massage therapy, they may have regulations at the local level.¹⁴ Colorado's regulation is consistent with the majority of the states that regulate the profession according to the Association of Bodywork and Massage Professionals State Regulation Guide.¹⁵

There are over 10,000 massage therapists registered in Colorado. The Director of the Division of Professions and Occupations (Director and Division, respectively) implements statutory requirements to practice massage therapy in Colorado. Applicants must submit fingerprints to the Colorado Bureau of Investigation for the purpose of conducting a state and national fingerprint-based criminal history records check utilizing records of the Colorado Bureau of Investigation and the Federal Bureau of Investigation.

The Division's application requires an applicant to disclose if he or she is, or has been, registered or licensed as a massage therapist in any state, U.S. territory, or country. The applicant must attest if the registration or license is currently active and if there has ever been disciplinary action taken against the applicant. Applicants must disclose all relevant complaints, disciplinary actions, arrests, charges, or convictions. Failure to fully disclose could constitute grounds for denial of the application or revocation of an existing registration.

The Director received 54 complaints against massage therapists from fiscal year 08-09 through fiscal year 10-11. Twenty-two of those complaints alleged sexual misconduct by massage therapists. An additional seven complaints involved felony convictions of massage therapists.

¹⁴ Bureau of Labor Statistics, U.S. Department of Labor. *Occupational Outlook Handbook, 2012-13 Edition, Massage Therapists*. Retrieved on May 2, 2012, from www.bls.gov/ooh/healthcare/massage-therapists.htm

¹⁵ Association of Bodywork and Massage Professionals. *Massage State Regulation Guide*. Retrieved October 9, 2012, from http://www.abmp.com/world_massage_conference/Student_CredentialingResources.pdf

During the same period, 32 massage therapists were disciplined. Discipline included four revocations and two suspensions.

It is somewhat uncommon to find such a high number of sexual misconduct complaints in a regulated profession. And, given the rather intimate nature of massage therapy, discipline of such behaviors by massage therapists is a particularly important component of public protection.

Thus, it appears that the regulation of massage therapists has accomplished what the General Assembly intended: restriction of entry into the occupation to those who meet the prescribed requirements and creation of an effective complaint processing mechanism that results in discipline by the state of practitioners who violate the law.

For these reasons, the General Assembly should continue the regulation of massage therapists in Colorado for nine years, until 2022.

Recommendation 2 – Repeal registration requirements and implement licensing of massage therapists.

The present regulatory scheme of registering massage therapists is a misnomer. Page 2 of this sunset report describes licensure as typically involving the completion of a prescribed educational program and the passage of an examination that is designed to measure the minimal level of competency that is necessary to practice safely. Further, licensing protects certain titles--only those individuals who are properly licensed can use certain titles and engage in that particular practice. All three of these components exist in the current massage therapist regulatory scheme.

Licensing offers the highest level of consumer protection by ensuring that only those who are deemed competent can practice and the public is alerted to those who may practice by the titles used. Thus, licensing is the appropriate, concomitant response by state government to the practice of a profession or occupation that poses a significant risk to the public safety, health and welfare. The proper regulatory response communicates clearly to the public that government recognizes the potential threat of harm and is responding to that threat appropriately. Further, the use of the proper level of occupational or professional licensing informs practitioners, as well as those applying to practice massage therapy in Colorado, that the most rigorous standards will be applied to them as practitioners.

In sum, registration of an occupation or profession is appropriately employed by the government when the risk of public harm is relatively low. As this sunset review has shown, complaints against massage therapists reveal that sexual misconduct, a most serious offense, is the single most frequently occurring transgression by these practitioners.

It is also helpful to reflect on why the current registration regime was enacted in the first place. The Department of Regulatory Agencies' 2006 sunrise review of massage therapists recommended against regulation, based on the fact that no competency-related harm was identified. However, the General Assembly was persuaded to enact the Massage Therapy Practice Act (MTPA) as a means to address two issues that were not related to competency--prostitution and human trafficking.

This is reflected in the requirement that massage therapists submit to criminal history background checks as a precondition to registration.

The MTPA's requirements that applicants obtain training and pass an examination can also be attributed to this goal. These requirements were not enacted to ensure competency, as is usually the case. Rather they were intended to dissuade those seeking to use massage as a cover for prostitution by requiring a measureable time and financial commitment.

Because of this, a registration regime seemed reasonable.

However, since the MTPA was enacted, the Director has received a number of complaints that have been classified as sexual misconduct but that have more to do with inappropriate draping. Although this is not a competency issue, it is a standard of care issue, and, as such, is more indicative of the types of issues that arise in licensing, as opposed to registration, programs.

Indeed, several of the recommendations in this sunset report build on this very theme by seeking to more properly equip the Director to deal with such issues.

Therefore, the General Assembly should amend the MTPA to make it a licensing program.

Recommendation 3 – Update and improve the grounds for discipline of massage therapists.

The MTPA contains certain grounds for discipline found in section 12-35.5-111, Colorado Revised Statutes (C.R.S.). Perhaps because the MTPA was created as a registration scheme, a number of needed grounds for discipline are missing. As defined earlier in this sunset review, massage therapy is a type of complementary alternative medicine. Healthcare regulatory statutes should afford consumers a high level of protection due to the potential for harm that exists in healthcare professions. Consequently, the MTPA should be amended by adding a number of disciplinary provisions.

As discussed elsewhere in this sunset review, the purpose of state regulation of a profession is the protection of consumers from the actions of incompetent or dishonest practitioners. The state performs this duty by limiting market access to those practitioners the state deems competent and qualified and by disciplining practitioners who violate the regulatory practice act.

Practitioners from other states often pose a difficult challenge for regulators. In particular, a practitioner may move to Colorado but an investigation or disciplinary proceedings may be underway against the practitioner in another state. In order to maximize protection of Colorado consumers, it is incumbent upon the practitioner to report to the Colorado regulatory authority any adverse actions taken against his or her license or ability to practice in other states.

To accomplish this, the MTPA should be amended such that these new grounds for discipline are added to the statute:

failing to report to the Director the surrender of a massage therapy license, registration, or certification, or adverse action taken against a license, registration, or certification by a licensing agency in another state, territory, or country, a governmental agency, a law enforcement agency, or a court for acts or conduct that would constitute grounds for discipline pursuant to this article.

Similarly, criminal proceedings may be brought against a practitioner for actions that would constitute grounds for discipline under the MTPA. Such convictions should be reported to the Director so that the practitioner's competence to practice may be assessed. Toward this end, the MTPA currently authorizes the Director to take disciplinary action against practitioners convicted of felonies.

However, many crimes do not rise to the level of felony, but could still impact a practitioner's ability to practice safely.

Therefore, the MTPA should be amended to add to the grounds for discipline: being convicted of any crime when the act was related to the practice of massage therapy or was perpetrated against the massage client during a therapeutic relationship. A certified copy of the judgment of a court of competent jurisdiction of a conviction or plea should be established in statute as conclusive evidence of the conviction or plea.

Finally, the potentially intimate nature of the practice of massage therapy exposes consumers to certain risks that may not clearly constitute a violation of the MTPA. An important component of massage therapy practice is draping the client to prevent exposure of, for example, the client's genitals or breasts. The Director should be able to impose discipline in response to a complaint in which the investigation reveals that the action by the practitioner can reasonably be construed to be intentional or malicious.

To accomplish this, the MTPA should be amended to add the following grounds for discipline:

Committed any act which does not meet generally accepted standards of massage therapy care or failed to perform an act necessary to meet the generally accepted standards of massage therapy care.

Since the phrase “generally accepted standards of massage therapy care” is somewhat vague, the Director should be required to promulgate rules to define what those standards are.

Therefore, the General Assembly should amend the MTPA to add to the grounds for discipline: disciplinary action taken in another jurisdiction, conviction of any crime related to the practice of massage therapy and failing to meet generally accepted standards of massage therapy care.

Recommendation 4 – Authorize the Director to issue letters of admonition and confidential letters of concern.

Regulatory programs, especially programs that regulate healthcare practitioners, typically have a full range of regulatory actions available to them. Letters of admonition (LOAs) and confidential letters of concern (LOCs) are two regulatory responses lacking in the MTPA.

LOAs are formal disciplinary actions taken by the regulatory agency.

The LOA is issued when there has been a violation of the practice act but the harm to the public or the complainant is not so severe that it rises to the level of revocation or suspension of a license or registration.

The LOC is a dismissal and can be issued when there is no violation of the practice act but there is evidence of conduct or behavior that, if continued, could result in violation of the practice act and harm to the consumer. The LOC is typically confidential and benefits the practitioner by alerting her or him to the requirements of safe and legal practice in Colorado.

In order to maximize protection of the health, safety and welfare of Colorado consumers, the MTPA should be amended to authorize the Director to issue LOAs and LOCs.

Recommendation 5 – Amend the MTPA to facilitate the registration of applicants trained outside of Colorado.

To register as a massage therapist in Colorado, an individual must, among other things,

Attain a degree, diploma, or otherwise successfully complete a massage therapy program that consists of at least 500 total hours of course work and clinical work from an approved massage school.¹⁶

¹⁶ § 12-35.5-107(1)(a), C.R.S.

The MTPA defines “approved massage school” as:¹⁷

A massage therapy educational school that has a valid certificate of approval from the Division of Private and Occupational Schools in accordance with the provisions of [the Private Occupational Education Act of 1981];

A massage therapy educational program certified by the Colorado Community College System; or

A massage therapy educational entity or program that is accredited by a nationally recognized accrediting agency.¹⁸

These restrictions have proven to be problematic for applicants who obtain their training outside of Colorado.

The Division of Professional and Occupational Schools (DPOS) has approved only 38 out-of-state schools.¹⁹ However, only one such approved school appears to have a massage therapy training program.

Division staff speculates that so few out-of-state schools have sought DPOS approval because massage therapy schools tend to be relatively small. Most, very likely, only seek approval in the state in which they are located.

Additionally, one professional association representing massage therapists estimates that 58 percent of massage training programs are accredited by a nationally recognized accrediting agency. Again, most agree that because massage therapy schools tend to be relatively small, few have sought national accreditation.

It is reasonable to conclude that a significant number of massage therapy schools in the U.S. are not approved by DPOS and are not accredited by a nationally recognized accrediting agency. This places their graduates in a difficult position if they seek registration in Colorado. They could obtain a license in the state in which they trained, and then apply for registration by endorsement in Colorado, but this seems unnecessarily bureaucratic and costly. Alternatively, they could obtain a second round of training from an “approved massage school,” but this would be redundant and costly.

A more tenable option is to amend the MTPA to authorize the Director to determine, by rule, acceptable levels of training obtained at out-of-state schools. While this may require a more rigorous examination of individual applications, it will also ensure that the training is equivalent to Colorado’s standards and facilitate the registration of applicants who train outside of Colorado.

¹⁷ § 12-35.5-103(3), C.R.S.

¹⁸ § 12-35.5-103(3), C.R.S.

¹⁹ Colorado Department of Higher Education. *DPOS School Directory: Out-of-State Schools by Category*. Retrieved October 5, 2012, from <http://higherred.colorado.gov/DPOS/Students/directorycategory.asp?residency=out>

An important safeguard is the required passage of an examination.

Therefore, the General Assembly should authorize the Director to determine, by rule, acceptable levels of training obtained at out-of-state schools.

Recommendation 6 – Require massage therapists who have been denied registration, have had their registration revoked, or who have surrendered their registration in lieu of disciplinary action, to wait two years to reapply.

Section 12-35.5-112, C.R.S., authorizes the Director to revoke the registration of a massage therapist for violating the MTPA or the rules promulgated thereunder.

Revocation proceedings, if appealed, can be lengthy and expensive and are typically undertaken only when the alleged conduct is so egregious that the individual must be barred from practice in order to protect the public.

Similarly, many registrants, when faced with the prospect of revocation proceedings, voluntarily surrender their registrations.

However, the MTPA makes no provision for an individual who has had a registration revoked to wait to apply for a new registration. As a result, such an individual could apply for a new registration the very day that a revocation order becomes effective. This not only poses a risk to the public, but also requires the Director to incur additional expenses in processing the new application and, if it is denied and appealed, additional legal expenses.

At least 27 statutes regulating various professions and occupations in Colorado provide for a waiting, or “cooling off,” period. These periods range from between one and three years, with most requiring such individuals to wait two years before applying for a new license.

The same concerns apply to massage therapists who surrender their registrations rather than face revocation proceedings. These individuals should not be allowed to immediately apply for a new registration.

Since it is an inefficient use of state resources to revoke a registration only to have that same individual immediately apply for a new registration, since such a loophole is a risk to the public and since many other regulatory programs impose a waiting period, the General Assembly should amend the MTPA to require a massage therapist who has had a registration revoked or who surrenders his or her registration in lieu of discipline, to wait two years before re-applying for registration.

Recommendation 7 – Revise the MTPA so that failure to act within the limitations created by a physical or mental condition or disability is grounds for discipline and authorize the Director to enter into confidential agreements with practitioners to address conditions that may impact the practitioner’s ability to practice.

Massage therapists can become ill, suffer injuries and have disabilities. Some conditions can impact their ability to practice.

To determine if a massage therapist has a condition that impacts his or her ability to practice, the application for initial registration and the registration renewal questionnaire ask:

In the last five years, have you been diagnosed with or treated for a condition that significantly disturbs your cognition, behavior, or motor function, and that may impair your ability to practice as a massage therapist safely and competently, such as bipolar disorder, severe major depression, schizophrenia or other major psychotic disorder, a neurological illness, or sleep disorder?

If a practitioner answers the above question in the affirmative, his or her application may be denied or his or her registration may be revoked.

One way to help ensure that practitioners act within the limitations created by an illness or condition, thus avoiding discipline, is to authorize the Director to enter into confidential agreements with such practitioners whereby the practitioner agrees to limit his or her practice.

However, this process should not be available to those practitioners with substance abuse problems. Practicing with such a condition already constitutes a separate statutory violation, and this recommendation is not intended to in any way limit the Director’s authority to discipline such practitioners.

If a registrant has a disability and is no longer able to practice safely, the current remedy is disciplinary action which must be made available to the public. However, the registrant did not really do anything wrong and the underlying reason for his or her disciplinary action is due to a protected, confidential medical situation. The General Assembly should revise the MTPA so that failure to act within the limitations created by a physical or mental condition or disability is grounds for discipline, as opposed to simply having such a condition or disability, and authorize the Director to be able to handle such matters without those cases being open to the public, and without the registrant being disciplined.

To effectuate the purposes of this recommendation, the MTPA should be further amended to require that if a registrant suffers from a physical or mental illness or condition that renders the registrant unable to practice with reasonable skill and with safety to patients/clients, the registrant shall notify the Director of the illness or condition in a manner and within a period determined by the Director.

The Director should then be authorized to enter into a confidential agreement with the registrant in which the registrant agrees to limit his or her practice based on the restrictions imposed by the illness or condition, as determined by the Director.