Prepared by the North Dakota Legislative Council staff for the Budget Committee on Health Care
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REGULATION OF ACUPUNCTURE - OPTIONS

BACKGROUND

This memorandum is in response to a request for information regarding what options exist for regulating acupuncturists who practice in North Dakota. Currently, North Dakota does not regulate the practice of acupuncture as a profession. However, the State Board of Chiropractic Examiners does make special provisions to allow qualified chiropractors to perform acupuncture within the scope of chiropractic and the State Board of Veterinary Medical Examiners does provide acupuncture is included within the scope of veterinary medicine.

Mr. David Magnuson, an acupuncturist who practices in Grand Forks, testified at the March 2, 2006, meeting of the Budget Committee on Health Care that he believes there are approximately three individuals practicing traditional acupuncture in North Dakota. Given this small number of practitioners, the committee discussion indicated the desire to consider regulation options that would not require creation of a freestanding board to regulate acupuncture.

Following the March 2, 2006, Budget Committee on Health Care meeting, Senator Judy Lee, the committee member who requested the information regarding regulation options for the practice of acupuncture, initiated discussions regarding this matter with a representative of the State Department of Health, Senator Ray Holmberg, Mr. Magnuson, and the Legislative Council staff. These individuals considered the feasibility of different regulation options, keeping in mind the limitations inherent in regulating a three-member profession. This discussion ultimately focused on having the State Health Officer regulate the practice of acupuncture.

The following list of options is a generalized list of options that may be considered when determining how best to regulate a profession.

TERMINOLOGY

The following quotations are general definitions of professional regulation terms contained in the second edition of *Questions a Legislator Should Ask* by Benjamin Shimberg and Doug Roederer, (1994), published by The Council on Licensure, Enforcement and Regulation. The Council on Licensure, Enforcement and Regulation is an affiliate organization of the Council of State Governments. This publication suggests questions a legislator should ask when considering whether to regulate a profession. Although the actual use of these terms in daily use, state laws, and court cases does not closely follow the technical definitions, the definitions do assist in illustrating the spectrum of options a state may consider when determining whether to regulate a profession.

Certification - May be granted by either a state regulatory body, or a non-governmental agency or association. Title protection is granted to persons who have met the predetermined qualifications. Those without the title may perform the services of the profession or occupation, but may not use the title.

Credentialing - A generic term for licensure, certification, and registration. Can also be used as a term for a voluntary process under the auspices of private sector associations.

Endorsement - The acceptance of a licensee's qualifications based on the fact that the requirements met initially were substantially equivalent to those required in the new state.

Licensure - The most restrictive form of state regulation. Under licensure laws, it is illegal for a person to practice a profession without first meeting the standards imposed by the state. It is illegal for unlicensed individuals to perform acts within the statutorily defined scope of practice.

Reciprocity - An arrangement through which a practitioner in one state may practice in another if the two states have a reciprocal agreement.

Registration - The least restrictive form of state regulation, usually consisting of requiring individuals to file their name, address and qualifications with a government agency before practicing the profession.

OPTIONS

Using these definitions and considering the options of certification, licensure, and registration, licensure is the only method that provides for a system under which professional standards are set and an individual is prohibited from practicing unless those standards are met. With registration an individual could be prohibited from practicing unless that individual registered with the identified state entity. Legislative history regarding attempts to regulate acupuncture, as well as the discussions initiated by Senator Lee, indicate there may be a preference toward a licensure-based regulation of the profession. If licensure is the desired method of regulation, there are a variety of ways this may be implemented.

The term reciprocity addresses the situation in which two states regulate a profession. Because reciprocity inherently requires that both states provide for regulation of a practice, it is not appropriate to consider reciprocity as an option until North Dakota establishes some method of regulation. On the same note, the term endorsement addresses the evolution of regulation of a profession within a state and is not appropriate to consider as an option in North Dakota at this point.

LICENSURE

If the state regulates a profession through licensure, one of the first determinations is what state entity will implement the regulation. Once it is determined what state entity will implement the regulation, it is necessary to determine the degree to which that profession will be regulated and the powers and duties that will be granted to the state entity for purposes of regulating the profession.

State Entity

Typically in North Dakota the regulation of a profession is provided through licensure and is conducted by a legislatively created board. Professional board members typically include practitioners and may include laypersons. Examples of this type of professional board include the State Board of Medical Examiners and the State Board of Chiropractic Examiners.

Generally North Dakota professional boards regulate a single practice, but there are some examples of boards that regulate a related but different profession. For example, in addition to licensing physicians, the State Board of Medical Examiners is also charged with regulating radiologic technologists who render fluoroscopy services; the State Board of Architecture is a board comprised of architects, but the board has been charged with regulating landscape architects; and the State Board of Dental Examiners is a board comprised of dentists and a dental hygienist, but the board has been charged with regulating dental assistants.

There are alternatives to legislatively created boards which may be used to regulate a profession. Instead of creating a new board or including a new profession under an already existing board, an existing or new executive agency of the state could be charged with the regulation of a profession. For example, the Attorney General regulates polygraph operators, the Secretary of State regulates contractors, and the State Health Council regulates the practice of electrolysis.

Powers and Duties

The licensure standards that are established to regulate a profession through licensure may fall anywhere within a broad spectrum of requirements. The less demanding the standards are, the more similar the licensure is to registration and the more exclusive or demanding the standards are, the more dissimilar the licensure is to registration.

Typical professional licensure standards of North Dakota professional boards might include legislatively created standards, administratively created standards, or administratively or legislatively designated standards of a nonstate entity. For example, North Dakota Century Code Section 43-12.1-09(2)(c)(3) provides an applicant for licensure as an advanced practice registered nurse applicant must hold a current license as a registered nurse; Section 43-12.1-09(2)(c)(1) provides an applicant for licensure as an advanced practice registered nurse must submit an appropriate fee as established by the board; and Section 43-12.1-09(2)(a)(2) provides that for purposes of a registered nurse applicant the Board of Nursing shall establish out-of-state educational standards based upon whether the educational institution meets the standards of one of two identified private accrediting organizations.

CONCLUSION

The regulation of a profession, such as acupuncture, may range between licensure, which is the most restrictive form of state regulation, and registration, which is the least restrictive form. The actual use of these terms is academic but does give a framework in which to consider professional regulation. Typically, North Dakota regulates professions through a method more attuned to licensure. Licensure of a profession in North Dakota is typically conducted by a legislatively created board; however, there are examples of executive state agencies performing this function.

In the case of acupuncture, the feasibility of creating a new stand-alone board to regulate the single profession of acupuncture is limited if there are only three practitioners in the state. If the practice of acupuncture is to be regulated by a board, there would be fewer practicability issues if the act of regulating were charged an existing board or if a new board were created and that new board regulates more than one profession.

Instead of being regulated by a board, the practice of acupuncture could be regulated by an executive agency. The degree of expertise required of an agency charged with regulating a profession would in large part depend on the standards required. If an agency regulated acupuncture through a registry, very little expertise would be required. However, if an agency regulated acupuncture through licensure, a higher level of expertise would be required. As an illustration, in the case of a registry for acupuncture, the failure to register is a relatively basic issue to prove and enforce but in the case of licensure, the failure to meet a standard of care requires a higher level of expertise to prove and enforce.

The licensure standards established for a profession may range from very general, such as minimum age requirements and possession of a high school diploma, to very specific, such as a baccalaureate degree in specified courses of study and the ongoing requirement that the professional meet continuing education requirements. These standards may be specifically stated in statute, may be provided through administrative rule, or may be standards of a private organization which are referenced by statute or rule.