



MEMORANDUM

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**RE: Delegation Doctrine Issues In
Massage Therapy Regulation**

Executive Summary

Without citation of authority or discussion of the law of any particular State, counsel for the Federation of State Massage Therapy Boards broadly claims that references in professional licensure statutes to examinations and accreditation criteria generated by private entities would result in unconstitutional delegations of legislative power to those entities. Relevant constitutional cases and authorities strongly contradict this conclusion. Instead, we find substantial authority upholding the incorporation of privately crafted examinations and accreditation standards into the licensing process. Initially, courts have endorsed them as helpful in assuring that proper professional expertise is brought to bear on professional licensure issues. Some courts have held that reference to private examinations and standards do not delegate any authority at all, while others

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have said that any delegation that does occur is permissible so long as the State, through a regulatory agency or board, maintains control over the ultimate licensing decision. Courts have also relied on the fact that these private examinations and accreditation programs have significance independent of any role they may play in a State's regulatory process, including providing professional status and recognition and furthering educational goals and standards. That these examinations and accreditation criteria have such independent significance further supports the conclusion that reference to them in state regulatory statutes does not represent any improper delegation of legislative authority over the professional licensing process.

Introduction

The Federation of State Massage Therapy Boards ("FSMTB") recently circulated a legal memorandum prepared by its general counsel, Dale Atkinson ("the Atkinson memorandum"), that discusses whether the identification in state professional licensure statutes of particular examinations and accreditation programs generated or operated by private entities presents constitutional issues. According to the Atkinson memorandum, reliance on private standards, purportedly without governmental oversight or public accountability, might result in an unconstitutional delegation of authority to the private entities that

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promulgated those standards. The Atkinson memorandum did not include citations to any cases or statutes, supposedly because it was intended for an audience largely made up of non-lawyers, and did not limit its discussion to the law of any single state.

Mayer, Brown, Rowe & Maw LLP has been retained by the American Massage Therapy Association (“AMTA”) to assess the opinions and legal analysis in the Atkinson memorandum and to offer an opinion, subject to the limitations set forth below, on whether such statutory incorporations of private accreditations or examination results are likely to raise constitutional delegation issues in the professional licensure context. As explained more fully below, it is our opinion that incorporation by state legislatures of independently-maintained standards set by private entities need not constitute delegation of state authority or raise any of the concerns set forth in the Atkinson memorandum.

As this memorandum offers a response to the points addressed in the Atkinson memorandum, which were entirely general, we do not limit our analysis to the law of any single State. Instead, the conclusions offered here are meant to provide a general context for applying the delegation doctrine, a principle of constitutional law, to the use of private accreditation and examinations. The validity of these conclusions when applied to any particular state licensing statute

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will thus necessarily depend on that State's constitutional and statutory language, as well as binding case law interpreting them.¹

The Delegation Doctrine

The delegation doctrine arises out of the familiar separation-of-powers principles articulated in the United States and most or all state constitutions. These principles hold that constitutional governments operate in branches, each of which have specifically circumscribed powers and each of which, in some way, operate to check and balance the powers of the others. The delegation doctrine, in turn, holds that in a system of such defined governmental branches, each with limited authority, the legislative branch is not free to delegate its power to legislate to any other branch. See *Mistretta v. United States*, 488 U.S. 361, 371-372 (1989). As a corollary of that principle, the delegation doctrine also limits the ability of legislatures to delegate the exercise of their legislative authority to private decision-makers. Such delegations, so goes the argument, unbind governance from the checks and balances of other branches and threatens the division of

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The Atkinson memorandum refers to the possibility that the delegations it challenges by state legislatures could raise federal constitutional issues. We do not see how this could be so, as no individual rights guaranteed by the U.S. Constitution are at issue and the regulations and statutes the memorandum questions are all state laws. The question appears to us to be one solely of the constitutional law of the State involved, although certainly decisions rendered under analogous federal constitutional delegation principles could be informative.

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authority vested by the applicable constitution.

As time has passed, the delegation doctrine has necessarily become more flexible in its application. Congress and state legislatures have taken on the regulation of increasingly complicated and specialized matters, reducing the practical ability of legislators to make appropriate policy decisions without outside assistance. In response, there has been a significant trend towards delegation of certain duties to state agencies or other actors with specialized knowledge. This phenomenon has been most pronounced at the federal level; the States have as a general matter preserved a more robust delegation doctrine than has the federal government, see J. Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 Vand. L. Rev. 1167, 1189 (1999). But even at the state level, delegations are often recognized as a practical necessity given the limited resources of governments and the limited expertise and broad regulatory mandates of legislatures.

Separate Standards and Non-Delegation

Professional licensing statutes that reference private accreditation services or privately-administered examinations are common. State legislatures often lack the expertise necessary to assure satisfactory minimum competence by setting specific professional standards themselves, and therefore readily rely on private

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professional organizations dedicated to setting and monitoring such standards. The use of such standards has been almost uniformly upheld. As the court in *Lucas v. Maine Commission of Pharmacy* explained, “[a] constitutional attack based on the nondelegation doctrine has almost never been successfully launched against a licensing statute requiring graduation from a nationally accredited professional school.” 472 A.2d 904, 909 (Me. 1984).

Despite the resistance such statutes have shown to constitutional challenge, the Atkinson memorandum contends baldly that “a congress cannot vest *the assessment of mandatory licensure criteria* in a private entity, except under very stringent circumstances”. Atkinson memorandum at 4 (emphasis added). This assertion misstates the duties traditionally performed by private accreditation and examining entities. Contrary to Mr. Atkinson’s characterization, private accrediting agencies are generally not empowered by licensure statutes to decide whether to admit or deny an applicant. That final exercise of discretion is either reserved for the state legislature itself, or, as is more common in professional licensing situations, assigned to a duly appointed or elected state board or agency. Private entities and programs, like the accrediting service of the Commission on Massage Therapy Accreditation (“COMTA”), instead create a set of criteria from which the States may draw their own conclusions. COMTA may consider a certain

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program worthy of its accreditation, but “[b]y using such independent determinations as a referent, the Legislature is not delegating how that fact will be used.” *Taylor v. SmithKline Beecham Corp.*, 468 Mich. 1, 14, 658 N.W.2d 127 (2003).

On this logic, state licensing laws have survived constitutional challenges similar to those advanced by the Atkinson memorandum. One of the most commonly litigated types of challenges involves the States’ professional licensure of attorneys. In *In re Hansen*, 275 N.W.2d 790 (Minn. 1978), the Minnesota Supreme Court considered a challenge to the State’s requirement that all applicants to the Minnesota bar have graduated from a law school accredited by the American Bar Association (“ABA”), a private entity. According to the petitioner, the requirement of ABA accreditation constituted an unlawful delegation of the power to license to a private organization. The court disagreed, pointing out a critical distinction: “[p]etitioner misconstrues the relationship, however. We have not delegated our authority to the ABA but, instead, have simply made a rational decision to follow the standards of educational excellence it has developed.” *Id.* at 796; see also *Florida Board of Bar Examiners re: Barry University School of Law*, 821 So.2d 1050 (Fla. 2002).

As mentioned, the use of the accreditation policies of the ABA in the

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licensing of lawyers has been challenged on many occasions. Those cases have been decided consistently in favor of upholding the use by States of the ABA's private accreditation system. See *Appeal of Murphy*, 482 Pa. 43, 52, 393 A.2d 369 (1978) (noting "unanimous" authority rejecting constitutional delegation attacks on ABA accreditation). But courts have also found the use of private accreditation policies appropriate in connection with a range of other professions. See, e.g., *Gaudet v. Florida Bd. of Professional Engineers*, 900 So.2d 574 (Ct. App. Fla. 2004) (engineers); *Lucas v. Maine Commission of Pharmacy*, 472 A.2d 904 (Me. 1984) (pharmacists); *People v. Lopez*, 126 Misc.2d 1072, 484 N.Y.S.2d 974 (Sup. Ct. N.Y. 1985) (psychiatrists); *Kaplan v. Dee*, 77 So.2d 768 (Fla. 1955) (veterinarians). These examples severely weaken the claim, repeated throughout the Atkinson memorandum (albeit without contradictory citation), that the incorporation of privately generated standards in professional licensure is susceptible to constitutional challenge based on the delegation doctrine.

Even when the state licensing standards adopted by the legislature track those of a private entity, moreover, courts do not hold that the entity is exercising undue control over the licensing process. Instead, courts accept the notion that the State has simply decided that the criteria set by the private entity require the level of expertise that the State desires in its licensees. In *Appeal of Murphy*, 482

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Pa. 43, 393 A.2d 369 (1978), the Pennsylvania Supreme Court considered whether requiring candidates for the state bar to have graduated from an ABA-accredited institution improperly delegated authority to the ABA, which was in exclusive control of setting its *own* accreditation standards. The court found no improper delegation because, in setting admissions rules for the state bar, the court could have made those standards either more or less stringent than the ABA's; it simply saw no compelling reason to do so. 482 Pa. at 51-52, 393 A.2d 369. Likewise, the court in *People v. Lopez*, considering a reference to privately generated standards for the practice of psychiatry, recognized that:

The Legislature could have prescribed a different standard of professional training, or, on the other hand, could have provided merely that the examining physician have 'suitable' experience in psychiatry. Instead, it restricted the directors and the courts to using physicians who have *precisely* the extensive background required by an esteemed professional organization for recognition by that group.

126 Misc.2d 1072, 1080, 484 N.Y.S.2d 974 (Sup. Ct. N.Y. 1985) (emphasis added).

In these cases, the decision to impose the exact same requirements as adopted by a private entity is no less a proper exercise of legislative power than setting standards at a higher or lower threshold. In all such cases it is the government body – rather than the private entity – that gives legal effect to the private entity's criteria.

Many licensure statutes also require an applicant to pass an examination

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created by a private professional association or body that was designed to test the subject-matter knowledge of the applicant in his or her chosen field. Sometimes this examination is developed with particular attention to the applicable rules or policies of the State where licensure is sought; in other cases, though, the State relies on an examination created to have nationwide application. We did not locate any case where an applicant challenged the use of such examinations, successfully or unsuccessfully, as a violation of the delegation doctrine, even where those exams were incorporated by name into the statute. Cf. Atkinson memorandum at 5 (alleging improper delegation of legislative authority where a state names a particular examination). Nonetheless, we view these examinations, like professional accreditation, as methods by which a private entity can express its professional standards. Thus cases upholding the use of privately generated accreditation standards would equally support the use of privately generated qualification examinations.

There are also cases, useful by analogy, in which failed applicants have challenged States' use of other kinds of privately administered tests on constitutional grounds. In these cases, the claimants argued that administration of the examination constituted "state action." Courts have generally disagreed, even when the examination was used in making determinations regarding

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enrollment in state universities. See, e.g., *Langston v. ACT*, 890 F.2d 380 (11th Cir. 1989) (administering the ACT was not “state action” even though taking it was required for admission to the University of Alabama); *Johnson v. Educational Testing Service*, 754 F.2d 20, 24 (1st Cir. 1985) (ETS’ offering of the LSAT was not “state action” even though required for entry into state law schools; “ETS merely reports test scores and lacks authority to decide who shall be admitted and who shall be rejected.”); see also *Stewart v. Hannon*, 469 F. Supp. 1142 (N.D. Ill. 1979) (even if hiring was “arguably an exclusive function of the sovereign....the essential part of that function, the actual hiring decision, remain[ed] with the Board, it [was] not delegated to ETS.”). In these “state action” cases the private entity that produced and administered the exam was not viewed by the courts as making admissions decisions. Therefore, as in the delegation cases, the legal meaning of the exam results — and the coordinated exercise of government power — remained in the hands of the government and not those of the private entity.

Independent Significance and Valid Delegations

In many professional accreditation cases, courts have given weight to the significance of privately promulgated standards independent of their use by state regulators when assessing whether a proper delegation to a private entity took place. The existence of independent significance provides an assurance that a

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privately generated program or examination was not created simply as a non-governmental adjunct to a State's regulatory process. "Where a private organization's standards have significance independent of a legislative enactment, they may be incorporated into a statutory scheme without offending constitutional restrictions on delegation of legislative powers. This is because '[a] private entity's standards cannot be construed as deliberate law-making when their development of the standards is guided by objectives unrelated to the statute in which they function.'" *Farber v. North Carolina Psychology Board*, 153 N.C. App. 1, 20, 569 S.E.2d 587 (2002), quoting *Madrid v. St. Joseph Hospital*, 122 N.M. 524, 531, 928 P.2d 250 (1996).

Courts have found no shortage of independent justifications for privately-developed standards. In *Lucas*, a candidate pharmacist licensed in Massachusetts was denied licensure in Maine because his college had not been accredited by a national body. The candidate brought suit, arguing that reliance on the private agency's accreditations improperly delegated power to that entity. The court disagreed, noting that "[c]ourts have long recognized that a fact or event that has a significance independent of a legislative act may be incorporated by reference into a statute without running afoul of the nondelegation doctrine." 472 A.2d at 909. The court went on to identify several independent justifications for the

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private group's accrediting program, including: (1) setting educational standards that schools could work to achieve and maintain; (2) signifying status in the profession; (3) garnering support from federal financing programs through the group's inclusion on the Secretary of Education's list of recognized accrediting institutions; and (4) providing guidance to the licensure and accreditation programs of other States. *Id.* at 909-911. Because these purposes served interests other than assisting in Maine's licensure process, and because of the pragmatic costs that would be associated with the State's self-administration of such a program, the court upheld use of the private accreditation program to review the qualifications of applicants for pharmacists' licenses. *Id.* at 913.

Each of the stated "independent purposes" enumerated in *Lucas* would apply to the accreditation policies of COMTA. The COMTA website sets forth the Policies and Standards programs must achieve to become accredited by the group.² These standards, as applied in private accreditation, allow massage therapy programs to distinguish themselves and their graduates and operate as a public symbol of quality training and education. Additionally, like the ACOPE pharmacists' group cited in *Lucas*, COMTA is recognized by the Secretary of Education as a specialized accrediting agency for professional schools and

² <http://www.comta.org/policies.htm>

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programs in massage therapy and a reliable authority concerning the quality of education in the field.³

Likewise, the National Certification Examination for Therapeutic Massage and Bodywork (“NCETMB”), administered by the National Certification Board for Therapeutic Massage and Bodywork (“NCBTMB”), has sufficient independent justification to pass constitutional muster under the criteria set forth in *Lucas*. The group’s stated mission is “[t]o foster high standards of ethical and professional practice in the delivery of services through a recognized credible credentialing program that assures the competency of practitioners of therapeutic massage and bodywork.”⁴ Among the possible independent reasons supporting use of the NCETMB are membership as a certified practitioner through the group, as well as the fact that the exam is a component of licensure in a majority of the States that regulate massage therapy. Therefore, under the criteria set forth in *Lucas*, AMTA, COMTA, and NCBTMB have established themselves as adequately independent of the legislative and regulatory process so as to eliminate any concerns about improper delegation.

Atkinson’s Test for Delegation

The flaw in legal analysis presented in the Atkinson memorandum is its

³ See <http://www.ed.gov/admins/finaid/accred/accreditation.html#Overview>

⁴ <http://www.ncbtmb.com/index.htm>

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indiscriminate reliance on cases involving the direct exercise of regulatory power by private entities. This distinction is basic to constitutional delegation cases. As Professor Davis explained in his treatise nearly thirty years ago, statutes “whose operation depends upon private action which is taken for purposes which are independent of the statute” are “[m]uch more likely to be sustained than statutes conferring the power of choice upon private parties”. 1 K. Davis *Administrative Law Treatise* § 3.12 (2d Ed. 1978) at 196. The Atkinson memorandum misses the crucial distinction between these lines of cases.

The likely but unspoken source of Mr. Atkinson’s proposed eight-prong test for improper delegations is *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, 952 S.W.2d 454, 472 (Texas 1997). The facts of *Boll Weevil* differ substantially from the kind of professional licensure cases that would be at issue in the massage therapy context. In *Boll Weevil*, the Texas Boll Weevil Foundation (“the Foundation”) was assembled by a private corporation, but its elected members exercised state powers to call referenda, impose penalties for late payments and raise revenues through assessments. *Id.* at 459, 457-458. The distinction between these direct exercises of state authority and the role more traditionally played by national accrediting or testing agencies in state licensure processes was described in *Lucas*:

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The[] aspects of independent significance inhering in ACOPE accreditation nationally clearly distinguish the [statute's] incorporation by reference from an invalid delegation to a private entity of the power to make law by a deliberate act intended to encompass that very result. *** Nothing in our state constitution prevents the legislature from availing itself of the independent work of organizations like ACOPE.

472 A.2d at 911 (citation & quotation marks omitted). By contrast, the powers exercised by the Foundation in *Boll Weevil* more accurately fit the type of invalid delegation described in L. Jaffe, *Law Making by Private Groups*, 51 Harv. L. Rev. 201, 231 (1936): the private group was given authority over *Boll Weevil* eradication, and used state powers to “encompass that very result.”

Finally, the Texas Supreme Court has itself recognized the difference between the use of private accreditation services as part of the regulatory process and the improper delegation of legislative power exercised by the Foundation in *Boll Weevil*. Even in *Boll Weevil*, the court noted that “delegation of authority to private associations to promulgate certain industrial and professional standards has been of immense benefit to the public.” 952 S.W.2d at 469. Three years later, in *F.M. Properties Operating Co. v. City of Austin*, 22 S.W.3d 868 (Tex. 2000), that same court expanded upon this distinction, expressly limiting *Boll Weevil* in the process:

[A]s we explained in *Boll Weevil*, private delegations are frequently necessary and desirable. Indeed, private delegations are used

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extensively in Texas government. The Legislature has routinely delegated to private associations the power to promulgate certain industrial and professional standards. See, e.g., Tex. Gov't Code § 441.007(b) (requiring graduation from a privately accredited library school for permanent certification as county librarian);... Tex. Occ. Code § 204.153 (defining physician's assistant as a person who graduated from a program accredited by the American Medical Association's Committee on Allied Health Education and Accreditation and who passed the certifying examination administered by the National Commission on Certification of Physician Assistants). . . .

F.M. Properties, 22 S.W.3d at 874 (citation omitted). The Atkinson memorandum, by contrast, makes no effort to explain why the analogy between *Boll Weevil* and the massage therapy accreditation context is at all workable.

In fact, the Atkinson memorandum assumes away the major tension between *Boll Weevil* and the genuine accreditation cases as decided in many jurisdictions, including those cited above. The court in *Boll Weevil* considered whether a delegation to a private entity had occurred at all, *id.* at 470-471; only after deciding that there had been a delegation did the court go on to apply its eight-factor test to determine whether the delegation was proper. The Atkinson memorandum instead begins with the assumption that naming an examination or accrediting board standard in a state regulatory statute is a delegation. See, e.g., Atkinson memorandum at 5 ("an analysis of these criteria may well lead to a judicial ruling which strikes down a legislative attempt to delegate the

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examination authority to NCBTMB or to name a specific examination or private sector examination or accrediting entity in statutes.”). But the cases highlighted above have found that incorporating specific references into a statute need not even be considered a delegation of authority, see, e.g., *Murphy*, 482 Pa. at 492 (court has “not ‘delegated’ any judicial function to the ABA” by relying on ABA accreditation), or that delegation in and of itself is not improper solely because the private standard has independent significance, see, e.g., *Taylor*, 468 Mich. at 12, 658 N.W.2d 127 (“There is no improper delegation where the agency or outside body making the finding ... is doing it for purposes independent of the particular statute to which it makes reference”). These approaches provide more apt analogies to challenged licensure statutes than the eight-factor test set out in *Boll Weevil*, and demonstrate that the prospect of unconstitutional delegation in the massage therapy licensure context as it exists today is not a serious concern.

Finally, the Atkinson memorandum declines to ground its argument in the law of any particular State or, indeed, to cite any authority. These omissions severely limit its usefulness on the questions it raises. We have found no cases outside of Texas that have employed the *Boll Weevil* eight-factor test to evaluate whether a delegation of authority was proper, much less any outside the context of the genuine delegation of regulatory power. The Atkinson memorandum’s

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reliance on this test as one of general application is therefore inappropriate.

Conclusion

The Atkinson memorandum broadly claims, without citation of authority or even mention of any particular State's law, that reference to privately generated examinations or standards in licensing statutes is "fraught with legal and practical implications." Atkinson memorandum at 1. Based on our review of applicable case law, this across-the-board conclusion is unwarranted. Instead, the weight of authority supports the opposite conclusion, namely that the use of privately generated licensure examinations and accreditation would not likely be subject to a successful constitutional challenge. Some of these cases reject the notion that incorporation of private standards constitutes a delegation of legislative power at all, while others uphold any such delegation as reasonable given the protections inherent in the private entity's independent, non-legislative significance. Because of the strong factual parallels between these cases and the kinds of licensure statutes on which the Atkinson memorandum is based, we believe that incorporation of such standards does not raise constitutional concerns.