Athlete Agents

SUNRISE REVIEW

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DEPARTMENT OF Licensing

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SUNRISE REVIEW OF ATHLETE AGENTS
(18.118 RCW)

Report to the Committee on Commerce and Labor,
Washington State House of Representatives
Representative Art Wang, Chair

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SUNRISE REVIEW OF ATHLETE AGENTS

Executive Summary

The profession of athlete agent is a relatively new profession that began representing athletes in negotiations with professional sports organizations in the 1960s and 1970s. Current estimates are between 2,000 and 15,000 athlete agents nationwide.

The primary complaint against some athlete agents and the impetus for proposed regulation stems from the overly-aggressive solicitation of amateur athletes with remaining eligibility at major colleges and universities under the jurisdiction of the National Collegiate Athletic Association (NCAA). Current NCAA rules (adopted without public input or input from student athletes) prohibit professional agents from dealing with amateur athletes, and the penalties for athlete/agent dealings are exacted against both the student athlete and the member institution (e.g forfeiture of games played with athletes who have become ineligible for continued amateur status). Often there is a public outcry when the more celebrated cases are brought to light.

The Department of Licensing in its review of possible regulation of athlete agents found that sufficient regulatory and other authority now exists at both state and federal levels to deal with improper conduct on the part of athlete agents with respect to representation of athletes, both students and otherwise.

Those athlete agents currently operating in Washington State are predominately members of the Washington State Bar Association and, therefore, subject to limitations on solicitation of clients, mismanagement of client trust funds, conflict of interest, etc. With respect to regulation of athlete agents to prevent them from being retained by student athletes, we could find no evidence that such regulation is required in the public interest. Conversely, such proposals raise many serious public policy questions relating to:

(1) the practices of higher education institutions with respect to their athletic programs;
(2) the rights of student athletes, particularly those who are economically disadvantaged; and
(3) the advisability of codification in state law of rules adopted by non-governmental organizations without public input and which themselves raise legal and constitutional questions.

As a result of our review, it is recommended that no licensing of athlete agents be required at this time.

INTRODUCTION

The Sunrise Review Process

In 1987, the Washington State Legislature established as state policy that: (1) new or additional regulation of business professions be imposed only in those cases where such regulation is necessary to protect the public interest, and (2) that, if imposed, any new or additional regulation be set at the least restrictive level possible.

Chapter 514, Laws of 1987 (18.118 RCW) designated the Department of Licensing's Research Office as the unit of state government responsible for what is commonly known as the "Sunrise Review" process, whereby an independent review of proposed regulation could be carried out "removed from the political process". However, the Legislature remains the sole authority for establishment of any professional or occupational regulation.

The Sunrise Review of athlete agents was initiated by written request from the chairman of the House Committee on Commerce and Labor to the director of the Department. A thorough analysis of the issues was carried out by DOL research staff according to the guidelines and criteria set forth in 18.118 RCW. Questions which must be addressed include the danger, if any, to public health and safety from unregulated practice as well as an analysis of the most cost-beneficial and least restrictive methods of public protection. Among the alternatives examined are the regulation of business employers rather than employee practitioners; the regulation of program or service rather than the individual practitioner; and the licensure hierarchy of registration, certification, and licensing. (See Appendix A)

Sunrise Review of Athlete Agents

The request to conduct a Sunrise Review of possible regulation of athlete agents stemmed from proposals (SB 6225;SSB 6225) introduced during the 1988 Legislature. SB 6225, originally introduced by Senator George Fleming et al, sought to require the licensing of athlete agents and to provide criminal and civil penalties for actions jeopardizing individual player and college eligibility to compete in sanctioned amateur athletic events.

The Department of Licensing Research Office conducted the Sunrise Review between March and September 1988. Staff identified and analyzed issues and held discussions with legislative staff; representatives of affected state agencies,

including the Department of Licensing's Business & Professions Division; representatives of college and university athletic programs, including the University of Washington; athlete agents; representatives of the Washington State Bar Association; representatives of professional sports teams, including the Seattle Seahawks; officials of the United States Department of Justice; and legal experts in the field of sports law.

Additional input was solicited through statewide publicity and the scheduling of a widely-advertised public meeting held August 9, 1988. Specific invitations to the meeting were extended to interested state agency officials, chairpersons of affected House and Senate Committees, legislative staff, athlete agents, and college and university athletic departments. Written comments were also solicited and encouraged, both from those unable to attend the public meeting and those attending.

BACKGROUND

Overview: Athlete Agents

The profession of athlete agent as presently practiced in Washington State and in other areas of the country is a relatively new profession. With a few rare exceptions, such as the 1925 contract between football player Red Grange and the Chicago Bears - negotiated by Grange's manager/advisor C.C. Pyle - it wasn't until the late 1960s and early 1970s that player agents began to represent athletes in negotiations with professional sports organizations. Indeed, players who used lawyers or other agents were sometimes penalized, evidence the case of Green Bay Packers center Jim Ringo who, in 1967, was traded by Vince Lombardi to the Philadelphia Eagles for attempting to have legal representation in contract talks.

From a handful of lawyers and non-lawyers who pioneered the athlete agent field in the 1960s and 1970s, when players' rights to be represented had yet to be affirmed by the courts, the profession has grown significantly; estimates range from 2,000 to as high as 15,000 agents operating in the United States (although there are only 6-8 active athlete agents based in Washington State).

According to sports law expert Lionel S. Sobel, writing in the Baylor University Law Review, there are a number of reasons for the growth of the profession in the past 20 years. Perhaps the single most important factor are the court rulings which were handed down beginning in the early 1970s "emancipating" the professional athletes from the legal bonds of reserve or option clauses that were standard in professional sports contracts. Other factors include increased competition between

sports leagues, increasing strength of player organizations and their transformation into true labor unions, increased player incomes with the commensurate need for investment and tax planning, and the need for legal, financial, and other advice to help athletes take advantage of the growing number of endorsement offers and other income opportunities off the playing fields and courts.

As athlete compensation grew, and million dollar a year incomes became more frequent, it was inevitable that lawyers, accountants, professional negotiators, and others would gravitate toward the field of athlete representation and advising.

It should be pointed out that the term athlete agent or player agent as used herein, and as understood in the field of professional sports, covers a wide variety of distinct services, many of which are not typically offered in combination by a single agent. The term athlete agent or player agent is most often connected with lawyers and non-lawyers who negotiate employment contracts with professional sports teams. But other services provided by agents include solicitation and negotiation of non-sports contracts, such as television or other advertising contracts and product endorsements, as well as legal advice associated with such activities; investment advice and income management, ranging from day-to-day budgeting and bill paying to long-term investment of sports and non-sports income; and, general legal and tax counseling.

Although athlete agents of all types were not welcomed by professional sports team management, in part because the agent heralded the end of relatively low salaries and management-dictated contract terms, eventually even the United States Congress acknowledged the useful role played by player agents. The House Select Committee on Professional Sports in its 1977 final report stated, "...player agents are now generally accepted as a permanent, highly visible, and at times positively beneficial, element in the sport labor relations process". The committee pointed to the potential benefits in agents negotiating personal services contracts, and providing legal, financial and other counseling to athletes, "particularly the younger athlete" who often do not have, and shouldn't be expected to have the requisite legal, accounting, labor relations, financial planning and similar specialized skills in addition to their athletic prowess.

As with any profession, athlete agents have had their problems. Athlete incomes have been mismanaged by agents, agents have charged excessive fees, some agents have provided less than full representation to their clients because of conflicts of interest, etc. There are also incompetent athlete agents and, on occasion, criminal agents, as well. However, the

primary complaint against some athlete agents that has given rise to regulatory legislation in many states is the overly-aggressive solicitation of young athletes, particularly those still playing as amateurs in the nation's colleges, universities and - on occasion - high schools.

Athlete Agents and NCAA Eligibility

Essentially, the controversy over athlete agents in Washington State focuses on solicitation of promising student athletes by agents seeking to represent the athlete when he or she turns professional. Specifically, most of those who have sought regulation of athlete agents in recent years have been concerned about actual and potential financial loss to colleges and universities and other problems associated with the loss of National Collegiate Athletic Association (NCAA) eligibility. Under provisions of the NCAA constitution, an amateur player who signs a contract with an athlete agent to represent him or her in professional sports negotiations faces loss of amateur eligibility, <u>even if no professional sports contract is negotiated or signed until after the athlete's NCAA eligibility expires</u>

Not all representation of amateur athletes by athlete agents violates NCAA rules. A college football player at an NCAA school would be in violation if he had a representation contract with an agent that either applied to general professional negotiations or specified representation in negotiations with professional football teams. However, if that same player signed a representation contract for professional negotiations specifically limited to a sport to which NCAA eligibility was not applicable, no rules violation would exist.

College and university athletic departments are concerned about possible NCAA rules violations for several reasons. First, there is potential for schools to be declared ineligible to compete in NCAA sanctioned play because a player is technically ineligible but doesn't reveal the fact to the school. The problem is exacerbated if schools know about the eligibility violation but hide it, as has sometimes been the case. Another problem relates to the investment many schools make in promising student athletes. College sports-particularly football and basketball and, regionally, baseball, hockey, etc. - are often regarded as important by administration, alumni, and the general public. In order to enhance their athletic programs and attract the best talent, colleges often give student athletes very attractive scholarship and financial assistance packages. Loss of eligibility can mean that this financial investment is wasted. Such problems bring negative publicity to colleges and universities, and - in some instances - have caused "shakeups" in college athletic departments, even in college

administrations.

One point should be made clear: while the NCAA and, thus, NCAA member schools regard athlete agent representation of student athletes as somehow onerous, this is not a universally held opinion. Sobel points out that NCAA eligible athletes who do comply with the rule against retaining agents do so because of fear of loss of eligibility, not because it is necessarily in their best interests to do so. Indeed, the pros and cons of NCAA rules are frequently the subject of debate, and they are only one of a number of issues which fall into the exceedingly gray area which lies between amateur vs. professional athletics as practiced in the world today.

The relatively recent movement by many states to regulate athlete agents (see Current Regulatory Practices section below) has clearly been prompted more by fear of potential financial loss and other harm to college sports programs than the potential harm (if any) to individual student athletes. (One lawyer, a former college athlete, commented that at least as many student athletes have been harmed by "greedy colleges that provide diplomas but no educations" as they have by athlete agents.

The question also exists as to the wisdom in public policy terms of employing the police powers of the state to enforce the rules of a nongovernmental body which is both controversial and lacking in public accountability.

Current Regulatory Practices

Virtually all states, as well as the federal government, have long had in place laws and other regulatory mechanisms impacting many of the professional activities of athlete agents. Many athlete agents are lawyers or accountants, and are subject to state laws regarding solicitation of clients, fraud, misuse of client trust funds, etc.

Since 1981, 12 states have enacted athlete agent licensing or other athlete agent regulatory plans, some of which specifically address the question of solicitation of representation agreements among amateur athletes playing for NCAA member schools. These states include California, Oklahoma, Texas, Alabama, Louisiana, Georgia, Indiana, Iowa, Kentucky, Minnesota, Ohio, and Tennessee.

Two player associations, including the National Football League Players Association and the National Baseball Players Association have also instituted agent regulation plans, as has the NCAA. All of these plans serve to limit the ability of agents to represent amateur athletes in negotiations before the expiration of their NCAA eligibility.

Several of the state regulatory plans provide the NCAA with two important types of authority it otherwise wouldn't have: (1) police powers, and (2) the possibility of immunity in certain circumstances from antitrust action. The NCAA is not a governmental unit and therefore has no police power. Neither is the NCAA a player organization, and therefore it doesn't enjoy the benefits of the labor exemption from the anti-trust laws. (In fact, the Supreme Court in NCAA vs. Board of Regents, 468 U.S. 85 [1984] held that the NCAA was subject to the antitrust laws, at least in respect to television broadcasting.) Student athletes are not members of the NCAA, nor are athlete agents. Therefore, the NCAA has used sanctions against member schools- including removal of eligibility and withholding of funds - to enforce its rules with respect to athletes and athlete agents. Over the past 7 years, the organization has extended its "reach" through successful lobbying efforts among some state legislatures.

Proposals introduced in 1988 to the Washington State Legislature shared elements of regulatory plans adopted by several other states. They sought licensing of athlete agents, required posting of bonds, and - like states such as Texas- focused on severely penalizing actions by agents and athletes that would lead to loss of eligibility of an NCAA member school, making such violations a Class C felony. Some sports law experts feel that such laws constitute overkill, however. As one attorney pointed out, Title 18 RCW makes unlicensed medical practice a gross misdemeanor in this state, yet a lawyer retained by a student athlete to represent him in negotiations could be charged with a felony crime under the athlete agent regulations proposed earlier this year.

The athlete agent can represent clients from a number of different states in negotiations with sports teams, corporations, television networks and other enterprises located in a number of other states. Thus, one of the criticisms of current regulatory practices is that they are often inconsistent and their scope of concern is too narrow, serving the interests primarily of the NCAA and its member schools, rather than protecting the student athlete, or the general public.

FINDINGS

Licensing of Athlete Agents

Proposals offered to license athlete agents in the State of Washington, while similar to those adopted or being considered in several other states, carry with them the implication that it is unethical or improper for an athlete

agent to have a representation agreement with a student athlete, when in the view of many attorneys, athletes, and even some coaches, such a relationship may actually be beneficial for the student athlete. The prime beneficiary of prohibitions against such representation agreements are NCAA colleges. However, as Sobel points out in his 1987 article in Baylor Law Review, "when colleges suffer from the loss of an ineligible player, they suffer a self-inflicted wound. There is nothing inherently unethical or improper about an athlete retaining an agent while still participating in college sports; it has simply been made "improper" only by the votes of NCAA colleges themselves, and only because the NCAA retains traditional views of "amateur" athletes, views with a disproportionate impact on financially underprivileged college athletes, many of whom are black.

One of the principal policy questions raised particularly by this type of licensure proposal is reflected in the observations of Roberts, in his article Protecting the College Athlete from Unscrupulous Agents in **The Sports Lawyer** (Fall 1987). In essence, he states that the definition of the amateur college athlete needs to be rethought, and current treatment of college athletes by both colleges and the NCAA need to be examined. The NCAA, he notes, requires college athletes "to live by utopian standards" and "to take a kind of vow of poverty when they accept college scholarships". The present situation is, according to Toverts, the product of a "decades-long gentlemen's agreement between the NFL and the college powers-that-be that has kept all but a handful of football-playing collegians from turning pro before their four-year use to their schools is exhausted". Moreover, critics claim that the present system provides little protection for athletes, but rather provides that the professional sports teams "get a free farm system that supplies them with well-trained, much-publicized employees" while colleges "get to keep their players the equivalent of barefoot and pregnant".

Sobel adds that laws such as those of Texas (similar to laws proposed in Washington State) "codify the notion that football and basketball players should stay in college - with nothing but a scholarship to sustain them - until their NCAA eligibility expires....this notion has no counterpart anywhere else in higher education".

CONCLUSION

The Department of Licensing in its review of possible regulation of athlete agents found that sufficient regulatory and other authority now exists at both state and federal levels

to deal with improper conduct on the part of athlete agents with respect to representation of athletes, both students and otherwise. Those athlete agents currently operating in Washington State are predominately members of the Washington State Bar Association and, therefore, subject to limitations on solicitation of clients, mismanagement of client trust funds, conflict of interest, etc. With respect to regulation of athlete agents to prevent them from being retained by student athletes, we could find no evidence that such regulation is required in the public interest; conversely, such proposals raise many serious public policy questions relating to the practices of higher education institutions with respect to their athletic programs; the rights of student athletes, particularly those who are economically disadvantaged; and the advisability of codification in state law of rules adopted by non-governmental organizations without public input and which themselves raise legal and constitutional questions.

RECOMMENDATION

In view of the above findings, following is our recommendation to the Legislature:

> that no licensing of athlete agents be required at this time.

APPENDIX A

fine art by the art dealer directly or indirectly for the art dealer's own account until the purchase price is paid in full to the artist. No property which is trust property under this section is subject to the claims, liens, or security interests of the creditors of the art dealer. [1981 c 33 § 2.]

18.110.030 Contract required——Provisions. (1) An art dealer may accept a work of fine art on a fee, commission, or other compensation basis, on consignment from the artist only if prior to or at the time of acceptance the art dealer enters into a written contract with the artist which states:

(a) The value of the work of fine art;

(b) The minimum price for the sale of the work of fine art; and

(c) The fee, commission, or other compensation basis of the art dealer.

(2) An art dealer who accepts a work of fine art on a fee, commission, or other compensation basis, on consignment from the artist may use or display the work of fine art or a photograph of the work of fine art or permit the use or display of the work or photograph only if:

(a) Notice is given to users or viewers that the work of fine art is the work of the artist; and

(b) The artist gives prior written consent to the particular use or display.

(3) Any portion of a contract which waives any provision of this chapter is void. [1981 c 33 § 3.]

18.110.040 Violations——Penalties——Attorney fees. An art dealer violating RCW 18.110.030 is liable to the artist for fifty dollars plus actual damages, including incidental and consequential damages, sustained as a result of the violation. If an art dealer violates RCW 18.110.030, the artist's obligation for compensation to the art dealer is voidable. In an action under this section the court may, in its discretion, award the artist reasonable attorney's fees. [1981 c 33 § 4.]

18.110.900 Application of chapter. This chapter applies to any work of fine art accepted on consignment on or after July 26, 1981. If a work of fine art is accepted on consignment on or after July 26, 1981 under a contract made before that date, this section applies only to the extent that it does not conflict with the contract. [1981 c 33 § 5.]

18.110.905 Construction——Chapter controls over any conflicting provision of Title 62A RCW. See RCW 62A.1–110.

Chapter 18.118
REGULATION OF BUSINESS PROFESSIONS

Sections

18.118.005 Legislative findings——Intent. The legislature recognizes the value of an analytical review, removed from the political process, of proposals for increased regulation of real estate and other business professions which the legislature already regulates, as well as of proposals for regulation of professions not currently regulated. The legislature further finds that policies and standards set out for regulation of the health professions in chapter 18.120 RCW have equal applicability to other professions. To further the goal of governmental regulation only as necessary to protect the public interest and to promote economic development through employment, the legislature expands the scope of chapter 18.120 RCW to apply to business professions. The legislature intends that the reviews of proposed business profession regulation be conducted by the department of licensing's policy and research rather than regulatory staff and that the reviews be conducted and recommendations made in an impartial manner. Further, the legislature intends that the department of licensing provide sufficient staffing to conduct the reviews. [1987 c 514 § 3.]

18.118.010 Purpose——Intent. (1) The purpose of this chapter is to establish guidelines for the regulation of the real estate profession and other business professions which may seek legislation to substantially increase their scope of practice or the level of regulation of the profession, and for the regulation of business professions not licensed or regulated on July 26, 1987: *Provided*, That the provisions of this chapter are not intended and shall not be construed to: (a) Apply to any regulatory entity created prior to July 26, 1987, except as provided in this chapter; (b) affect the powers and responsibilities of the superintendent of public instruction or state board of education under RCW 28A.04.120 and 28A.70.005; (c) apply to or interfere in any way with the practice of religion or to any kind of treatment by prayer; (d) apply to any remedial or technical amendments to any statutes which licensed or regulated activity before July 26, 1987; and (e) apply to proposals relating solely to continuing education. The legislature believes that all individuals should be permitted to enter into a business profession unless there is an overwhelming need for the state to protect the interests of the public by restricting entry into the profession. Where such a need is identified, the regulation adopted by the state should be set at the least restrictive level consistent with the public interest to be protected.

(2) It is the intent of this chapter that no regulation shall be imposed upon any business profession except for the exclusive purpose of protecting the public interest. All bills introduced in the legislature to regulate a business profession for the first time should be reviewed according to the following criteria. A business profession should be regulated by the state only when:

(a) Unregulated practice can clearly harm or endanger the health, safety, or welfare of the public, and the

potential for the harm is easily recognizable and not remote or dependent upon tenuous argument;

(b) The public needs and can reasonably be expected to benefit from an assurance of initial and continuing professional ability; and

(c) The public cannot be effectively protected by other means in a more cost–beneficial manner.

(3) After evaluating the criteria in subsection (2) of this section and considering governmental and societal costs and benefits, if the legislature finds that it is necessary to regulate a business profession not previously regulated by law, the least restrictive alternative method of regulation should be implemented, consistent with the public interest and this section:

(a) Where existing common law and statutory civil actions and criminal prohibitions are not sufficient to eradicate existing harm, the regulation should provide for stricter civil actions and criminal prosecutions;

(b) Where a service is being performed for individuals involving a hazard to the public health, safety, or welfare, the regulation should impose inspection requirements and enable an appropriate state agency to enforce violations by injunctive relief in court, including, but not limited to, regulation of the business activity providing the service rather than the employees of the business;

(c) Where the threat to the public health, safety, or economic well–being is relatively small as a result of the operation of the business profession, the regulation should implement a system of registration;

(d) Where the consumer may have a substantial basis for relying on the services of a practitioner, the regulation should implement a system of certification; or

(e) Where apparent that adequate regulation cannot be achieved by means other than licensing, the regulation should implement a system of licensing. [1987 c 514 § 4.]

18.118.020 Definitions. The definitions contained in this section shall apply throughout this chapter unless the context clearly requires otherwise.

(1) "Applicant group" includes any business professional group or organization, any individual, or any other interested party which proposes that any business professional group not presently regulated be regulated or which proposes legislation to substantially increase the scope of practice or the level of regulation of the profession.

(2) "Business professions" means those business occupations or professions which are not health professions under chapter 18.120 RCW and includes, in addition to real estate brokers and salespersons under chapter 18.85 RCW, the following professions and occupations: Accountancy under chapter 18.04 RCW; architects under chapter 18.08 RCW; auctioneering under chapter 18.11 RCW; cosmetologists, barbers, and manicurists under chapter 18.16 RCW; contractors under chapter 18.27 RCW; debt adjusting under chapter 18.28 RCW; engineers and surveyors under chapter 18.43 RCW; escrow agents under chapter 18.44 RCW; landscape architects under chapter 18.96 RCW; water well construction under chapter 18.104 RCW; plumbers under chapter 18-.106 RCW; and art dealers under chapter 18.110 RCW.

(3) "Certificate" and "certification" mean a voluntary process by which a statutory regulatory entity grants recognition to an individual who (a) has met certain prerequisite qualifications specified by that regulatory entity, and (b) may assume or use "certified" in the title or designation to perform prescribed professional tasks.

(4) "Grandfather clause" means a provision in a regulatory statute applicable to practitioners actively engaged in the regulated profession prior to the effective date of the regulatory statute which exempts the practitioners from meeting the prerequisite qualifications set forth in the regulatory statute to perform prescribed occupational tasks.

(5) "Inspection" means the periodic examination of practitioners by a state agency in order to ascertain whether the practitioners' occupation is being carried out in a fashion consistent with the public health, safety, and welfare.

(6) "Legislative committees of reference" means the standing legislative committees designated by the respective rules committees of the senate and house of representatives to consider proposed legislation to regulate business professions not previously regulated.

(7) "License", "licensing", and "licensure" mean permission to engage in a business profession which would otherwise be unlawful in the state in the absence of the permission. A license is granted to those individuals who meet prerequisite qualifications to perform prescribed professional tasks and for the use of a particular title.

(8) "Professional license" means an individual, nontransferable authorization to carry on an activity based on qualifications which include: (a) Graduation from an accredited or approved program, and (b) acceptable performance on a qualifying examination or series of examinations.

(9) "Practitioner" means an individual who (a) has achieved knowledge and skill by practice, and (b) is actively engaged in a specified business profession.

(10) "Public member" means an individual who is not, and never was, a member of the business profession being regulated or the spouse of a member, or an individual who does not have and never has had a material financial interest in either the rendering of the business professional service being regulated or an activity directly related to the profession being regulated.

(11) "Registration" means the formal notification which, prior to rendering services, a practitioner shall submit to a state agency setting forth the name and address of the practitioner; the location, nature and operation of the business activity to be practiced; and, if required by the regulatory entity, a description of the service to be provided.

(12) "Regulatory entity" means any board, commission, agency, division, or other unit or subunit of state government which regulates one or more professions, occupations, industries, businesses, or other endeavors in this state.

(13) "State agency" includes every state office, department, board, commission, regulatory entity, and agency of the state, and, where provided by law, programs and activities involving less than the full responsibility of a state agency. [1987 c 514 § 5.]

18.118.030 Applicants for regulation——Information. After July 26, 1987, if appropriate, applicant groups shall explain each of the following factors to the extent requested by the legislative committees of reference:

(1) A definition of the problem and why regulation is necessary:

(a) The nature of the potential harm to the public if the business profession is not regulated, and the extent to which there is a threat to public health and safety;

(b) The extent to which consumers need and will benefit from a method of regulation identifying competent practitioners, indicating typical employers, if any, of practitioners in the profession; and

(c) The extent of autonomy a practitioner has, as indicated by:

(i) The extent to which the profession calls for independent judgment and the extent of skill or experience required in making the independent judgment; and

(ii) The extent to which practitioners are supervised;

(2) The efforts made to address the problem:

(a) Voluntary efforts, if any, by members of the profession to:

(i) Establish a code of ethics; or

(ii) Help resolve disputes between practitioners and consumers; and

(b) Recourse to and the extent of use of applicable law and whether it could be strengthened to control the problem;

(3) The alternatives considered:

(a) Regulation of business employers or practitioners rather than employee practitioners;

(b) Regulation of the program or service rather than the individual practitioners;

(c) Registration of all practitioners;

(d) Certification of all practitioners;

(e) Other alternatives;

(f) Why the use of the alternatives specified in this subsection would not be adequate to protect the public interest; and

(g) Why licensing would serve to protect the public interest;

(4) The benefit to the public if regulation is granted:

(a) The extent to which the incidence of specific problems present in the unregulated profession can reasonably be expected to be reduced by regulation;

(b) Whether the public can identify qualified practitioners;

(c) The extent to which the public can be confident that qualified practitioners are competent:

(i) Whether the proposed regulatory entity would be a board composed of members of the profession and public members, or a state agency, or both, and, if appropriate, their respective responsibilities in administering the system of registration, certification, or licensure, including the composition of the board and the number of public members, if any; the powers and duties of the board or state agency regarding examinations and for cause revocation, suspension, and nonrenewal of registrations, certificates, or licenses; the promulgation of rules and canons of ethics; the conduct of inspections; the receipt of complaints and disciplinary action taken against practitioners; and how fees would be levied and collected to cover the expenses of administering and operating the regulatory system;

(ii) If there is a grandfather clause, whether such practitioners will be required to meet the prerequisite qualifications established by the regulatory entity at a later date;

(iii) The nature of the standards proposed for registration, certification, or licensure as compared with the standards of other jurisdictions;

(iv) Whether the regulatory entity would be authorized to enter into reciprocity agreements with other jurisdictions; and

(v) The nature and duration of any training including, but not limited to, whether the training includes a substantial amount of supervised field experience; whether training programs exist in this state; if there will be an experience requirement; whether the experience must be acquired under a registered, certificated, or licensed practitioner; whether there are alternative routes of entry or methods of meeting the prerequisite qualifications; whether all applicants will be required to pass an examination; and, if an examination is required, by whom it will be developed and how the costs of development will be met;

(d) Assurance of the public that practitioners have maintained their competence:

(i) Whether the registration, certification, or licensure will carry an expiration date; and

(ii) Whether renewal will be based only upon payment of a fee, or whether renewal will involve reexamination, peer review, or other enforcement;

(5) The extent to which regulation might harm the public:

(a) The extent to which regulation will restrict entry into the profession:

(i) Whether the proposed standards are more restrictive than necessary to insure safe and effective performance; and

(ii) Whether the proposed legislation requires registered, certificated, or licensed practitioners in other jurisdictions who migrate to this state to qualify in the same manner as state applicants for registration, certification, and licensure when the other jurisdiction has substantially equivalent requirements for registration, certification, or licensure as those in this state; and

(b) Whether there are similar professions to that of the applicant group which should be included in, or portions of the applicant group which should be excluded from, the proposed legislation;

(6) The maintenance of standards:

(a) Whether effective quality assurance standards exist in the profession, such as legal requirements associated with specific programs that define or enforce standards, or a code of ethics; and

(b) How the proposed legislation will assure quality:

(i) The extent to which a code of ethics, if any, will be adopted; and

(ii) The grounds for suspension or revocation of registration, certification, or licensure;

(7) A description of the group proposed for regulation, including a list of associations, organizations, and other groups representing the practitioners in this state, an estimate of the number of practitioners in each group, and whether the groups represent different levels of practice; and

(8) The expected costs of regulation:

(a) The impact registration, certification, or licensure will have on the costs of the services to the public; and

(b) The cost to the state and to the general public of implementing the proposed legislation. [1987 c 514 § 6.]

18.118.040 Applicants for regulation——Written report——Recommendation of department of licensing. Applicant groups shall submit a written report explaining the factors enumerated in RCW 18.118.030 to the legislative committees of reference. Applicant groups, other than state agencies created prior to July 26, 1987, shall submit copies of their written report to the department of licensing for review and comment. The department of licensing shall make recommendations based on the report to the extent requested by the legislative committees. [1987 c 514 § 7.]

18.118.900 Severability——1987 c 514. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected. [1987 c 514 § 10.]

Chapter 18.120
REGULATION OF HEALTH PROFESSIONS——CRITERIA

Sections

Director of licensing or director's designee ex officio member of health professional licensure and disciplinary boards: RCW 43.24.015.

Health professions account——Fees credited——Requirements for biennial budget request: RCW 43.24.072.

18.120.010 Purpose——Criteria. (1) The purpose of this chapter is to establish guidelines for the regulation of health professions not licensed or regulated prior to July 24, 1983, and those licensed or regulated health professions which seek to substantially increase their scope of practice: *Provided*, That the provisions of this chapter are not intended and shall not be construed to: (a) Apply to any regulatory entity created prior to July 24, 1983, except as provided in this chapter; (b) affect the powers and responsibilities of the superintendent of public instruction or state board of education under RCW 28A.04.120 and 28A.70.005; (c) apply to or interfere in any way with the practice of religion or to any kind of treatment by prayer; and (d) apply to any remedial or technical amendments to any statutes which licensed or regulated activity before July 24, 1983. The legislature believes that all individuals should be permitted to enter into a health profession unless there is an overwhelming need for the state to protect the interests of the public by restricting entry into the profession. Where such a need is identified, the regulation adopted by the state should be set at the least restrictive level consistent with the public interest to be protected.

(2) It is the intent of this chapter that no regulation shall, after July 24, 1983, be imposed upon any health profession except for the exclusive purpose of protecting the public interest. All bills introduced in the legislature to regulate a health profession for the first time should be reviewed according to the following criteria. A health profession should be regulated by the state only when:

(a) Unregulated practice can clearly harm or endanger the health, safety, or welfare of the public, and the potential for the harm is easily recognizable and not remote or dependent upon tenuous argument;

(b) The public needs and can reasonably be expected to benefit from an assurance of initial and continuing professional ability; and

(c) The public cannot be effectively protected by other means in a more cost-beneficial manner.

(3) After evaluating the criteria in subsection (2) of this section and considering governmental and societal costs and benefits, if the legislature finds that it is necessary to regulate a health profession not previously regulated by law, the least restrictive alternative method of regulation should be implemented, consistent with the public interest and this section:

(a) Where existing common law and statutory civil actions and criminal prohibitions are not sufficient to eradicate existing harm, the regulation should provide for stricter civil actions and criminal prosecutions;

(b) Where a service is being performed for individuals involving a hazard to the public health, safety, or welfare, the regulation should impose inspection requirements and enable an appropriate state agency to enforce violations by injunctive relief in court, including, but not limited to, regulation of the business activity providing the service rather than the employees of the business;

(c) Where the threat to the public health, safety, or economic well-being is relatively small as a result of the operation of the health profession, the regulation should implement a system of registration;

(d) Where the consumer may have a substantial basis for relying on the services of a practitioner, the regulation should implement a system of certification; or