Sunrise Analysis of a Proposal to Regulate Marriage and Family Therapists

A Report to the Governor and the Legislature of the State of Hawaii

Report No. 95-26
November 1995

THE AUDITOR
STATE OF HAWAII

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Foreword

The Sunset Law, or the Hawaii Regulatory Licensing Reform Act of 1977, contains a sunrise provision that requires that measures proposing to regulate professions or vocations be referred to the State Auditor for analysis prior to enactment. The Auditor is responsible for reporting the results of the analysis to the Legislature.

This report evaluates the regulation of marriage and family therapists as proposed in House Bill No. 764, introduced in the Regular Session of 1995. The Legislature requested this study in House Concurrent Resolution No. 4, House Draft 1, of the session. The study presents our findings on whether the proposed regulation complies with policies in the Sunset Law and whether there is a reasonable need to regulate marriage and family therapists to protect the health, safety, and welfare of the public. It concludes with our recommendation on whether the proposed regulation should be enacted.

We acknowledge the cooperation of the Department of Commerce and Consumer Affairs, other state officials, and organizations and individuals knowledgeable about the occupation whom we contacted during the course of our analysis.

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State Auditor

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Chapter 1
Introduction

The Sunset Law, or the Hawaii Regulatory Licensing Reform Act (Chapter 26H, Hawaii Revised Statutes), contains a sunrise provision requiring that measures proposing to regulate professions or vocations be referred to the State Auditor for analysis prior to enactment. The Auditor is to determine whether regulation is necessary to protect the health, safety, and welfare of consumers.

This report evaluates whether the regulation of marriage and family therapists proposed in House Bill No. 764, introduced in the Regular Session of 1995, complies with policies for occupational regulation in the Sunset Law. The Legislature requested this study in House Concurrent Resolution No. 4, House Draft 1, of the 1995 session.

Background on Marriage and Family Therapists

Marriage and family therapists assist individuals (adults and children) and families with emotional, behavioral, and relationship problems. Therapists help people with difficulties of childhood and adolescence, marriages in crisis, families needing assistance with senior parents, domestic violence, physical and sexual abuse, substance abuse, and other areas.

Nationally, marriage and family therapists may work in private practice, hospitals, schools, colleges, court systems, community mental health centers, health maintenance organizations, and employee assistance programs.

Professional organizations and credentials

The American Association for Marriage and Family Therapy is the major professional association with about 23,000 members. The association promotes and represents the professional interests of marriage and family therapists. It also establishes and maintains professional standards in education, training, and practice. The association's Commission on Accreditation for Marriage and Family Therapy Education develops standards for master's, doctoral, and post-degree clinical training in marriage and family therapy.

The association grants three types of credentials. *Clinical membership* requires (1) a master's or doctorate degree in marriage and family therapy from a program accredited by the commission, or a qualifying graduate degree in a related mental health field from a regionally accredited institution, and (2) two years of supervised clinical work

experience in marriage and family therapy following the degree. *Associate membership* requires the qualifying graduate degree but not the supervised clinical work. *Student membership* requires current enrollment in a qualifying graduate program.

The local affiliate of the American Association for Marriage and Family Therapy is the Hawaii Association for Marriage and Family Therapy which has about 60 members.

Numbers in Hawaii

The precise number of marriage and family therapists in Hawaii is not known. The Department of Labor and Industrial Relations keeps statistics on "counselors" but does not break this down by types.

A representative of the Hawaii Association for Marriage and Family Therapy estimates that there are 75 marriage and family therapists in the state, most of whom belong to the association. The number is higher if psychologists, psychiatrists, and other licensees who perform marriage and family therapy are included.

The Oahu yellow pages list 93 individuals and organizations under "Marriage, Family, Child & Individual Counselors." This apparently includes psychologists who perform marriage and family therapy and others who call themselves marriage and family counselors.

We found no documented information on the numbers of marriage and family therapists in various work settings in Hawaii. Nationally, most of these therapists are independent providers in private practice. The available information indicates that this is also the case in Hawaii.

Regulation in other states

Marriage and family therapists are regulated in 37 states. The nature and extent of regulation varies considerably. Some states require a license to practice. Others restrict only the use of the title of marriage and family therapist. One state requires only registration.

Definitions of the occupation also differ among the states. For example, some focus on treating *diagnosed disorders* and others on assisting with *problems* or *conditions*. Other differences include educational requirements, exemptions from regulation, and the composition of regulatory boards.

Current Proposal to Regulate Marriage and Family Therapists

The proposal, House Bill No. 764 of the 1995 Regular Session, would regulate both the practice of marriage and family therapy and the use of certain titles. With some exceptions, unless licensed by the State, no one could (1) lawfully practice marriage and family therapy; (2) use a title such as "marriage and family therapist," "marriage counselor," or any

other title denoting that the person is a marriage and family therapist; or (3) advertise the performance of marriage and family therapy or counseling. Any person violating these provisions could be convicted of a misdemeanor.

Exemptions

The bill exempts various groups including persons who practice marriage and family therapy as employees of institutions and agencies such as nonprofits. Also, qualified professionals, such as psychologists and psychiatric nurses, could perform work "in the nature of marriage and family therapy" so long as they did not indicate that they are marriage and family therapists.

Licensing board

The bill would create a marriage and family therapist board consisting of seven members to be located within the Department of Commerce and Consumers Affairs. At least four members must be licensed marriage and family therapists and at least two must be public members. The board is responsible for adopting rules, examining applicants, issuing licenses, and disciplining licensees.

Licensing requirements

To be licensed as a marriage and family therapist, those applying up to January 1, 1996 must have (1) an appropriate graduate degree from a regionally accredited institution, (2) five years of clinical experience in marriage and family therapy, and (3) membership in or certification by an appropriate professional organization.

Persons applying after January 1, 1996 need to (1) have a master's or doctoral degree in marriage and family therapy from a recognized educational institution (or a graduate degree in an allied field and coursework equivalent to a master's in marriage and family therapy), (2) have two calendar years of supervised work experience in marriage and family therapy after receiving a qualifying degree, and (3) pass an examination administered by the board. The examination could be written or oral and would be held at least once a year.

Applicants licensed or certified by another state having equivalent or stricter requirements could be licensed by reciprocity. Also, the bill would allow the board to grant temporary permits for up to one year while a person's license application is being processed or while awaiting the next examination.

Confidential communications and duty to warn

The bill provides for privileged communications between the client and therapist. In addition, therapists would be legally liable for failing to warn others of danger only if the patient had communicated to the therapist a serious threat of physical violence against a reasonably identifiable victim.

Objectives of the Analysis

The objectives for this analysis were to:

1. Determine whether there is a reasonable need to regulate the occupation to protect the health, safety, and welfare of the public.

2. Make recommendations based on our findings.

Criteria for the Analysis

The Legislature established the "sunrise" criteria to ensure that regulation of an occupation takes place only for the right reason: to protect consumers. Regulation is an exercise of the State's police powers and should not be taken lightly.

Consumers rarely initiate regulation. More often, practitioners themselves request regulation for benefits that go beyond consumer protection. They often equate licensure with professional status in seeking respect for the occupation. Through regulation, they may gain access to third-party reimbursements for their services and control entry into their field.

Policies and principles for regulation

Hawaii's sunrise law—Section 26H-6, HRS—requires the Auditor to assess legislative proposals against the regulation policies in the statute. The policies reinforce the primary purpose of consumer protection:

- the State should regulate professions and vocations only where reasonably necessary to protect consumers;

- regulation should protect the public health, safety, and welfare and not the profession;

- evidence of abuses by providers of the service shall be given great weight in determining whether a reasonable need for government intervention exists;

- regulation should protect those consumers who may be at a disadvantage in choosing or relying on the provider;

- regulation should be avoided if it artificially increases the costs of goods and services or if its costs to taxpayers outweigh its benefits to consumers; and

- regulation should not unreasonably restrict qualified persons from entry into the profession.

We were also guided by the publication *Questions a Legislator Should Ask*, published by the national Council on Licensure, Enforcement and Regulation. The primary guiding principle for legislators, according to this publication, is whether the unregulated profession presents a clear and present danger to the public's health, safety, and welfare. If it does, regulation may be necessary; if not, regulation is unnecessary and wastes taxpayers' money.[1]

We developed additional criteria for this review, including whether:

- the incidence or severity of harm based on documented evidence is sufficiently real or serious to warrant regulation;
- the cause of harm is the practitioner's insufficient skill or incompetence;
- the occupational skill needed to prevent harm can be defined in law and measured;
- the field is too complex for consumers to be able to choose practitioners wisely; and
- no alternatives provide sufficient protection to consumers, for example federal programs, other state laws, marketplace constraints, private action, or supervision.

We assessed the specific regulatory proposal—House Bill No. 764—as to whether:

- the scope of practice to be regulated is clearly defined and enforceable;
- the licensing requirements are constitutional and legal, for example, no residency or citizenship requirements;
- licensing requirements, such as experience or continuing education, are directly related to preventing harm;
- provisions are not unduly restrictive nor do they violate federal anticompetition laws;
- prohibited practices are directly related to protecting the public; and
- disciplinary provisions are appropriate.

Burden of proof

The sunrise process places the burden of proof on those in the occupation to justify their request for regulation and defend their proposed legislation. We evaluate their arguments and data against the sunrise criteria.

We examine the regulatory proposal and determine whether practitioners and their professional associations have made a strong enough case for regulation. It is not enough that regulation *may* have *some* benefits. We recommend in favor of regulation only if it is *demonstrably* necessary to protect the public. We also scrutinize the language of the regulatory proposal for appropriateness.

Types of regulation

In examining the type of government regulation being proposed, we determine whether it is one of three approaches to occupational regulation:

A *licensing* law gives persons who meet certain qualifications the legal right to deliver services, that is, to practice the profession (for example, social work). Penalties may be imposed on those who practice without a license.

A *certification* law restricts the use of certain titles (for example "social worker") to persons who meet certain qualifications, but does not bar others who do not use the title from offering such services. This is sometimes called title protection. (Government certification should not be confused with certification, or credentialing, by private organizations. For example, social workers receive accreditation from the National Association of Social Workers.)

A *registration* law simply requires practitioners to sign up with the State so that a roster or registry will exist to inform the public of the nature of their services and to enable the State to keep track of them. Registration may be mandatory or voluntary.

As part of our analysis, we assess the appropriateness of the selected approach.

Scope and Methodology

To accomplish the objectives of the analysis, we reviewed literature on marriage and family therapists. We also reviewed complaints and other evidence of harm to consumers.

We obtained information from national and Hawaii associations of marriage and family therapists. We interviewed representatives of these and other associations and academic programs in the fields of

psychotherapy and counseling. We contacted staff of the Department of Commerce and Consumer Affairs and other government agencies as appropriate.

Our work was performed from July 1995 through October 1995 in accordance with generally accepted government auditing standards.

Chapter 2

Findings and Recommendation

This chapter presents our findings and recommendation on the need to regulate marriage and family therapists. We conclude that regulation is not necessary and that House Bill No. 764 which proposes regulation is flawed.

Summary of Findings

1. The regulation of marriage and family therapists is not warranted. Little evidence of harm exists in Hawaii, and the benefits of licensing are uncertain. Regulation would be costly.

2. House Bill No. 764 does not clearly define who and what would be regulated.

3. The bill has other flaws. It sets licensing requirements that are restrictive and includes provisions that are unclear or questionable.

Regulation of Marriage and Family Therapists Is Not Warranted

The Sunset Law, Chapter 26H, Hawaii Revised Statutes, states that professions and vocations should be regulated only when necessary to protect the health, safety, and welfare of consumers. In assessing the need for regulation, evidence of abuses must be given great weight and the benefits and costs of regulation to taxpayers must be considered.

A recent article published by the national Council on Licensure, Enforcement and Regulation (CLEAR) suggested the following threats to the public from counseling and psychotherapy in general: (1) incorrect diagnosis or lack of documentation of the need of treatment; (2) incorrect application of a technique or method; (3) damages due to the violation of confidentiality; (4) damages due to inhumane treatment; (5) unethical entanglement of relationships; and (6) financial irresponsibility or fraud.[1]

However, we found limited evidence of actual abuse and harm by marriage and family therapists in Hawaii. Licensing seeks to assure basic competence and would not address the potential harm, which consists principally of unethical and fraudulent behavior. The benefits of licensing are uncertain and the costs would be substantial.

Limited evidence of harm in Hawaii

The Hawaii Association for Marriage and Family Therapy, a division of the American Association for Marriage and Family Therapy, supports House Bill No. 764 to regulate the profession. However, proponents of

regulation offered little evidence of public harm caused by therapists. Most of the cases of alleged harm—for example, a therapist's romantic relationship with a married client—were anecdotal.

In the only documented case brought to our attention, a marriage and family counselor in Honolulu was convicted for defrauding a government health plan of $40,000 through false billings that included "therapy" sessions involving sex with his patients.

We found no consumer complaints about marriage and family therapists during the last four years at the Office of Consumer Protection and the Regulated Industries Complaints Office (both in the Department of Commerce and Consumer Affairs) or the Office of the Ombudsman.

Uncertain benefits of licensing

Proponents of licensing point to the potential harm from marriage and family therapists because clients seeking therapy at times of crisis are vulnerable and lack expertise in choosing a qualified and ethical therapist.

The purpose of licensing would be to screen out practitioners who *would* harm consumers and discipline those who *have* harmed consumers. We find the benefits of licensing marriage and family therapists uncertain in both areas.

Competency not the issue

A leading authority on occupational regulation has stated:

> Licensing is a process by which a government agency grants individuals permission to engage in a specified profession or occupation upon finding that individual applicants have attained the minimal degree of competency required to ensure that the public's health, safety and welfare will be reasonably well protected.[2]

However, the potential harm from marriage and family therapists apparently results not from lack of competency (in terms of qualifications, knowledge, and skills) but from unethical actions, dishonesty, or substance abuse. Sometimes criminal activity is involved. The Hawaii case that resulted in a conviction provides one example of this.

The same is true on the national scene. The American Association for Marriage and Family Therapy investigates allegations that its members have violated its ethics code. In 1994, the association deliberated 55 claims of ethical violations including "dual relationship" (for example having sex with patients), harassment (sexual and otherwise), violation

of confidentiality, financial irresponsibility or fraud, substance abuse, and other ethical violations. Complaints in states that regulate marriage and family therapy are similar in nature to those handled by the association, plus complaints of unlicensed practice.

With unethical and fraudulent conduct dominating consumers' complaints, it is questionable whether qualifications based on education, training, and testing of competency would address the potential harm to the public.

Competency difficult to assess

Even if it were a significant problem, the competency of marriage and family therapists is difficult to assess.

The CLEAR article proposes a combination of three licensing examinations for counselors and psychotherapists to screen for competency: (1) a written examination covering pathology to protect consumers from incorrect diagnosis or lack of documentation of the need for treatment; (2) a written examination covering treatment procedures and practice skills to deter inappropriate techniques or methods; and (3) a clinical examination involving observation of the therapist's interactions with an actual client to assess therapist/client interaction.

However, while optimistic that adequate examinations can be developed, the CLEAR article concludes that "at this time the pieces that are needed to regulate counseling and psychotherapy are not in place, perhaps not even in existence."[3] This is due to disagreement within the field as to appropriate practices and effective methods, the lack of a clear relationship between treatment and outcome, and the difficulty of defining a desirable outcome.

The CLEAR article also suggests that the personal and interpersonal qualities of the therapist—such as warmth and empathy—are key to minimal competence. The article therefore puts heavy emphasis on clinical examinations involving actual therapy sessions. However, we maintain that clinical examinations can be difficult to administer objectively and uniformly.

As of October 1994, about half the states that regulate marriage and family therapists were using a national examination developed by Professional Examination Services, a testing company, to test the knowledge base of license applicants. Some psychologists also suggest that supervised experience in a clinical setting can help assess competency.

Nevertheless, we believe that the capacity of licensing authorities to assess and assure competency of marriage and family therapists and other counselors has not been clearly demonstrated.

Ethics and honesty hard to regulate

We do not believe that licensing offers a solution to the apparent risks to consumers from unethical and fraudulent behavior of marriage and family therapists. For example, marriage and family therapists are licensed in California under strict education and experience requirements. Yet the State's Board of Behavioral Science Examiners, which regulates these practitioners, continues to receive many complaints of ethical violations.

Furthermore, most marriage and family therapists in Hawaii are clinical members of the American Association for Marriage and Family Therapy. The association may take disciplinary action against members who violate its ethical standards. Licensing does not seem justified simply on the basis of potential harm by a few non-members of the association.

Other arguments insufficient

Proponents also favor enacting House Bill No. 764 because it makes therapist-client communications privileged. Currently, they point out, the client cannot be assured that therapy sessions will be treated confidentially. However, clinical membership in the American Association for Marriage and Family Therapy already imposes an ethical obligation of confidentiality. Ensuring confidentiality is by itself not sufficient justification for an extensive licensing program.

The bill also protects marriage and family therapists from liability for failing to warn persons who may be in danger from the client, except in limited circumstances where the threat is very specific. However, this provision is designed to protect practitioners and is not sufficient to justify licensing.

Considerable cost of regulation

Regulation would be costly. The Sunset Law requires that regulation be avoided if its benefits to consumers are outweighed by its cost to taxpayers and if it unreasonably restricts entry into the occupation. The proposed regulation of marriage and family therapists appears unacceptable under this requirement.

The Department of Commerce and Consumer Affairs has informed us that it would need a general fund appropriation of at least $5,000 to start up the program and prepare for implementation. If no national, valid, and reliable licensing examination is available, an additional general

fund appropriation of $45,000 would be needed to develop an examination. This would bring the total start-up appropriation to $50,000.

Once the start-up period has elapsed, the program must become self-sustaining. The department estimates that $97,555 a year would be needed, to cover personnel and operations.

Section 26-9(1), HRS, authorizes the department to assess fees on applicants and licensees so long as the fees bear a reasonable relationship to the cost of services provided. We provided the department with our estimate that as many as 75 marriage and family therapists might initially obtain licenses, and perhaps 30 applicants would apply in each subsequent year.

The department says that it would rely on the initial group of 75 to bear the $195,110 cost of the program for two fiscal years ($97,555 times two). To fully recover this cost, each applicant/licensee would be assessed an initial application/license fee of $2,600. An additional fee of $70 to support the department's Compliance Resolution Fund would bring the total fee to $2,670. Examination fees could make the fee even higher.

Furthermore, the department says it might require the regulated group to "reimburse" the general fund for the $5,000 start-up appropriation, which would add $67 to the initial application/license fee for each of the 75 applicants. This would bring the total fee to $2,737 at a minimum.

The department calculates that license renewal fees would be in the same range, but slightly lower if the pool of licensees increases slightly as we estimated.

We believe the State should not allocate its limited resources to establish regulation of marriage and family therapists when the benefits of regulation are so uncertain. Moreover, charging fees to cover the State's costs could severely restrict entry into the occupation.

Scope of Regulation in House Bill No. 764 Is Unclear

For regulation to be effective, the profession and its scope of practice must be delineated so that the State can readily determine who falls under regulation and who does not. A basic problem with regulating marriage and family therapists is that the practice cannot be defined with any precision. We reached the same conclusion with regard to counselors in our *Sunrise Analysis of a Proposal to Regulate Professional Counselors*, Report No. 92-23.

The definition of marriage and family therapy in House Bill No. 764 is too broad and vague to be enforceable. The exemptions in the law are also confusing. These deficiencies reflect a lack of clarity and consensus about the nature of the profession and its proper scope of practice. Without clarity, regulation is difficult.

Broad and vague language

Following a model developed by the American Association for Marriage and Family Therapy, House Bill No. 764 defines marriage and family therapy as:

> the diagnosis and treatment of mental and emotional disorders, whether cognitive, affective, or behavioral, within the context of marriage and family systems. Marriage and family therapy involves the professional application of psychotherapeutic and family systems theories and techniques in the delivery of services to individuals, couples, and families for the purpose of treating such diagnosed nervous and mental disorders.

However, the words "in the context of marriage and family systems" and "the professional application of psychotherapeutic and family systems techniques" are broad, vague, and ambiguous. "Family systems" in particular is subject to interpretation. For example, how would an enforcement official investigating a claim of unlicensed activity determine whether the therapist was applying "family systems theory" in treating clients?

Furthermore, psychotherapy has been described as "an amorphous and vaguely defined process with wide variations in theory and technique."[4]

Also, the bill does not specify the "cognitive, affective, or behavioral" disorders covered. The *Diagnostic and Statistical Manual of Mental Disorders* published by the American Psychiatric Association, which is widely used by mental health professionals, contains a 12-page classification of a wide variety of mental disorders. But the bill does not refer to the manual or any other source of professional guidance.

The bill does not sharply distinguish marriage and family therapy as a profession separate and distinct from other mental health professions. Groups seeking mandatory licensure usually argue that their scope of practice must be defined broadly in order to prevent unqualified persons from engaging in any aspect of their practice. This view may protect the particular profession, but it does not necessarily provide greater protection for the public.

Confusing and questionable exemptions

House Bill No. 764 contains some exemptions for other professionals and institutional employees that are unclear or whose purpose is questionable.

Other professionals

Marriage and family therapists share common practices with other "helping professionals." These include psychiatrists, clinical psychologists, clinical social workers, psychiatric nurse specialists, and professional counselors. All may treat disorders and deliver services to individuals, couples, and families. Others who may provide therapeutic services include occupational therapists, rehabilitation counselors, and drug abuse workers.

All may emphasize the importance of the family system, as shown by House Bill No. 764 which explicitly acknowledges the overlap:

> Nothing in this [law] shall be construed to prevent qualified members of other professional groups as defined by the [marriage and family therapist licensing] board, including but not necessarily limited to clinical social workers, psychiatric nurses, psychologists, physicians, or members of the clergy, from doing or advertising that they perform work of a marriage and family therapy nature consistent with the accepted standards of their respective professions; provided that no such persons shall use a title or description stating or implying that they are marriage and family therapists or marriage and family counselors or that they are licensed as marriage and family therapists or marriage and family counselors.

This exemption is unclear—and therefore difficult to implement—in several ways. It does not explain whether the board will determine which *professions* or *individuals within various professions* are qualified for the exemption.

Furthermore, the specific professions are not precise. The bill does not define "clinical social worker"; Chapter 467E, HRS, the licensing law for social workers, does not use this term. The bill also uses the term "psychiatric nurse," yet according to the Hawaii Nurses Association not all of these nurses have the educational background to perform diagnosis and treatment for marriage and family therapy. The association says that only "psychiatric clinical nurse specialists" can perform marriage and family therapy.

In addition, the provision allows exempted persons to perform or advertise that they perform "work of a marriage and family therapy nature" but does not explain whether this means that their work falls within the bill's definition of marriage and family therapy, or is in some other category.

The provision is also confusing because it allows other professionals to practice marriage and family therapy but prohibits them from even "implying" that they are marriage or family therapists or marriage and family counselors. These vague terms are potentially restrictive. The provision also appears to conflict with the language that allows the exempted professionals to *advertise* that they do "work of a marriage and family therapy nature." Also, the provision introduces the term "marriage and family *counselor*" without defining it.

Employees of organizations

The bill *completely* exempts persons who practice marriage and family therapy as part of their duties as employees of the following: recognized academic institutions; government agencies; or nonprofit organizations determined by the marriage and family therapist board to meet community needs.

The reasons for this sweeping exemption are unclear. A proponent of regulation pointed out that therapists working for institutions receive supervision and that the exemptions are designed to ensure that the bill is not too restrictive. However, we estimate that the exemptions would allow about 50 therapists to practice without meeting the standards applicable to private practitioners—a questionable approach.

Furthermore, the exemption would give the board too much discretion to determine which academic institutions are recognized and what nonprofit organizations meet community needs. This could lead to arbitrary and preferential treatment.

Confusion within the field

The unclear scope of regulation in House Bill No. 764 reflects confusion and a lack of consensus both nationally and in Hawaii about the nature of marriage and family therapy and how it should be regulated, if at all.

Regulations of the U.S. Public Health Service concerning the designation of health professional shortage areas recognize the marriage and family therapist as one of the core mental health professionals along with the psychiatrist, clinical psychologist, clinical social worker, and psychiatric nurse specialist. The regulations define a marriage and family therapist as:

> an individual (normally with a master's or doctorate degree in marital and family therapy and at least two years of supervised clinical experience) who is practicing as a marital and family therapist and is licensed or certified to do so by the State of practice; or, if licensure or certification is not required by the State of practice, is eligible for clinical membership in the American Association for Marriage and Family Therapy.[5]

However, inconsistencies abound. A recent study of the proposed licensing of marriage and family therapists in Virginia found no consensus in the mental health field as to the definition and scope of practice of marriage and family therapists.[6]

In our fieldwork we found this to be the case. The following are some examples of the disagreements and controversies.

Distinct profession or therapeutic approach

On the one hand, specialized education and supervised experience in marriage and family therapy seem to prepare specialist practitioners. On the other hand, marriage and family therapy has sometimes been viewed as a therapeutic approach, or constellation of services, not as a profession in its own right. For example, marriage and family therapy has been described as one type of counseling and not appropriate for separate regulation.

Diagnosis with or without treatment

Some experts—including some marriage and family therapists—believe that these therapists should not diagnose and treat serious illness. They state that therapists need only to recognize mental disorders and refer their clients to more qualified professionals for treatment.

Other studies indicate that marriage and family therapists can effectively treat mental and emotional disorders such as schizophrenia, bipolar disorder, and major depression, and prevent relapse and rehospitalization. House Bill No. 764 appears to reflect this by defining the profession as one that treats diagnosed disorders.

Therapy with or without disorders

Some of the literature we reviewed—including publications issued by the marriage and family therapy profession—suggests that therapists work only with "sick" marriages, families, and individuals. Other literature indicates that marriage and family therapists are also trained to strengthen families that already are well functioning and happy—or at least not "ill"—to prevent problems from arising and improve the quality of life.

A recent article in the professional journal *Contemporary Family Therapy* illustrates the confusion. It defines the field of marital and family *therapy* as involving the treatment of disorders—as does House Bill No. 764. But it also defines marital and family *counseling* as a part of family therapy that focuses on marital adjustment and intrafamily relationships in the absence of a diagnosed disorder—an inherent contradiction.[7]

Unique or standard approach

Marriage and family therapists claim their profession is distinguishable because—unlike traditional therapy—it focuses primarily on the couple or family system and the relationships within that system, and only secondarily on the individual. The dysfunctional family system as a whole becomes the "identified patient." They also claim a greater emphasis on practical approaches to therapy leading to quicker results. However, we suspect these claims are exaggerated since many other types of practitioners may also emphasize the family and favor speedy and result-oriented counseling.

Differing approaches to regulation

Across the nation, there is an array of different approaches to regulation of marriage and family therapists (for example, licensure, certification, or registration), entry requirements, exemptions from licensure, supervision, and board structures.

As of 1993, 31 states regulated practitioners but only 13 of the 31 states had true licensing (practice protection). The other states regulated the use of a title only. Recent data indicate that the number of states regulating the occupation has grown to 37.

The 1993 information indicated that state regulations differed in scope of practice. Some states used the definition in House Bill No. 764. Others used "assessment" instead of "diagnosis," "problems/conditions" instead of "disorders," or totally different definitions.

Nebraska's law prohibited marriage and family therapists from "measuring personality or intelligence for the purpose of diagnosis or treatment planning, [or] using psychotherapy with individuals suspected of having major mental or emotional disorders" unless these services are performed in consultation with a physician or licensed psychologist.

The wide range of regulation is evidence of lack of clarity and consensus in the field.

Bill Has Other Flaws

Besides the unclear scope of regulation, House Bill No. 764 has several other deficiencies. These include bias against consumers, restrictive licensing requirements, inappropriate examination provisions, and a questionable provision on morality.

Licensing board dominated by profession

The principal function of occupational regulatory boards is to safeguard consumers by establishing, monitoring, and enforcing standards for the profession. State boards are not intended to be advocacy groups for professionals.

House Bill No. 764 requires a seven-member marriage and family therapist board. Up to five of the seven are licensed marriage and family therapists; only two must be public members.

The purpose of placing public members on licensing boards is to provide impartial viewpoints and ensure that the broader public interest is considered in the board's deliberations. House Bill No. 764 does not achieve this.

Restrictive and unclear licensing requirements

The bill contains licensing requirements that would unreasonably restrict entry into the profession. The problem areas include experience, supervision, and a "grandfather" clause.

Questionable experience requirements

After an initial period that enables current practitioners to be easily licensed, the subsequent period requires applicants to have at least a master's degree or doctoral degree in marriage and family therapy, or a graduate degree in an allied field with coursework equivalent to a master's in marriage and family therapy. Two calendar years of post-degree work experience in marriage and family therapy under qualified supervision are also required.

However, we are not convinced that all of these requirements are essential to minimal competency or that their absence would harm the public. States that regulate marriage and family therapists do generally require a master's degree with at least some emphasis on marriage and family therapy. However, among the states, experience requirements for marriage and family therapists vary from one to four years and differ in the required number of hours and types of experience.

The bill also requires applicants for licensure to complete two calendar years of work experience under qualified supervision by an individual whom the board recognizes as an approved supervisor. By leaving this determination to the board, the bill risks arbitrary and restrictive application of the supervision requirement.

Unfair grandfather clause

The bill has a "grandfather" clause that would allow current practitioners to meet less stringent requirements. These applicants could qualify with an appropriate graduate degree (instead of a marriage and family therapy

degree or a degree in a related professional field), five years of clinical experience in marriage and family therapy, and membership in an appropriate professional organization. The board would define what is "appropriate." Also, the bill does not require previous supervised experience and a licensing examination for these initial applicants as it does for subsequent ones.

This grandfather provision constitutes a loophole that unfairly favors current practitioners and could restrict new applicants unreasonably. The provision calls into question the need for education and supervised experience specifically in marriage and family therapy. Also, the provision is inconsistent with the purpose of licensing which is to ensure that *all* licensees meet a minimum level of competency.

Questionable examination and morality requirements

House Bill No. 764 allows licensing examinations to be written, oral, or both—and leaves this determination up to the board. But oral examinations are subjective and difficult to administer even-handedly. Oral examinations in other states tend to focus on state law and professional ethics. But these areas can be tested by written examinations as is done for attorneys.

Also, the bill does not specify the number of examinations to be offered each year. Temporary permits are allowed at the board's discretion for up to one year while the licensing application is being processed or while awaiting the first written examination. This suggests an annual examination, which would unreasonably restrict entry into the profession.

The bill also requires evidence of "good moral character." Judgments concerning moral character are highly subjective and the provision is too vague to be enforceable. Moral character is not clearly related to an applicant's competency.

Conclusion

Occupational licensing seeks to protect the public by establishing standards of basic competency for the profession. While clients of marriage and family therapists may be in a vulnerable state, we found insufficient evidence of harm in Hawaii to warrant licensing. Competency does not appear to be the issue; furthermore, competency is hard to measure in the field of counseling and psychotherapy. The potential harm found in other states includes ethical violations, fraud, and substance abuse. However, the benefits of licensing to control such harm are unclear and the costs of regulation would be substantial.

We also conclude that the scope of the regulation in House Bill No. 764 is too broad to be enforceable. Furthermore, the bill is biased against the public and contains other questionable provisions including those that unreasonably restrict entry into the profession.

Recommendation

We recommend that House Bill No. 764 not be enacted.

Notes

Chapter 1

1. Benjamin Shimberg and Doug Roederer, *Questions a Legislator Should Ask*, Second Edition, The Council on Licensure, Enforcement and Regulation, Lexington, Kentucky, 1994, p. 24.

Chapter 2

1. Jim C. Fortune and David E. Hutchins, "Can Competence in Counseling and Psychotherapy Be Identified and Assured?" Resource Brief 94-2, The Council on Licensure, Enforcement and Regulation, Lexington, Kentucky, p. 3.

2. Benjamin Shimberg and Doug Roederer, *Questions a Legislator Should Ask*, Second Edition, The Council on Licensure, Enforcement and Regulation, Lexington, Kentucky, 1994, p. 1.

3. Fortune and Hutchins, p. 5.

4. Daniel B. Hogan, *The Regulation of Psychotherapists, Volume I, A Study in the Philosophy and Practice of Professional Regulation*, Ballinger Publishing Company, Cambridge, Massachusetts, 1979, p. 11.

5. 42 Code of Federal Regulations, Chapter 1, Subchapter A, Part 5, Appendix C.

6. Virginia, Department of Health Professions, Board of Health Professions, *The Feasibility of Licensing Marriage and Family Therapists in the Commonwealth of Virginia*, Richmond, Virginia, 1994.

7. Robert E. Lee, "The Marital and Family Therapy Examination Program," *Contemporary Family Therapy*, vol. 15, no. 5, October 1993, p. 348.

Response of the Affected Agency

Comments on Agency Response

We transmitted a draft of this report to the Department of Commerce and Consumer Affairs on October 27, 1995. A copy of the transmittal letter to the department is included as Attachment 1. The response from the department is included as Attachment 2.

The department supports our analysis of the substantive provisions of the bill. It says it shares concerns with the lack of fairness, equitability, and consistency in the licensing program. The department notes that the issues raised would make this a "very problematic regulatory program to implement."

ATTACHMENT 1

STATE OF HAWAII
OFFICE OF THE AUDITOR
465 S. King Street, Room 500
Honolulu, Hawaii 96813-2917

MARION M. HIGA
State Auditor

(808) 587-0800
FAX: (808) 587-0830

October 27, 1995

COPY

The Honorable Kathryn S. Matoyoshi, Director
Department of Commerce and Consumer Affairs
Kamamalu Building
1010 Richards Street
Honolulu, Hawaii 96813

Dear Ms. Matayoshi:

Enclosed for your information are three copies, numbered 6 to 8 of our draft report, *Sunrise Analysis of a Proposal to Regulate Marriage and Family Therapists.* We ask that you telephone us by Wednesday, November 1, 1995, on whether or not you intend to comment on our recommendations. If you wish your comments to be included in the report, please submit them no later than Friday, November 10, 1995.

The Governor and presiding officers of the two houses of the Legislature have also been provided copies of this draft report.

Since this report is not in final form and changes may be made to it, access to the report should be restricted to those assisting you in preparing your response. Public release of the report will be made solely by our office and only after the report is published in its final form.

Sincerely,

Marion M. Higa
State Auditor

Enclosures

BENJAMIN J. CAYETANO
GOVERNOR

KATHRYN S. MATAYOSHI
DIRECTOR

BENJAMIN I. FUKUMOTO
DEPUTY DIRECTOR

STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
1010 RICHARDS STREET
P. O. BOX 541
HONOLULU, HAWAII 96809

November 1, 1995

RECEIVED
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OFC. OF THE AUDITOR
STATE OF HAWAII

Ms. Marion M. Higa
State Auditor
Office of the Auditor
465 South King Street, Room 500
Honolulu, HI 96813-2917

Dear Ms. Higa:

Thank you for the opportunity to comment on the draft report, ***Sunrise Analysis of a Proposal to Regulate Marriage and Family Therapists.***

We support the thorough analysis of the substantive provisions of the bill. Concerns with the (lack of) fairness, equitability, and consistency in the licensing program is similarly shared by us.

While we see a few other technical problems with specific language in the bill, even if cured, this would not resolve the major issues raised that would make this a very problematic regulatory program to implement.

Very truly yours,

KATHRYN S. MATAYOSHI
Director