

Licensure of Complementary and Alternative Practitioners

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POLICY FORUM
Licensure of Complementary and Alternative Practitioners
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How States Control Health Care Licensure
For over 120 years, the Supreme Court has upheld the principle that states may regulate the practice of medicine and determine what is and is not lawful [1]. In *Dent v. West Virginia*, the State of West Virginia refused a license to Frank Dent, a member of the "eclectic" sect of physicians who incorporated botanical remedies into medicine. Dent had graduated from the American Medical Eclectic College of Cincinnati, but could not establish that he had attended a medical college recognized by West Virginia, passed a designated examination, or practiced in West Virginia for 10 years.

Dent argued that, by refusing him a license, West Virginia deprived him of the process of law. The Supreme Court disagreed, holding that "the power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud" [2].

Around the time of *Dent*, the states began enacting medical licensing statutes. Today, all states define the "practice of medicine," in part, by using such words as *diagnosis*, *treatment*, *prevention*, *cure*, and *prescribe*, in connection with *disease*, *injury*, and *mental or physical condition* [3]. State law came to designate the practice of medicine without a license as a crime.

Subsequent cases relied on the *Dent* holding to interpret the medical licensing statutes and uphold prosecutions against a variety of complementary and alternative medicine ("CAM") practitioners. For example, in *People v. Amber*, an acupuncturist argued that the statutory prohibition on unlicensed "practice of medicine" referred only to "Western allopathic medicine" and did not encompass systems such as Chinese acupuncture, which differs in its "philosophy, practice and technique" [4]. The court disagreed, holding that any "'sizing up' or a comprehending of the physical or mental status of a patient" constitutes diagnosis, which is part of the practice of medicine [5]. Similarly, other cases involved prosecutions of practitioners of modalities such as hands-on healing [6], iridology [7], and homeopathy [8]. In each case, courts interpreted statutory terms such as "diagnosis" and "treatment" broadly. Courts have also resisted constitutional challenges to health care licensure on a variety of fronts, including challenges based on free exercise and due process limitations [3].

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Licensing of Allied Health Professionals and Complementary Care Providers

Allied health providers, such as dentists, psychologists, and nurses, have their own distinct licensing statutes. The key difference is that medical licensure, known as “unlimited” licensure, grants physicians broad leeway to diagnose and treat disease, whereas licensure for allied health professionals, known as “limited” licensure, carves out a narrower scope of practice [9]. Exceeding that designated scope of practice is considered the unlawful practice of “medicine.”

In response to the prosecution of CAM practitioners for unlicensed medical practice, efforts arose to garner statutory licensing for different CAM professional groups. Presently, chiropractors are licensed in every state; acupuncturists and massage therapists, in over 40 states; and naturopathic physicians, in at least 15 [10].

Like allied health professionals, CAM practitioners have limited licensure and a designated scope of practice. For example, chiropractors can manipulate the spine and provide certain ancillary therapies but may not diagnose and treat disease or otherwise practice “medicine;” massage therapists may deal with emotional content that arises during bodywork, but may not practice “psychology.” The legal boundaries of scope of practice vary and are sometimes difficult to ascertain [9].

The Different Kinds of Licensure

There are several different kinds of licensure. Under *mandatory licensure*, an individual cannot practice without a state license. For example, an individual may not practice “medicine” unless licensed as a physician. With *title licensure*, the state requires an individual to meet specified requirements in order to use a particular professional title. Some states use title licensure for the practice of psychology or counseling. *Registration* involves registering a practice and disclosing information about training and experience to a state consumer protection agency.

Typically, mandatory and title licensure require much higher standards than simple registration. For example, chiropractic licensure typically requires 4,200 hours of education, including basic medical sciences and clinical experience, and passage of the National Board of Chiropractic Examiners (NBCE) written exam [11]. The terminology can get confusing, however, because some boards granting title licensure use the term “registration”—for example, the Massachusetts medical licensing board calls itself the “Board of Registration in Medicine.”

States also use exemptions to licensure as a mechanism to authorize health care practices. For example, in response to the proliferation of interstate electronic communications among clinicians, some states have elected (in lieu of explicit telemedicine statutes) to carve out exemptions from state licensing laws to provide that out-of-state physicians who periodically consult with in-state physicians about in-state patients are not considered to be practicing “medicine” within the state [9]. Similarly, some states exempt practices such as reflexology from medical and massage therapy licensing laws [9].

One interesting variation is a California statute authorizing health care practices by nonlicensed health care professionals, so long as they do not practice “medicine,” make appropriate disclosures to consumers, provide appropriate informed consent, and meet other specified requirements [12].

Licensure as Opposed to Certification, Accreditation, and Credentialing

It is important to distinguish licensure from related concepts such as certification, accreditation, and credentialing. Licensure refers to specific review and approval (and ongoing oversight) by the state of an individual’s right to a license. By contrast, certification ordinarily refers to a review process by a third-party *professional* organization, typically involving the satisfaction of defined criteria, such as completion of a particular training program. Certification can be either a prerequisite for licensure or, in some cases, an alternative. For example, many states require acupuncturists to be certified by the National Certification Commission for Acupuncture and Oriental Medicine (NCCAOM). Professional certifications, however, do not always have licensing implications; states may, for example, require a practitioner to be certified without imposing a requirement of licensure.

Accreditation refers to the application of uniform standards to the educational organizations and programs that train people for certification or licensure. Often, the standards for licensure include a requirement of graduation from one of a limited number of specified accredited programs. The U.S. Department of Education (DOE), for example, has authorized the Council on Chiropractic Education to accredit chiropractic colleges. Similarly, the DOE has

authorized the Accreditation Commission for Acupuncture and Oriental Medicine to accredit acupuncture programs.

Credentialing refers to efforts by organizations to ascertain the licensure and other qualifications or credentials of their health care practitioners. Typically, aspiring members of a credentialing organization submit applications setting forth their qualifications for review and approval of their credentials. Some states require self-governing bodies to perform peer review and credentialing functions within health care organizations.

Why Health Care Licensure Matters

From the state's perspective, health care licensure protects patients from unskilled or unscrupulous practitioners. From the standpoint of health care professionals and groups, licensure offers legitimacy, credibility, and greater access to patients.

For CAM practitioners, licensure is a double-edged sword. On the one hand, licensure offers the state's imprimatur of legitimacy and access to greater integration with conventional medical care. But for some practitioners, licensure also has a "dark side." Many healing practices—particularly those from folk traditions—rely on more intuitive sources of knowledge and fit less comfortably into highly structured systems. From the latter perspective, regulation represents a potentially unhealthy crystallization of healing work into the Western, analytical mindset and subjects practitioners to regulatory mazes they might rather avoid [9].

Most health care providers, from neurologists to shamans, fit somewhere in the spectrum of mandatory licensure, title licensure, registration, or exemption from licensure. A practitioner who does not fall within one of these four categories could be considered to be engaged in unlicensed medical practice (or the unlicensed practice of another profession).

Although, historically, regulation began with the effort to protect physicians affiliated with the American Medical Association from competition with other practitioners [13], the regulatory trend today is toward medical pluralism and greater inclusion of a variety of practitioners [10]. Due in part to such inclusion, CAM practitioners are increasingly being integrated into conventional medical settings, including academic medical centers [14].

The trend towards medical pluralism and inclusion of CAM practitioners appears to be accelerating as a result of the federal Patient Protection and Affordable Care Act (ACA) enacted in March 2010. Notably, for example, Section 2706 of the ACA includes a nondiscrimination provision, championed by chiropractors, that prohibits health care payors from discriminating "against any health care provider who is acting within the scope of that provider's license or certification under applicable State law" [15, 16]. Elsewhere, the ACA calls for the inclusion of CAM practitioners in new community-based, interdisciplinary health teams (Section 3502) and recognizes both CAM practitioners and chiropractors as part of the health care workforce for purposes of a new National Healthcare Workforce Commission. It will be interesting to see whether the expanding role (and possibility of federal funding) for CAM services leads to an influx of new practitioners and changes in state licensing requirements.

The existence of licensure for CAM professionals makes it more likely that they and conventional medical professionals will exchange referrals and continue to integrate the divergent practices and philosophies relating to patient care.

References

1. *Dent v West Virginia*, 129 US 114 (1889).
2. *Dent v West Virginia*, 129 US 114, 117 (1889).
3. Cohen MH. A fixed star in health care reform: the emerging paradigm of holistic healing. *Ariz State Law J.* 1995;27:79.
4. *People v Amber*, 349 NYS2d 604, 613 (1973).
5. *People v Amber*, 349 NYS2d 604, 612 (1973).
6. *Smith v People*, 117 P 612 (Colo 1911).
7. *Stetina v State*, 513 NE2d 1234 (Ind Ct App 1987).
8. *State v Hinze*, 441 NW2d 593 (Neb 1989).
9. See Cohen MH. *Complementary and Alternative Medicine: Legal Boundaries and Regulatory Perspectives*. Baltimore: Johns Hopkins University Press; 1998: chapters 1-3.

10. See Eisenberg DM, Cohen MH, Hrbek A, Grayzel J, van Rompay MI, Cooper RA. Credentialing complementary and alternative medical providers. *Ann Intern Med.* 2002;137(12):965-973.
11. New York State Education Department Office of the Professions. Chiropractic: license requirements. <http://www.op.nysed.gov/prof/chiro/chirolic.htm>. Accessed May 13, 2011.
12. Cohen MH. California law for non-licensed practitioners and nutritional advice. <http://www.camlawblog.com/articles/dietary-supplements/california-law-for-nonlicensed-practitioners-and-nutritional-advice>. Accessed May 12, 2011.
13. See Cohen, *Complementary and Alternative Medicine*, chapter 1.
14. See Cohen MH. *Healing at the Borderland of Medicine and Religion*. Chapel Hill: University of North Carolina Press; 2006.
15. Cohen MH, Sandler L, Hrbek A, Davis RB, Eisenberg DM. Policies pertaining to complementary and alternative medical therapies in a random sample of 39 academic health centers. *Alt Ther Health Med.* 2005;11(1):1:36-40.
16. Patient Protection and Affordable Care Act of 2009, section 2706. Non-discrimination in health care. <http://www.gpo.gov/fdsys/pkg/PLAW-111publ148/html/PLAW-111publ148.htm>. Accessed May 13, 2011.

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