

MESSAGE PARLOR ORDINANCES

By: MURRAY J. WEED

**Freeman Mathis & Gary, LLP
100 Galleria Parkway
Suite 1600
Atlanta, Georgia 30339-5948**

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I. INTRODUCTION*

On June 5, 2009, a Georgia police department was called to the scene at a local massage parlor where there was a report of a “person down.” When police arrived, they found a man dead, wearing no shirt, boxer shorts and his pants were unzipped around his thighs. After interviewing the employees of the massage parlor, police were told that the dead person had asked for a full body massage and was escorted back to a massage room. When the masseuse came into the room, the man fell back against the massage table and stopped breathing.

A quick search of the area found a long-sleeved shirt that was wadded upon a bench adjacent to the body. The shirt was wet with an unknown substance as were three white towels that were wet to the touch and had a chemical odor about them. There was a bottle of pink liquid located close to the towels and the shirt. Further, on the door of the massage room was a lock that would have allowed the room to be locked from the inside.

The police left the facility and returned later with a search warrant. During the search, police found 131 pink condoms which were located in the front bathroom of the establishment on a shelf above the toilet. The condoms were concealed in a Value-Plus bathroom cleaner can with a screw off bottom.

Stories like the one above may be part of the reason that during the 2010 legislative session, Senator Cecil Staton of Macon, Georgia, put forward Senate Bill 364 regarding massage therapists and referencing changes to the state massage therapist

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statutes found in O.C.G.A. § 43-24A-1 through § 43-24A-24. The original Georgia statutes were enacted in 2005.

The original legislation and Senator Staton's amendments arose out of the growing concern of human trafficking and prostitution that appeared to be a regular part of the massage industry in Georgia. The other part of the effort, with regard to the original statute, was spearheaded by the leadership of Georgia massage therapists who were concerned and angry with the reputation that their legitimate industry had developed in Georgia on the basis of illegal activities that were occurring in some locations.

The original statute and the 2010 amendments are explored in this paper. Further, this paper concludes with a sample massage ordinance which can be adapted for use by Georgia local governments. The paper also explores other commercial human touch occupations in Georgia and their existing regulation as well as another sample ordinance that the author has denoted as a Commercial Soft Tissue, Touch or Manipulation (CSTTOM) ordinance. Thus, the goal of this paper is to explore state law and to provide sample local government ordinances in the area of both massage and commercial touch.

II. GEORGIA LAW BEFORE THE 2010 AMENDMENT

For many years, local governments had adopted local ordinances regulating both the massage industry and massage parlors. In 2004 and 2005, the Legislature adopted the Georgia Massage Therapy Practice Act. As stated in the law, the purpose of the Act was to clarify that legitimate massage is a therapeutic and useful function. However, unregulated massage from "unqualified practitioners" is a danger to the public's health, safety and welfare and reflects poorly on the "high standards of professional

performance” of licensed massage therapists. O.C.G.A. § 43-24A-2. The statute defined massage therapist as “a person who administers massage for massage therapy for compensation.” Massage therapy was defined as “the application of a system of structured touch, pressure, movement, and holding to the soft tissue of the body in which the primary intent is to enhance or restore health and well-being.” However, massage therapy does not include “the use of ultrasound, fluidotherapy, laser and other methods of deep thermal modalities.” O.C.G.A. § 43-24A-3(8). Further, the statute created the Georgia Board of Massage Therapy. O.C.G.A. § 43-24A-4 through § 43-24A-7. The Board was assigned certain powers and qualifications for admission on the Board were also enumerated. Id.

Importantly for city/county attorney purposes, however, is § 43-24A-8 which set out clearly the requirements for a state licensed massage therapist. First, massage therapists had to be licensed by the state, or at least hold a valid provisional permit. The basic requirements to gain a massage therapy license in Georgia were set out as: (1) that the applicant be at least 18 years old; (2) the applicant must be of good moral character (no convictions for acts of moral turpitude); (3) the applicant must provide to the Massage Board all information necessary for a background check; and (4) that the applicant must meet certain educational requirements. The educational requirements include:

- (1) 500 hours of course and clinical work at a Board recognized massage program;
- (2) Passage of the National Certification Examination for Therapeutic Massage and Bodywork exam, or an equivalent test;
- (3) Being able to meet the qualifications necessary to sit for the National Certification Examination of Therapeutic Massage and Bodywork, or have similar qualifications;

- (4) A license of massage therapy in another state or jurisdiction, where the requirements meet or exceed those of Georgia;
- (5) At least 10 hours per week of actual practice in massage therapy for at least 10 years prior to the date of the application and at least 100 hours of formal training in massage therapy as determined by the Board;
- (6) That the applicant has practiced massage therapy for at least 5 years prior to the date of the application and has completed a minimum of 200 hours of formal training in massage therapy;
- (7) That the applicant has met, to the satisfaction of the Board, training in another state or jurisdiction that meets or exceeds the requirements in Georgia;
- (8) That the applicant has been a member as a massage therapist for at least one year prior to his application of a professional massage therapy association established before 2002, which has a published code of ethics; and
- (9) That they legally practiced massage therapy in Georgia for compensation prior to July 1, 2005.

In comparison, after July 1, 2007, the requirements for a legitimate massage therapist include that:

- (1) They be at least 18 years of age;
- (2) They have a high school diploma or equivalent;
- (3) They be a citizen of the United States or a permanent resident;
- (4) They must be of good moral character which is defined similarly to § 43-24A-8(b)(2) above;
- (5) The applicant agrees to provide the Board any and all information necessary to perform a background check;
- (6) They complete a Board-recognized educational program consisting of a minimum of 500 hours of course and clinical work; and
- (7) The applicant has passed the National Certification Examination of Therapeutic Massage and Bodywork or an equivalent test approved by the Georgia Board. See O.C.G.A. § 43-24A-8(c).

The statute also provided for provisional permits where the applicant is licensed in another state that has requirements similar to that of Georgia. These provisional permits may be used for a two year period. O.C.G.A. § 43-24A-9. Finally, with regard to permitting, a license can be issued by endorsement pursuant to O.C.G.A. § 43-24A-13 where the applicant meets most of the qualifications of O.C.G.A. § 43-24A-8 and the applicant is currently licensed in another jurisdiction, state or territory of the United States or a foreign country that requires standards for licensure which are considered by the Georgia Board to be equivalent to the licensure standards of the Act.

An important aspect of the Act is its regulation of the practice of massage therapy in a practical manner. The regulation provisions begin with O.C.G.A. § 43-24A-14. This section requires that the license, or a copy of it, must be placed in a public location where the massage practice occurs. The license has to be renewed every two years and the licensee must inform the Board of any address change within 30 days. Further, the statute provided a list of what would constitute an “unlawful act” with regard to misuse or a misnomer on a massage business. O.C.G.A. § 43-24A-15 clearly provided that it is unlawful for a person to advertise any massage service unless the following regulations are complied with:

- (1) There is Georgia licensed massage therapist performing the service;
- (2) Massage therapy can never be combined with escort or dating services or adult entertainment;
- (3) No advertising of the terms “massage,” “massage therapy,” “massage therapist,” “massage practitioner,” or the use of the letters “M.T.,” “L.M.T.,” or “any other words, letters, abbreviations or insignia indicating or implying, directly or indirectly, that massage therapy is provided or supplied unless such massage therapy is provided by a massage therapist licensed and practicing in accordance with this chapter.” O.C.G.A. § 43-24A-15(c).

In order to enforce these sections, § 43-24A-16 provided that any citizen of the state, the Board or any appropriate prosecuting attorney can act on behalf of the public and bring an action to restrain and enjoin the license to practice of massage in the superior court of the county where the activity is occurring. Notably, the statute provided that it was not necessary to file an injunction or to allege or prove that there is no adequate remedy at law or to allege or prove any special injury. § 43-24A-16. Further, the Board itself can file a restraining, injunction or writ of mandamus against any person who is accused of violating the Act. § 43-24A-21.

Violations of the act were also punishable as misdemeanor offenses. The first fine for such an offense was \$500 per offense and upon a conviction of a second or subsequent offense, a fine of up to \$1,000 and/or imprisonment for not more than 12 months imprisonment. § 43-24A-24(c).

There were also important exceptions to the Massage Act for other services that do involve commercial touch, including:

- (1) Persons who are otherwise licensed under Title 43 are exempt as long as they do not use the title of “massage therapist.”
- (2) If a person is studying to become a certified massage therapist in a recognized education program and uses a title of “student” while performing uncompensated work, that person is also deemed to be exempt.
- (3) A non-resident can render massage therapy up to 60 days during a 12 month period as a “temporary sojourner” provided that that person holds a license from another state or jurisdiction and the Board has determined that the requirements for that license in that other jurisdiction are equivalent to the Georgia requirements. The same exemption applies to nationally certified massage therapists.
- (4) A person who is duly licensed in another jurisdiction or foreign county who is working as part of an emergency response team in conjunction with local officials or is part of a charity where they come into the state of Georgia, is also exempt.

- (5) A person who restricts their practice to soft tissue manipulation of the hands, feet or ears and who does not have the client disrobe and does not hold themselves out as a massage therapist is otherwise exempt.
- (6) A person who uses touch, words and directed movement to deepen “awareness of existing patterns of movement in the body as well as to suggest new possibilities of movement while engaged within the scope of practice of a profession with established standards and ethics, provided that his or her services are not designated or implied to be a massage or ‘massage therapy’” is also exempt.
- (7) A person who uses touch and movement to effect a change in the structure of the body while engaged in the practice of “structural integration” is also exempt provided they are a member of the International Association of Structural Integrators. These persons cannot use the term “massage” or “massage therapy” in their practice.
- (8) A person who uses touch to effect the “energy systems, polarity, accupoints or Qi meridians, also known as channels of energy of the body while engaged in the practice of a profession with “established standards and ethics” is also exempt as long as they do not imply that they are performing “massage” or “massage therapy”; and
- (9) A person who is engaged in massage therapy prior to July 1, 2005 so long as after July 1, 2007, they meet all the standards of § 43-24A-15(c).

An interesting part of the 2005 Act applies to local governments and their ability, or lack thereof, to regulate massage and massage therapists. The Code section dealing with this subject was § 43-24A-22. This section provided that a local county or city could adopt regulation of persons “not licensed pursuant to this chapter.” However, that same section provided that no “provision of any ordinance enacted by a municipality, county or other jurisdiction that is in effect before July 1, 2005, and that relates to the practice of massage therapy or requires licensure of a massage therapist, may be enforced against a person who is issued a license by the Board under this chapter.”

This statute then raised an important question as to whether or not a local government, while apparently not being able to regulate massage or massage therapy after the summer of 2005, could regulate the location of massage therapy. The author and other local government attorneys, felt that without a specific preemption of regulation pertaining to locations of massage therapy, any needed health, safety and welfare regulations (such as prevention of internal locking doors, appropriate lighting, hours of operation, parking, and other such requirements) were allowed and continued to modify their local ordinances to exclude direct regulation of the profession of massage and massage therapy while adopting provisions that related only to the location of the massage therapy. In other words, did these attorneys make the right judgment? A review of the 2010 amendment of the Act seems to indicate that the answer is yes.

III. 2010 AMENDMENT

The 2010 amendment to the Georgia Massage Therapy Practice Act made some of the questions that resulted from the 2005 Act crystal clear. First, some massage parlors attempted to circumvent the Act by having owners of massage businesses that were themselves not massage therapists. This loophole seems to have been partially closed by an amendment to O.C.G.A. § 43-24A-3(4.1), which now provides a definition of “entity.” The entity definition includes owners or operators of a business where massage therapy for compensation is performed. Further, O.C.G.A. § 43-24A-7(a)(3) was amended to also include the term “entities.” Thus, business owners, where massage therapy occurs, can now be investigated for the purposes of discovering violations of this chapter. The term “entity” was also utilized on a number of occasions in the violation section of O.C.G.A. § 43-24A-15 for unlawful acts.

This part of the statute provides that it is a violation of the Act for any person “or entity” to advertise massage therapy or to advertise the offering of massage therapy services unless that service is provided by a person who holds a valid license. The prohibition sections found in O.C.G.A. § 43-24A-15(c) now more directly provide that a violation of the law occurs when an entity or representatives of the entity attempt to practice massage therapy in any person or entity’s name and the words “massage,” “massage therapy,” “massage therapist,” “massage practitioner” or the letters “M.T.” or “L.M.T.” or other similar words or abbreviations or even insignia indicating or implying that massage therapy is being provided by a certain person at a certain location unless it is being provided by a massage therapist.

Likewise, it is a violation of the Act for any owner or operator of a massage therapy business to advertise massage therapy services in combination with any escort or dating services or other adult entertainment or employ unlicensed massage therapist to perform massage therapy. Thus, while it remains possible that an entity may be an operator of a business for massage therapy for compensation and not hold a valid Georgia massage therapy license themselves, all of the representatives and employees who touch people now must do so. Further, the business owner or operator, while not being required to hold a valid Georgia massage therapist license themselves, cannot advertise massage therapy or massage unless any person who performs such massage is validly licensed. The entity (owner or operator) can now be punished for any activity of massage without a license, even if they themselves never lay hands upon a client.

This provision goes a great way toward preventing sham applicants for adult entertainment industries under the umbrella of massage and massage therapy. See O.C.G.A. § 43-24A-3(4.1); O.C.G.A. § 43-24A-7(a)(3); O.C.G.A. § 43-24A-15.

The former 2005 statute had a number of administrative provisions parallel to possible criminal provisions that the Board and others could use to act upon a license. The original statute provided a broad statement that the Georgia Board could take disciplinary action in accordance with the Georgia Administrative Procedures Act. The 2010 amendment now provides that, in the revised § 43-24A-17, that the Board can take “any one or more of the following actions” against a violator of the Massage Therapy Practice Act. Post-2010, the Board can administratively reprimand or place the licensee on probation, revoke or suspend the license or deny the issuance of a renewal of a license, impose an administrative fee not to exceed \$500 for each violation, and assess costs against the violator for expenses relating to the investigation of any administrative action required. Further, if a violator fails to pay the administrative costs assigned by the Board or any fine imposed, that person can be assessed additional costs and fines, including interest.

The 2010 amendment also made some modifications to the criminal penalty portions of the 2005 statute. O.C.G.A. § 43-24A-24 was modified to specifically refer to § 43-24A-15 and the acts which constitute massage and massage therapy that a person can be punished for if they violate the law. The section also revised the original \$500 and \$1000 fines and created a new fine structure. The new statute, effective July 1, 2010, now provides that based upon a conviction for violation of the statute the “person or entity shall be guilty of and shall be punished as for a misdemeanor of a high and aggravated nature.” Any third or subsequent conviction will result in a felony offense and will be punishable by a fine of not more than \$25,000 and imprisonment for not less than 1 and no more than 5 years, or both.

Clearly, the 2010 amendment is intended to prevent human trafficking and sex crimes and denotes the Georgia Legislature's strong commitment to curb similar activities in Georgia underneath the pretense of a legitimate massage or massage therapy place of business.

At the close of the previous section, the author put forward the question and provided a preliminary answer as to whether or not the 2005 Act intended to completely preempt all local regulation of massage parlors. This concern was definitively addressed in the 2010 amendment. O.C.G.A. § 43-24A-22 was modified to provide that "any place of business where massage therapy for compensation is performed shall also be subject to regulation by local government authorities." See O.C.G.A. § 43-24A-22(a). However, local governments are definitively preempted from adopting any ordinance that "relates to the practice of massage therapy or requires licensure of a massage therapist . . ." Thus, the statute now definitively sets forth the fact that while local ordinances on massage and massage therapy are preempted, licensure and regulations relating to massage parlors and locations where massage occurs are not. Likewise, on the face of parts of the Act, which were not modified by the amendment, the same do not prevent regulation of other forms of commercial touch. As such, other forms of commercial touch exempt from the definition of massage and massage therapy can be regulated by local governments.

What then, can a local government do with regard to the other commercial touch operations in regulating the same that are otherwise exempt from the definition of "massage" and "massage therapy" in the 2005 Code and the 2010 amendment? The answer to that question is explored in the next section.

IV. WHAT ABOUT OTHER COMMERCIAL TOUCHING? CAN YOU REGULATE IT?

It appears that a local government can regulate other forms of commercial touch outside of the definition of massage or massage therapy. First, O.C.G.A. § 43-24A-22(a) holds that local governments can regulate “persons not licensed pursuant to this chapter.” What practices of commercial touch can be regulated by the local government then? The answer seems to be found in O.C.G.A. § 43-24A-19. This section was not amended during the 2010 revision. Thus, it appears that the following list of persons who engage in commercial touch can still be regulated by the local government:

- (1) Persons who practice the manipulation of the soft tissue of the human body to hands, feet or ears and who does not have any client disrobe;
- (2) A person who uses touch, words and directed movement to deepen awareness of existing patterns of movement in the body as well as to suggest new possibilities of movement while engaged in the scope of practice of a profession with established standards and ethics;
- (3) A person who uses touch and movement education to effect change in the structure of the body while engaged in the practice of structural integration, provided that he or she is a member of a group whose training would qualify for membership in the International Association of Structure Integrators; and
- (4) A person who uses touch to effect the energy systems, polarity, accupoints or Qi meridians, also known as channels of energy of the human body while engaged within a scope of a practice of a profession with established standards and ethics.

The author has provided for the reader’s consideration and use a sample Commercial Soft Tissue Touch or Manipulation (CSTTOM) ordinance that is reflective of a classic massage parlor ordinance but which limits its effectiveness to the 4 categories found in O.C.G.A. § 43-24A-19. This sample reflects the conclusion that a local government seems to be able to regulate not just the profession, but also the place where the profession occurs.

V. CONCLUSION

The 2005 Georgia Massage Therapy Practice Act and the 2010 amendment provide clear preemption of local government regulation of “massage” and “massage therapy.” However, the 2010 amendment now definitively states that a local government can, by ordinance, regulate a massage parlor or a place where massage or massage therapy is conducted.

Further, the original 2005 Act also specifies at least 4 commercial soft tissue touch or manipulation professions that a local government can regulate along with the place of those operations. Thus, the local government attorney has some additional tools for their toolbox relevant to the regulation of massage parlors and commercial soft tissue touch or manipulation professions and locations. These regulations are important to help avoid human trafficking and to curb the sex trade while providing the ability for legitimate professions to flourish. The 2005 Act, the 2010 amendment and the sample ordinances attached are aimed to balance legitimate commercial interests with the public’s right to prevent disease and promote social justice. Hopefully, these tools will aid the local government practitioner in accomplishing their government’s legitimate goals in these areas.