

**Impact of Regulation**  
**on the**  
**Fundamental Right of Privacy**  
**To Make Health Care Choices**

*By Diane M. Miller JD  
Legal and Public Policy Director  
National Health Freedom Coalition  
National Health Freedom Action  
PMB 218, 2136 Ford Parkway  
St. Paul, MN 55116-1863  
Website: [www.nationalhealthfreedom.org](http://www.nationalhealthfreedom.org)*

*\* With grateful thanks for the tireless work of health freedom advocates*

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**National Health Freedom Coalition**

National Health Freedom Coalition (NHFC) has communicated with many health freedom groups working on legislation that promotes maximum access to unlicensed health care practitioners and maximum opportunities for unlicensed practitioners to practice their trades. A number of these bills have accomplished their goals by making laws that prohibit practitioners from participating in practices that pose an imminent risk of significant harm to the public as well as requiring unlicensed persons to provide clients with certain disclosures. However NHFC has not supported the concept of mandatory government registration of unlicensed health care practitioners.

NHFC has produced the following document in order to research and more clearly lay out its views on the registration of unlicensed health care practitioners. A large number of views have been expressed on this topic and NHFC thanks health freedom advocates across the country for engaging in lively debate. Sharing views of this nature is a necessary part of becoming enlightened and self empowered as individuals, as leaders, and as a nation. The discussion has served to sharpen and clarify issues that would otherwise have been left in a cloud. The following are the views only of NHFC.

To create and secure true freedom and liberty NHFC believes that we need to be able to articulate our vision and understanding. It would be a great blessing if there were consensus in America about how to proceed in protecting the sovereign right of the people to make their own health care decisions, and how to guard against infringement of that right by government. But freedom is not an object to be had, but rather a continual process of enlightenment and state of being. May this document add to freedom adventures and enlightenment.

**Memorandum Questions**

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*Why would a government take action to take an occupation out of the public domain?*

*What are the implications of requiring a person practicing a trade or occupation to register with the government before they practice, when that person is practicing a trade or occupation that has not been shown to pose an imminent risk of significant harm to the public?*

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Seemingly straightforward questions, these questions engender deep debate among health care reformers and advocates because it lies on the very cusp of the relationship line between the individual person and the government. A topic deliberated within societies since time immemorial.

## **Goal of the Memorandum**

The goal is to highlight key legal issues that might impact the registration of unlicensed practitioners. But by no means should this educational overview be considered to be a detailed legal treatise on these very broad issues. Since this is a complex area of law with whole libraries dedicated to these legal issues, we will need to make some general assumptions based on the current laws and court decisions of our country.

## **The United States of America, a Young Nation**

The United States is a young nation, growing speedily on its way to maturity. Like many young persons, their early years under parental guidance are soon left in the dust as they enter into exploratory years and set sail for their life journey. The values gleaned during upbringing often are challenged in developmental years and the tests help to clarify and understand the values set out in early life.

So too it is with the United States. The founders of our nation birthed our nation with deep intentional values, written down in only the words that they could choose, with only the vision that they could muster, for what they thought the future might hold. They relied on past experiences of living under the heavy hand of an oppressive monarch. Their experiences guided them in shaping a new way of life, a new way of living in community, and a new form of government.

Diligent discussions among the founders led to the articulation of basic principles, knowing that strong guideposts would be needed for the young nation navigating in the unknown future. The years sped by and today some would say they hardly recognize the United States, given its many changes.

## **Natural Rights**

The founders of the United States shared the belief that men had certain rights that were natural rights of existence and that no government should infringe upon them. “That among these are life, liberty and the pursuit of happiness.”<sup>1</sup> These natural rights were not given by the government to the people. They were from a higher source and part of being human. Thus the founders set out to write a charter to establish a government that would acknowledge these rights and that would function in a way that would secure these rights. Simply put, the vision of the birthing nation was a nation of sovereign individuals living together in harmony.

As a result, and generally speaking, persons in the United States today expect to be governed by their own bodies. Regarding community, they expect to live by the principles of the “law of the land” agreed to under the Constitution, written and adopted by “we the people”.

The Health Freedom Movement has come onto the horizon in response to Americans ever growing health care crisis. Americans are demanding access to all health care options and alternative practitioners of the healing arts are begging to be able to practice their trades without

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<sup>1</sup> Declaration of Independence, In Congress July 4, 1776, The unanimous Declaration of the thirteen united States of America, New Hampshire, Massachusetts Bay, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.

harassment but they are finding that there are legal and public policy barriers that keep them from getting what they need and want. Because of these barriers, health freedom advocates are emerging from around the country calling a tested nation to remember the intention of the founders, calling it to acknowledge, understand, and claim the values and intentions of the nation's birthright.

### **The United States Constitution:**

The United States Constitution was designed to delegate a limited amount of power to a federal government. The role of the government was to be clearly defined and agreed upon so as to avoid abuse of power by the government.

The Bill of Rights was added in order to enumerate the rights the people held so dear. Originally there was some debate as to whether to even adopt a Bill of Rights because supposedly, the way that constitution was drafted, it sufficiently secured the rights of the people. Thomas Jefferson was strong in his support of the adoption of the Bill of Rights, pointing out:

“the tyranny of the legislatures is the most formidable dread at present, and will be for long years. That of the executive will come in its turn, but it will be at a remote period. I know there are some among us who would now establish a monarchy but they are inconsiderable in number and weight of character. The rising race are all republicans. We were educated in royalism; no wonder if some of us retain that idolatry still.”<sup>2</sup>

In his wisdom Jefferson knew that additional language enumerating rights would be helpful for the future of our nation.

In very general terms, the people, through the constitution, delegated power to the federal government for such functions as declaring war, regulation of commerce, making treaties, and printing money.<sup>3</sup> In relation to health care issues addressed in this paper, federal government was given the power over commerce<sup>4</sup> and today that translates into such things as health care product, drugs, dietary supplements, and health care devices which are transported across state lines.

### **State Constitutions:**

In addition to the US Constitution, the individual states adopted constitutions. Early in the history of the United States, lengthy debates took place about whether the federal government or the state governments had authority for particular functions. These issues were interpreted and decided by court cases over a period of years.

State constitutions were set up to directly assist the people of the state. For example in Minnesota the first Article of the Minnesota Constitution reads:

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<sup>2</sup> Thomas Jefferson, Writings, Letters, Library of Congress Catalog Card Number 83-19917, Literary Classics of the United States, inc. NY, N.Y., 1984., page 944.

<sup>3</sup> United States Constitution

<sup>4</sup> United States Constitution, commerce clause, Section 8.

“Government is instituted for the security, benefit and protection of the people, in whom all political power is inherent, together with the right to alter, modify or reform government whenever required by the public good.”<sup>5</sup>

The states authority to protect the health, welfare, and morales, is called the states “police power”.<sup>6</sup> For example, state police power is limited by sections of the United States Constitution that secure our individual rights: “The exercise by the state of its police power is limited by the due process, equal protection and commerce clauses of U.S. Const. Art. 1, Section 8, cl. 3, and Amend. 14, and by the provision of this section dealing with the rights and privileges of citizens.”<sup>7</sup>

Under the authority of the state police power many states have adopted state laws about health care. State laws regarding health care products are often similar but not entirely emulating the federal product regulations. States also adopt laws for the regulation of certain occupations, including health care practitioners, in order to secure public safety. (Note in California, “Licensure ostensibly is designed to protect the public from harm.”<sup>8</sup> And in Minnesota, “the purpose of regulating any occupation is to protect the public.”<sup>9</sup>)

### **Federal and State Bill of Rights**

Federal and state constitutions are often not identical. Many state constitutions were originally much more lengthy and complex than the federal constitution. In addition to the Sections of the Constitution that include the powers delegated to the government, the constitutions enumerate rights and liberties.

The following are some of the federal rights listed in the United States Constitution Bill of Rights:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>10</sup>

“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>11</sup>

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>12</sup>

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<sup>5</sup> Minnesota Constitution, Article I. Object of the Government.

<sup>6</sup> Abeln v. City of Shakopee, 1947, 224 Minn. 262, 28 N.W.2d 642.

<sup>7</sup> State v. Ernst, 1941, 209 Minn. 586, 297 N.W. 24, 134 A.L.R. 643.

<sup>8</sup> California Board of Medical Quality Assurance, Proposal for Revision of Section 2052 of the Medical Practice Act, 1982, page 8.

<sup>9</sup> Minnesota Department of Health Report to the Legislature, Complementary and Alternative Medicine, January 1998, page 34

<sup>10</sup> Constitution of the United States, Amendment I.

<sup>11</sup> Constitution of the United States, Amendment IX.

<sup>12</sup> Constitution of the United States, Amendment X

“...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>13</sup>

State constitutions vary in content and length and as one scholar says, “State constitutions are often verbose and disorganized enough to provide both traps for the unwary and opportunities for the enterprising”<sup>14</sup> “These limitations aside, most state constitutions have provisions recognizing rights of privacy, expression, education, equal protection, and due process.”<sup>15</sup> In recent years some state constitutions have been modernized.

Many times the protections offered by the state constitutions are greater than those of the federal constitution. For example the following is Florida’s constitutional “right of privacy”:

“SECTION 23. **Right of privacy.** --Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

**History.**--Added, C.S. for H.J.R. 387, 1980; adopted 1980; Am. proposed by Constitution Revision Commission, Revision No. 13, 1998, filed with the Secretary of State May 5, 1998; adopted 1998. “<sup>16</sup>

\*Constitution of the State of Florida as revised in 1968 and subsequently amended.

And for example Minnesota’s constitutional liberty:

Sec. 3. **LIBERTY OF THE PRESS.** The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right. <sup>17</sup>

and

Sec. 7. **NO LICENSE REQUIRED TO PEDDLE.** Any person may sell or peddle the products of the farm or garden occupied and cultivated by him without obtaining a license thereof. <sup>18</sup>

### **The Structure of the Tripartite Government**

Both federal and state constitutions set forth a tripartite system of government including the three branches of government: legislative, executive, and judicial branches. In general these branches were to promote checks and balances to prevent abuse of power.

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<sup>13</sup> Constitution of the United States, Amendment XIV

<sup>14</sup> The Administrative Process, Third Edition, Glen O. Robinson, Ernest Gellhorn, Harold H. Bruff, 1986, pg. 695.

<sup>15</sup> The Administrative Process, Third Edition, Glen O. Robinson, Ernest Gellhorn, Harold H. Bruff, 1986, pg 696.

<sup>16</sup> Constitution of the State of Florida, Section 23.

<sup>17</sup> Constitution of the State of Minnesota, Article I, Section 3., Liberty of the Press.

<sup>18</sup> Constitution of the State of Minnesota, Article 13, Section 7., No license Required to Peddle.

For example the Minnesota Constitution reads:

“The powers of government shall be divided into tree distinct departments; legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.<sup>19</sup>

Before we discuss health care regulation specifically, the following is a general overview of the three-part system of government.

### **Legislative:**

The legislative branch of the government provides the opportunity of elected officials to make laws on behalf of the people. Although it was not always true, in current times, this arm of the government is often the one that citizens participate in to make change happen. The legislative process is expansive, and can be considered “...the most potent way of changing law...the legislature has at its beck and call all sorts of assistance which the courts do not have. Legislative hearings, investigative commissions, professional assistance, give the legislatures many more resources than the courts. In addition, legislatures can respond to problems as they arise, while courts must await litigants who will have the money and fortitude to bring cases before them.<sup>20</sup> However it is well known that a legislature is subject to many political forces.<sup>21</sup> It has the potential to raise emotions and has a difficult time passing whatever is proposed because strong feelings are often aroused on both sides.<sup>22</sup>

### **Executive:**

The executive arm of the government, headed by the Governor of a state, is unique to each state and can be very complex depending on the complexity of the state constitution or the complexity of the formation of state agency law. For example, in Minnesota, the executive department “consists of a governor, lieutenant governor, secretary of state, auditor, treasurer and attorney general, who shall be chosen by the electors of the state.”<sup>23</sup> “He [the Governor] shall fill any vacancy that may occur in the offices of secretary of state, treasurer, auditor, attorney general and the other state and district offices hereafter created by law...”<sup>24</sup>

In great generality, the executive branch implements state laws. For example the Governor powers in Minnesota include “...commander-in-chief of the military and naval forces and may call them out to execute the laws, suppress insurrection and repel invasion....He shall take care that the laws be faithfully executed....”<sup>25</sup>

Executive agencies are often designed by the legislature and defined and passed into law by the legislature, and then overseen by the executive branch of the government. For example in

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<sup>19</sup> Constitution of the State of Minnesota, Article 3, Section 1., Division of Powers.

<sup>20</sup> Historical Introduction to Anglo-American Law, Frederick G. Kempin, JR, 1986 page 90.

<sup>21</sup> Kempin Id. at 90.

<sup>22</sup> Kempin Id. at 90.

<sup>23</sup> Constitution of the State of Minnesota, Article 5, Section 1, Executive Officers.

<sup>24</sup> Constitution of the State of Minnesota, Article 5, Section 3, Powers of the Governor.

<sup>25</sup> Constitution of the State of Minnesota, Article 5, Section 3. Powers and Duties of Governor.

Minnesota the legislature passed a law defining the Department of Health and delegating authority to it including the authority to make further rules not passed by the legislature. The Commissioner of the Department of Health is appointed by the Governor and thus the Governor oversees the agency. However in some state some agencies are independent of the executive branch, having been set up directly under the constitution or independently by state legislature. For example the licensing Board of Medical Practice in Minnesota is independent and not under an executive agency and answers directly to the legislature.

As much as we would want to think that the Governor is implementing all of the laws of the state here is a look at the complexity of the executive branch:

“A governor usually presides over a constitutionally fragmented executive establishment. State constitutions usually create a number of agencies directly, and often provide for the direct election of their heads. Thus if the attorney general and the treasurer are directly elected as is common, the governor lacks effective control of prosecution, legal advice, and spending. Even state commissioners of education or agriculture may be elected officials. Not surprisingly, there is not widespread tradition of vigorous gubernatorial oversight of administration in the states. The most important gubernatorial power is often the veto, with most states granting their governor the item veto.”<sup>26</sup>

### **State Diversity**

Across the country, the architecture and organizational format of the state health care occupation laws are intensely diverse depending on the political and legal history of the state and the way that a state has chosen to organize and manage their health care laws and enforcement mechanisms. Some health care laws are implemented by the Governor and some are not.

For example some states have all of their occupations under one executive agency. Another state will have all of their health care professionals under one agency and all of the rest of occupations under another. Another state might have all of their conventional medical physician professionals under one agency and the allied health professionals under another agency. A state might have applications for licensure under one agency and the enforcement of complaints under another. A state might have health professional boards standing on their own with the attorney general in charge of enforcement and no agency involved. To some people, this diversity among states might seem burdensome, especially if a practitioner would like to practice in more than one state.

But on review of many of these systems one gains a deep appreciation for the unique culture and history of each individual state and the public policy promoting the values of the individual state. Upon travel to individual states and participation in individual state governments, one gains an appreciation for the power structures of the individual states and the players in the lawmaking and public policy making infrastructure.

The beauty of state governments is that they reflect the values and cultures of local communities in which legislators live and from which legislators often daily commute. Local citizens remind their policy-makers of their local history and the values that they are proud of. In state politics there appears to be a much closer connection between the people of the state and the lawmakers

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<sup>26</sup> The Administrative Process, Third Edition, Glen O. Robinson, Ernest Gellhorn, Harold H. Bruff, 1986, pg. 697.

representing them. Geographical issues of the citizens are apparent and discussed on a local level and the state image and identity of community are strong. There seems to be general knowledge amidst the professional political community as to who can be trusted and as to the motivations of particular individuals holding power. The beauty of these qualities is that it is more understandable, more accessible, more natural and compatible with the average citizen's everyday life. It is more conducive to participation by local citizens. It is an important challenge for federal officials to work hard to represent their constituents back home.

### **Judicial:**

Adjudication of cases of wrongdoing is an important component of any community and is accomplished by a court system with court procedures based on constitutional principles. State court systems are not identical from state to state but generally state courts are presided over by state judges that are either elected or appointed. These judges make decisions and orders that interpret and reflect the state laws. Judicial orders establish what is called precedents. Precedents are when a judicial order is used as the basis for future interpretations of the same law.

Special courts are often set up for special areas of law.

Criminal courts preside over criminal offense proceedings. Criminal laws require elements of a guilty act with intention (a guilty mind). A person can be imprisoned for committing a crime. For example, in Minnesota, the Attorney General is the chief prosecutor of the state and on behalf of the AG the local County Attorney prosecutes crimes that take place in the County Attorney's county.

Civil courts preside over regular civil offense proceedings. This does not include administrative proceedings for breaking a rule of an agency or Board. Civil laws are many including laws enforced by fines, penalties, money damages in the case of harm (tort), forcing someone to cease and desist, providing injunctive relief.

There are a number of specialty courts for example family court or juvenile court.

Administrative courts are not the same as basic state courts and are described below under administrative procedures.

Tribal Courts have their own relationship with the United States Court system.

### **Administrative Procedure and Laws:**

In very general terms, administrative processes are used when executive agencies and boards implement laws.<sup>27</sup> Administrative procedure laws guide the way for the executive branch as it attempts to carry out its duties. For example if a licensed health care professional is disciplined under a Board or an agency then the administrative procedures act will most often be followed during the complaint, investigation, and contested hearing process rather than the regular state court system and rules of adjudication.

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<sup>27</sup> The Administrative Process, Third Edition, Glen O. Robinson, Ernest Gellhorn, Harold H. Bruff, 1986, pg. 1.

Administrative procedure laws often include laws about agency jurisdiction, agency authority, agency rulemaking, agency hearing examiners or administrative law judge appointments, contested administrative hearing procedures, and other areas of law that impact the functioning of the power of an agency. These administrative laws are often precise complex laws designed to help agencies and Boards function within constitutional parameters.

Originally agency administrative procedures and laws varied in each state. But eventually a Model State Administrative Procedure Act was written and adopted by many states so that the concepts of the relationships between the three branches of the government would be carried out in a constitutionally sound manner when using the administrative process for adjudication.

### **State Agencies**

The word agency is not defined narrowly as one would think. It often includes a number of governmental entities. The actual definition of “agency” is often included in the administrative procedures law of a state. For example in Minnesota, for purposes of the administrative procedures act:

“Agency” means any state officer, board, commission, bureau, division, department, or tribunal, other than a judicial branch court and the tax court, having a statewide jurisdiction and authorized by law to make rules or to adjudicate contested cases.  
“Agency” also means the capitol area architectural and planning board.”<sup>28</sup>

Agencies generally have a threefold emphasis in their legal processes: rulemaking, adjudication, and judicial review: 1) agency rulemaking is for those occasions when an agency needs to make a rule in order to implement the task that the legislature has given to it; 2) adjudication is for the purpose of delivering opinions about whether a law or rule has been violated that falls within the area of responsibility of the agency; 3) and judicial review has to do with whether an agency decision or adjudication can be appealed in a regular civil or criminal court outside of the administrative process.

### **Agency Rulemaking**

When agencies are set up the legislature delegates a specifically defined area of responsibility to the agency so that they know their area of authority and jurisdiction. Often times the legislature intentionally does not make the law detailed enough to cover all of the issues that might arise in the future of the agency so the legislature often also delegates rulemaking authority to the agency with particular parameters for when or for what reason enforceable rules can be made by the agency.

Historically speaking, setting up agencies and giving them rulemaking authority was very controversial because the legislature is constitutionally viewed as the lawmaking body. The thinking was that agencies could not make further rules that were not already handed down by the legislature. However, it was decided through case law that in fact legislatures could delegate their law-making authority to agencies in the form of rulemaking as long as certain rulemaking procedures of public notice and input were followed closely. In most states, the rulemaking process itself includes very stringent administrative procedural laws under an Administrative

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<sup>28</sup> MN. Stat. 14.02 Subd. 2. Agency. 2004

Procedures Act. As such, rules can only be made with adequate procedural compliance and public notice and input according to the Administrative Rule Act.

You will notice at a state legislative level that rulemaking is still a very sensitive topic to legislators and an important issue to watch while drafting legislation having to do with an administrative process are agency. Lawmakers are generally careful about legislation that implicates rulemaking. They are careful to track whether a bill will have rulemaking implications or delegations and often will send a bill that contemplates rulemaking or that is under an agency that has rulemaking power through special committees for review of all of the potential issues that might arise. It is interesting to note that some legislators are pro-rulemaking and are willing to delegate broad rulemaking power to agencies, and other legislators might be extremely opposed to an agency making any kind of rule on its own without it being in an area specifically delegated by the legislature.

In each state the relationship between the lawmakers in the legislature and rule-makers in the agencies is unique. Many agency employees attend legislative hearings that pertain to issues relating to the rulemaking and any agency area of responsibility. For purposes of bill drafting, it is very important to be familiar with the rulemaking implications of a bill in a particular state.

### **Agency and adjudication**

Originally when agencies were first set up, the head of the agency, sometimes a Commissioner, would provide it's own division of employees whose role it was to make decisions on cases involving violations of agency laws and rules. Of course this was a potential conflict of interest when a Commissioner employed its own hearing examiners. Laws were put in place to separate contact between the regular agency employees carrying out the mission of the agency, and those persons selected to adjudicate cases.

These historical problems are largely resolved by Administrative Procedures Acts in the various states because the new act sets up an independent hearing office to provide administrative law judges to the agencies. Although every state may not have an Administrative Procedures Act an example of one is in Minnesota where a state Office of Administrative Hearings was created.<sup>29</sup> A chief administrative law judge (formerly known as a hearing examiner), learned in the law, is appointed by the Governor. "All hearings of state agencies required to be conducted under this chapter shall be conducted by an administrative law judge assigned by the chief administrative law judge".<sup>30</sup> .

### **Legal Representation for the State**

The issue of who represents the state when the state itself is being challenged in court or is participating as a party in a legal proceeding has always been of interest to freedom advocates. Many health freedom advocates will ask, is the Attorney General representing "the people" or is it representing "the state". This question is posed because the relationships between the Attorney General and Executive Agencies are complex. The reason can best be explained by describing typical scenarios.

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<sup>29</sup> MN Stat. 14.48 Creation of Office of Administrative Hearings; Chief Administrative Law Judge Appointed; Other Administrative Law Judges Appointed.

<sup>30</sup> MN Stat. 14.50 Hearings Before Administrative Law Judge.

1.) A health freedom advocate and patient of a licensed physician is concerned that their practitioner is being disciplined for practicing complementary and alternative medicine by a Medical Examiners Board. They reach out and call the Attorney General's office thinking the Attorney General represents the interests of the people and that something should be done about the situation. The Assistant Attorney General lets the concerned patient know that they represent the state, (in this case the Board of Medical Examiners) in the situation and cannot respond to their concerns. They assure the person that their role is to uphold the laws of the state of Minnesota.

2.) A health freedom advocate and patient of an unlicensed practitioner is concerned that their practitioner is being criminally charged in a local county court for practicing medicine without a license. They reach out and call the Attorney General's office thinking the Attorney General is an elected official and represents the interests of the people and that something should be done about the situation. The Assistant Attorney General lets the concerned patient know that the Attorney General, on behalf of the Board of Medical Practice, has reviewed the case and referred it to a local county attorney for prosecution in order to uphold the laws of the state.

3.) An interesting current scenario has recently taken place as follows: An agency attempts to make rules mandating particular vaccines for children. Concerned parents and parents of vaccine injured children attempt to challenge the rule and bring evidence of harmful preservatives such as thimerisol in the vaccines. The agency goes ahead and passes the rule anyway. Then the concerned parents go to the Attorney General to see if they can sue someone for damages to their children. The Attorney General reviews the evidence and considers a class action on behalf of the concerned parents. In this situation, the Attorney General represents the agency that passed the rule, and in another situation it represents the interests of the people protecting them from harm.

As you can see, tracking the relationships between the executive, legislative and judicial branches of the government is no small task.

### **Administrative Proceedings Regarding Health Care Practitioners**

The avenues of power and authority of regulatory bodies having jurisdiction over health care practitioners has been challenged in depth. This has been mainly because contested hearings regarding regulated practitioners in many states take place in administrative hearings rather than in state courts. Administrative processes are generally considered more informal than state court contested hearings and due process challenges are not uncommon.

There has been a call for reform in the area of due process in administrative procedures for health care professionals, intensified by the appearance of unfair treatment towards practitioners who practice complementary and alternative medicine. In particular, in New York, Professor Barrett of the Syracuse University College of Law, lays out recommendations for judicial and legislative reform pertaining to the New York state Board for Professional Medical conduct (BPMC) and the Office of Professional Medical Conduct (OPMC). On a judicial level he calls for the expansion of the pre-investigative stage of a complaint, by mandating the use of 'non-conventional' experts, by appointment of nonconventional physicians to investigative or hearing committees, and revision of the standard of care from the accepted and prevailing medical standard to an examination of the effective of the innovative health care. On a legislative level he calls for the reaffirmation of the guarantee of legitimate due process to nonconventional physicians and to

safeguard the freedom of patients to choose their own medicinal treatments.<sup>31</sup> A special note: As this memorandum is being completed a reform bill New York has been passed regarding these issues and is awaiting signature by the Governor.

Regarding unlicensed health care practitioners, although many actions taken against the unlicensed practice of medicine end up as criminal prosecutions, some states have civil or administrative remedies for unlicensed practice violations. The call for administrative procedure reform in these states have to do with challenging the type of experts used to discern whether a case should go forward in the first place. Often-times an alternative health care provider is still labeled a quack with much hostility from authorities from the get go, mostly because the practitioner is doing something very unfamiliar to the disciplinarian and unfamiliar to the expert that is called in to evaluate the initial case.

### **Appealing an Administrative Adjudication**

Even when the safeguard of being able to appeal an agency order is put in place, in some states and in some circumstances, the agency has the final word above state court. In that instance an Appellate State Court may make an order but the agency might regard it as a recommendation only and might then ignore it.

### **History of Regulation of Health care practitioners**

We now explore the legal status and underpinnings of occupational regulation. I begin with a recent and wise quote from two English authors writing about complementary medicine and the law:

“One important point is worth making at the outset. Readers may be surprised to learn how many of the central issues still being contested today have been the source of conflict for hundreds of year. Organized medicine has expended considerable energy over the century in an attempt to eliminate unorthodox therapies. The language of consumer protection has invariably been invoked to mask blatant professional self-interest. Conversely, the rhetoric of non-orthodox medicine, in attacking the medical monopoly, has often been based on an appeal to the common man to take up his right to improve health and greater self-determination.<sup>32</sup>

Regulation of health care profession is known to have taken place as early as 1800 B.C. where codes set fees for surgeon services and penalties for malpractice.<sup>33</sup> The first example of licensing laws similar to modern laws comes from 13<sup>th</sup>-century Sicily.<sup>34</sup> The next major step in the history of occupational regulation was the ascendancy of the craft, merchant, and professional guilds of

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<sup>31</sup> St. John's Law Review, *The Alternative Medical Practice Act: Does It Adequately Protect the Right of Physicians to Use Complementary and Alternative Medicine?*, by Joseph A. Barrette, Volume 77, Winter 2003, Number 1, page 122.

<sup>32</sup> *Complementary Medicine and the Law*, Julie Stone, MA, LLB, Barrister, and Joan Mathews LLB, MRQA, Oxford University Press, 1996, page 20.

<sup>33</sup> *The Rule of Experts, Occupational Licensing in America*, by S. David Young, Cato Institute, 1987. pg. 9

<sup>34</sup> Young, *Id* at 9

medieval times.<sup>35</sup> Frustrated by their efforts to achieve market control by private means, the English guilds turned to the state to secure enforceable monopoly privileges.<sup>36</sup>

The United Kingdom is notable because the Medical Act of 1858 established a unique State-sanctioned system of self-regulation.<sup>37</sup> “Unlike some countries where direct regulation by the state prevails, in the UK a tradition of government-profession contract creating a legal regulatory body and hence legitimizing self-regulation was, and still is, the preferred approach...” The system of State-sanctioned regulation still dominates the practice of medicine and has become the model for the regulation of other paramedical professions, including some of the more well-established complementary therapies.<sup>38</sup>

“The traditional guild structure eventually came to be seen as a serious constraint on economic growth and the barriers erected by that structure were gradually torn down. Philosophical forces, most notably the publication of Adam Smith’s *The Wealth of Nations*, accelerated the decline of guild franchises.”<sup>39</sup> “...early Americans found European-style constraints on occupational activity unduly restrictive and contrary to the freedom and rapid rise in living standards that initially attracted them to America.. One writer explains ‘The land is open, the people pioneers, their goal adaptation. To restrict the practice of any art to people specially trained would have been intolerable in a country where every man had to be...his own farmer, manufacturer, doctor, lawyer, builder, and banker.’”<sup>40</sup>

“ The first law regulating a profession in America was enacted in Virginia in 1639.”<sup>41</sup> But the early licensing movement met with resistance and by the mid 1800’s reformers succeeded in preventing licensing laws to be passed in many states and helped to repeal others.<sup>42</sup> This was the circumstance that led to the formation of the American Medical Association (AMA) in 1847.<sup>43</sup>

In 1909 Abraham Flexner was commissioned by the Carnegie Foundation for the Advancement of Teaching to visit medical schools and to write a report on the status of medical education in the United States and Canada<sup>44</sup>. He published a report called “Medical Education in the United States and Canada in 1910”.<sup>45</sup> The Rockefeller Foundation helped implement the recommendations of the report.<sup>46</sup> The combination of money from the Rockefeller Foundation and influence of the AMA and the Association of American Medical Colleges (AAMC), created the strongest professional monopoly in the United States known as Organized Medicine.<sup>47</sup>

American medical schools that wished to survive implemented the Flexner blueprint of what a medical school should look like and if they did not, then they would not be approved by the

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<sup>35</sup> Young, Id. at 9

<sup>36</sup> Young, Id at 10

<sup>37</sup> *Complementary Medicine and the Law*, Julie Stone, MA, LLB, Barrister, and Joan Mathews LLB, MRQS, Oxford University Press, 1996, page 28.

<sup>38</sup> Stone and Mathhews, Id. at 28.

<sup>39</sup> *The Rule of Experts, Occupational Licensing in America*, S. David Young, Cato Institute, 1987. pg. 10

<sup>40</sup> Young, Id at 11, [quoting Lieberman (1970), p. 46.]

<sup>41</sup> Young, Id. at 12. [citing Hogan (1979), p. 225)]

<sup>42</sup> Young, Id at 12

<sup>43</sup> Young, Id. at 12

<sup>44</sup> *Racketeering in Medicine*, Id. page xxiv

<sup>45</sup> *Racketeering*, page xxix

<sup>46</sup> *Racketeering*, page xxiv

<sup>47</sup> *Racketeering*, page xxvi

AAMC and graduates would not be licensed by state medical boards. The Flexner Report was used to eliminate schools of the healing arts that were not “affiliated with universities which had incorporated the teaching of the basic sciences during the first two years and which were committed to the applications of scientific research to the clinical practice of medicine.”<sup>48</sup> Homeopathic schools including Hahnemann Medical College of Philadelphia was closed as well as schools of herbal medicine (phyto-pharmacy) and schools of manipulative medicine.<sup>49</sup> This eliminated all healing arts other than allopathic medicine.<sup>50</sup>

The number of healing schools fell from 140 in 1900 to 77 in 1940. Schools failed because their graduates could no longer practice. All schools that accepted women were closed, as were all but two that trained African Americans. Only drug medicine schools remained.<sup>51</sup>

Following the Flexner Report, the Carnegie Foundation and the AMA lobbied state legislator to pass licensing laws. “The method adopted by the AMA to increase their members’ incomes was to eliminate the competition by passing licensing laws.”<sup>52</sup> By 1920 most states had physician licensing laws

In 1889 the Supreme Court of the United States delivered an opinion as follows:

“ It is undoubtedly the right of every citizen of the United State to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition...

But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society....

The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity.

Few professions require more careful preparation by one who seeks to enter it than that of medicine....

Due consideration, therefore, for the protection of society may well induce the state to exclude from practice those who have not such a licensee, or who are found upon examination not to be fully qualified....”<sup>53</sup>

In 1925, Harry Eugene Kelly of the Chicago Bar wrote a book promoting the regulation of the healing arts and commented on the breadth of the definition of medicine as follows:

It is apparent from judicial decisions and statutes that courts and legislators, in using the phrase, “the practice of medicine,” and generally in dealing with the healing of the sick, have in mind not a specific kind of healing or a specific remedial agent used by any

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<sup>48</sup> Racketeering, page xxvii

<sup>49</sup> Racketeering, page xxvii

<sup>50</sup> Racketeering page xxvii

<sup>51</sup> Legal Guidelines for Unlicensed Practitioners, Dr. Lawrence Wilson, page 41

<sup>52</sup> Legal Guidelines for Unlicensed Practitioners, Dr. Lawrence Wilson, page 40.

<sup>53</sup> Dent v. West Virginia, 129 U.S. 114

particular sect or school, but the occupation as such in its broadest aspects; and that the thing uniformly intended to be regulated is not any particular therapeutic agent but the entire occupation of healing the sick for hire, regardless of remedial agents or therapeutic theories.”<sup>54</sup>

Given Kelly’s conclusions of understandings it is no surprise that the medical lobbying groups in the early 1900’s were setting forth licensing laws that included very broad scopes of practice and which imposed criminal charges on those persons practicing the healing arts without a license.

The push for licensure of all kinds went forward. State and local societies brought in presumably impartial and knowledgeable experts to push through licensing laws.<sup>55</sup> 110 statutes licensing 24 occupations were enacted between 1911 and 1915 alone.<sup>56</sup> Today as much as a third of the work force is directly affected by licensing laws.<sup>57</sup>

### **The Rise and the Fall of Occupational Licensure.**

The broad definitions of medicine which literally prohibited all persons that did not have a license from practicing the healing arts stimulated a new movement of licensure of health care professions that wished to be recognized in their own right and that did not want to be considered criminal for practice of medicine without a license. For this reason many states enacted additional licensing laws for health care professions including nursing and gradually a host of other health care professions.

But the disadvantages of licensing were soon to be found. Young documents them as follows: “Occupational regulation has served to limit consumer choice, raise consumer costs, increase practitioner income, limit practitioner mobility, deprive the poor of adequate services, and restrict job opportunities for minorities—all without a demonstrated improvement in quality or safety of the licensed activities.”<sup>58</sup>

Even as recently as January 2004, the Florida Legislature through the House Select Committee on Affordable Health Care for Floridians, in their Final Draft Report stated: “Non-physician providers of health are in high demand in the United States, but licensure laws restrict access to their services. The result has almost inevitably been less choice and higher prices for consumers. Safety and health-seeker protection issues are often cited as reasons for restricting non-physician services. But the restrictions are not always based on empirical finding.”

A movement for deregulation began in the later 1900’s. But trying to deregulate existing professional groups was next to impossible. One observer described the political situation of deregulation as follows: “Deregulation in theory is universally praised, while deregulation in practice means eternal struggle with businesses and professions that benefit from regulation.”<sup>59</sup>

### **Deregulation: Getting to the Core of the Parameters on Police Power**

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<sup>54</sup> *Regulations of Physicians by Law, A Dissertation on Regulation by Law of the Occupation of Healing Diseases of Human Beings*, by Harry Eugene Kelly, 1925, at page 86.

<sup>55</sup> *The Rule of Experts, Occupational Licensing in America*, S. David Young, Cato Institute, 1987. pg. 14

<sup>56</sup> Young, *Id.* at 14 [citing Hogan (1979,p.228)]

<sup>57</sup> Young , *Id.* at 14 [citing Hogan (1979, p. 241)]

<sup>58</sup> Young *Id.* at 1

<sup>59</sup> Young *Id.* at 90 [quoting Isikoll(1983).]

Deregulation appeared to be a conscious attempt to return to an approach that resonates with our founding values. Maybe deregulation was the point in our evolution as a young country when we began to return to our foundational constitutional values and ask important questions such as:

- \* Under what circumstances does a state have the authority under the police power to regulate an occupation?
- \* Are state laws on licensing depriving persons of life, liberty, or property, without due process of law under the 14<sup>th</sup> amendment?
- \* Do state health care occupational laws deny or disparage other rights retained by the people?
- \* Why aren't there less restrictive types of regulation?

These were most likely some of the questions that Minnesota legislators asked themselves in 1986, when they became the first state to implement a sunrise program, which required legislators consider several criteria before licensing an occupation.

### **Current Forms of Regulation:**

Before we move on to discuss deregulation and what role the government should be in the lives of practitioners that do not have government licenses to practice, I offer this brief overview general descriptions of types of regulating health care practitioners today.

### **Permit (AKA Registration)**

Permit is called registration in some states. The significance of permit regulation is that it is the first step into regulation of a person, the beginning of a mandatory relationship directly with the government. There have been instances in our nation's history of the government requiring certain groups to sign up with the government so that the government could have a roster of individuals in a particular group. This history has helped us clarify as freedom advocates that any law that promotes a mandatory relationship with the government should always be grounded in a careful consideration of our founding fathers' intentions to protect the individual sovereignty of people and the natural law of man and woman to be free in their own person.

Permits are not specifically about the relationship a health care practitioner has with their client. There are many laws and ways to regulate the client/practitioner relationship including criminal, civil, and agency laws. The significance of permits is that it regulates a person's relationship with the government.

The purpose of permits is not often written about in the health care occupation arena. The reason being that generally speaking health care practitioners are licensed. And if a health care practitioner does not hold a license they are considered to be acting criminally by offering health care services. However I have found two examples that provide curious rationales for permits. Most interestingly, the states that provide these examples are the states that now do not require permits or registration for unlicensed health care practitioners.

### **Minnesota – No Permit Required for Unlicensed Health Care Practitioners**

A Minnesota study by the Minnesota Department of Health states in their report to the legislature on Complementary Medicine that a permit allows persons to practice an occupation on the condition that they submit information concerning the location, nature, and operation of the practice to the government. “This way the agency is able to supervise the activity if necessary.”<sup>60</sup> “A permit system in this form does little more than provide a roster of practitioners and a means for disciplining these professionals.”<sup>61</sup>

The Minnesota report did not recommend permit or registration for unlicensed health care practitioners. Two years after the report was submitted Minnesota passed the Complementary and Alternative Health Care Freedom of Access Act, which did not require permit or registration but which defined mandatory disclosures practitioners were required to give to their clients before treatment.

### **California – No Permit Required for Unlicensed Health Care Practitioners**

A 1982 study in California recommended that unlicensed health care practitioners be registered. The recommendation was similar to the concept of permit. The study offered rationale for the registration as follows: “We assume that an individual who is not providing healthcare will be deterred by the cost of registration, and by the requirements for disclosure and patient consent, and that few if any will register for frivolous reasons. Conversely, the penalties for practicing without license or registration will deter practitioners from practicing without legal sanction. For those who are serious about engaging in alternative systems of health care, the incentive to register is that they then would be able to pursue their activities openly, to advertise, and in some instances to have opportunity to prove the merits of their activities. For those systems, which may be without any real value, exposure to public scrutiny may hasten their demise.”<sup>62</sup>

In 2002, California legislature did not follow the thinking of the report but rather passed a Consumer Health Freedom Act, protecting consumer access to unlicensed practitioners. The new legislation did not involve permit or registration but mandated that unlicensed practitioners provide specific disclosures to their clients.

It is important to review an agency’s rulemaking authority in depth where an occupation has a voluntary or a mandatory permit or registration requirement under the jurisdiction of an agency. This can be helpful in evaluating the scope of the agencies ability to expand their requirements through rulemaking.

When an agency has responsibility of a group, it often evaluates the laws and procedures having to do with that group and recommends to the legislature changes needed to better serve the public. The legislature then considers expanding or decreasing the agency’s function regarding the group including providing expanded or decreased rulemaking capabilities or regulator features. (See the repeal of the Minnesota Unlicensed Mental Health Act converted to a licensing

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<sup>60</sup> Complementary Medicine, a Report to the Legislature, Minnesota Department of Health, Health Economics Program, January 15, 1998, page 35.

<sup>61</sup> Complementary Medicine, a Report to the Legislature, Id. at 35.

<sup>62</sup> California Board of Medical Quality Assurance, Proposal for Revision of Section 2052 of the Medical Practice Act, 1982, page 16.

law 2003, and See the revision of the Wisconsin Massage Therapy Voluntary Registration Act converted to a mandatory licensing law.) Whether it is the regulated group that comes before the legislature wanting more regulation or whether the agency recommends changes in the regulations, the important factor in this scenario is that “a group” has been identified and an administrative system has been put in place in the government to relate to the group. A specialized relationship and administrative process is set up with the government. Permit registration is the beginning of a mandatory relationship with the government.

A brief note here: It may be that applying for a permit or registration may waive your right to challenge the government’s jurisdiction over a practitioner. Please refer to Wilson regarding issues of common law jurisdiction challenges.<sup>63</sup> If jurisdiction is not challenged then jurisdiction is assumed to exist.<sup>64</sup>

### **Inspection: A Level of Regulation**

Sometimes a regulatory system is put in place by an agency to subject the activities and premises of persons in certain occupations to periodic inspections to ensure that the public’s health, safety, and welfare are protected. These inspection laws are founded on the need to ensure public safety.

### **Certification (AKA Registration that require qualifications)**

Certification and Registration are also used interchangeably in some state. This can be confusing in conversations with people from more than one state because some states also use permit and registration interchangeably. For that reason I have used “permit” and “certification” as the headlines.

Certification/registration is a type of regulation where government limits the use of an occupational title to persons who meet predetermined standards of education or training. Certification/registration is often called a voluntary certification or registration because practitioners who do not register with the government can still practice as long as they do not use the protected Titles.

The term certification can be confusing because private groups sometimes credential practitioners by giving them a certificate upon graduation from a particular academic program. This is not the same as government title regulation by certification or registration with the government.

The interesting component of certification/registration is that it is often sought after by groups that have affiliations with particular schools. The first step is that national certification bodies are set up, supported by academic institutions, to create more continuity in a profession and higher standards in the industry. As the national certification body gains more members and power their members often approach the legislature to request that their particular certification be recognized as the one that should be mandated if individuals want to call themselves a particular professional name. Of course if you happen to be a practitioner who has not obtained the certification but has historically always used the name of the occupation to describe what they do, then you would

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<sup>63</sup> Legal Guidelines for Unlicensed Practitioners, Dr. Lawrence Wilson, page 6

<sup>64</sup> Wilson Id.

lose that opportunity under a new law. The good news is that you would still be allowed to practice without use of title. The bad news is that academic institutions with more funds may have more funds available to lobby their interests. Individuals whose education is less prominent have less advantage.

This reflects the importance of a well-funded political movement that has no attachment to special interests but rather is promoting freedom on its many levels. There are occupations that support freedom efforts and do not proceed to claim exclusive title over a profession. (Minnesota Homeopathic Association support for Complementary and Alternative Health Freedom of Access bill 2002).

An example of this consolidation of academic power was given to me at a recent meeting in London with a leader in a particular alternative health care occupation group. This leader is very interested in having a title act in order that all persons calling themselves “xxxx” would have a “proper” education. In this particular popular occupation there are many forms of certification that one can get through various schools and there are also 8 independent certification bodies that provide exams and certification for the various types of education in the occupation.

The leader’s goal is to convince the private certification groups to merge to find their common ground and ask that all of their members take a central exam and receive one type of certification. Looking into the future the goal would be then to approach the government and enforce the need for the exam by all those persons practicing the occupation and using the title. This person was a member of the occupation rather than a consumer advocate. He was very interested in hearing about a health freedom law that would mandate disclosures but that would not mandate registration with the government.

Like permit/registration or any other type of occupational registration, the profession or the executive agency regulating such a profession can always approach the legislature for increases or decreases in the level of regulation. In addition, if rulemaking is involved, rules can be promulgated within the rulemaking capability of the agency. Reasons for revisions to certification/registration laws already in existence can include insurance issues, professional image, unwanted competition, disagreement on standards of care, belief that the public should not have access to uncertified practitioners because of harm.

## **Licensing**

Licensing is the most restrictive form of regulation of an occupation by the government because it produces a monopoly over a particular set of practices and particular title. The government gives a group of persons the privilege of doing particular acts and using a particular title on the condition that they receive a particular type of education and abide by a particular standard of care. These types of laws promote the government’s condoning of a particular type of education and training and standard of care and outlawing other types in the same field of health. To justify its actions governments have depended on “scientific evidence” to decide what is best for the population. Since these laws are mandatory they eliminate many practitioners and thus many options for health-seekers.

For example if a practitioner does not obtain a license but has a gift for practicing a trade that would be considered to be within the broad scope of the licensed profession they could be charged criminally for practice of the occupation without a license. Thus the health seeker cannot

have access to that person. And for those practitioners who go ahead and do obtain a license but who begin to practice things that they have learned beyond the accepted and prevailing standard of care of that profession, they could be disciplined and lose their license. In both of these scenarios health-seekers lose access to their options.

It is rare that a licensing law is repealed. However Sunset review laws have been put in place to put a check on the power of licensing boards. Recently in California the Consumer Protection Agency overseeing the California Dental Board, completely dismantled the dental licensing board for not abiding by a directive on notice to consumers of mercury toxicity.

### **Summary on Regulatory Types**

Because the many states have diverse ways of regulating the health care professions it is important to be familiar with state law as you proceed to health freedom.

### **To Regulate or Not to Regulate**

Before an occupation is regulated, bills are presented to the legislature and advocates provide rationale for the new law. Since the mid 1980's and the unsuccessful attempts at deregulation, some states have adopted new proactive laws which actually spell out the criteria that must be looked at before the legislature considers putting an occupational regulation in place.

In the case of Minnesota, the first state to pass a Sunrise Act, the state now sets forth the criteria for legislatures to consider before occupational regulation:

“Subd. 2. Criteria for regulation. The legislature declares that no regulation shall be imposed upon any occupation unless required for the safety and well being of the citizens of the state. In evaluating whether an occupation shall be regulated, the following factors shall be considered:

(a) Whether the unregulated practice of an occupation may harm or endanger the health, safety and welfare of citizens of the state and whether the potential for harm is recognizable and not remote;...”<sup>65</sup>

Likewise Florida's Sunrise Act states:

“It is the intent of the Legislature...that no profession or occupation be subject to regulation...unless...necessary to protect the public health, safety, or welfare from significant and discernible harm or damage and the police power...be exercised only to the extent necessary for that purpose.”<sup>66</sup>

These new laws shed some light on the lessons that we have learned over time about regulating occupations. They also shed some light on the future in terms of refining our understanding of the healing arts, in that our country now acknowledges that Medical Doctor Physicians are not the

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<sup>65</sup> MN Stat 214.001, Subd. 2

<sup>66</sup> Florida Statute 11.62

only practitioners that have a legitimate role in assisting a person with health care needs. Our country has the potential to make a broader array of licensed and unlicensed health care practitioners available to the public.

### **Constitutional rights and Regulation:**

*Constitutional law is complex. Rather than write a formal legal brief with all of the relevant cases included, the goal of the following is to explain some basic concepts of constitutional law as it relates to health for the reader. Legal cases are only used as examples to highlight concepts.*

The Fourteenth Amendment to the United States constitution tells us that states cannot make laws that “... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>67</sup>

As health freedom advocates we ask whether our rights to make health care decisions and to practice our trades is part of our life, liberty, or property.

The Fourteenth amendment has been used along with other sections of the constitution to protect the personal rights of individuals. Even when states pass laws that may have been initiated by powerful interest groups at the state legislature and reflecting the majority view point, those laws must still pass constitutional muster and not infringe on the life, liberty, or property of individuals without due process of law. The strength of the constitutional protection is that it protects individual rights, including the individual rights of members of a minority viewpoint, and holds individual rights in high regard.

When a state makes a law that is believed to deprive an individual of “life, liberty, or property” the law can be challenged as unconstitutional. The court then has to decide whether the law accurately reflects the meaning of the constitution or whether the law should be struck down.

### **Court Decisions on Constitutionality**

Courts have had to make some tough decisions over the years regarding whether a law is constitutional. Volumes of case law have been built up over time. These historical cases set precedence, which guide the court’s interpretation of the constitution into the future.

It is interesting to note that even a Supreme Court can change its approach to a particular subject over a period of time. A change in interpretation comes sometimes from a new awareness of the overall meaning that the founding fathers would have intended to apply to the constitution. Sometimes an issue engenders challenges in many states and the various states will arrive at different conclusions, some on one side of the issue and some on the other and they look to the United States Supreme Court to eventually decide.

When an issue is of major importance, and the Supreme Court receives a number of cases regarding various aspects of an issue, often times each one addressing the issue from a different angle, the solution eventually becomes clear as to what the constitutional truth of the issue is.

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<sup>67</sup> Constitution of the United States, Amendment XIV

For example the history of racism is a stark example of how the understanding of our constitution developed over years and how eventually the wisdom of the truth of the constitution was acknowledged by law.

In 1857 the US Supreme Court ruled in Dred Scott v. Sandford that slaves were not considered to be part of “the people” mentioned in the constitution. Now we consider this deeply deeply offensive but here are the words of the court at the time:

“In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as part of the people, nor intended to be included in the general words use in that memorable instrument.”<sup>68</sup>

In 1865 the people of the United States passed the Thirteenth Amendment stating clearly their intention that there should be no slavery:

“Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist with the United Sates, or any place subject to their jurisdiction.”<sup>69</sup>

Even after the 13<sup>th</sup> amendment passed segregation laws existed until 1954 when the Supreme Court finally held that segregation was unconstitutional: “...in the field of public education the doctrine of “separate but equal” has no place. Separate education facilities are inherently unequal.”<sup>70</sup>

This history shows that the constitution itself is a guiding force that can help us arrive at the truth that we are searching for. Although some argue that the interpretation of the constitution should never change -- that law is law, and that we must abide by the constitution as agreed upon, our history shows that as we grow in the depth of understanding of the words of the constitution we must allow ourselves to acknowledge the deeper meanings and truths that the founding principles hold. In that sense, the principles and words of the constitution are not static, but rather a creative and growing process of constant discernment as to what the nature of sovereignty really means in its fullness.

## **Fundamental Rights**

In order to evaluate whether a law is unconstitutional and infringing upon an individual right, the Court first reviews what kind of right is at stake.

The question has been asked: Should the Court confine itself to interpreting rights that are expressly guaranteed by the Constitution, such as the right to free speech, or should it also enforce general principles of liberty and justice when the principles are not express provisions of the Constitution?<sup>71</sup> It has been decided that there are implied rights that the constitution protects based on the liberty and justice interests within the Constitution in its entirety, and that the Courts

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<sup>68</sup> Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)

<sup>69</sup> Constitution of the United States, Amendment XIII, Section 1.

<sup>70</sup> Brown v. Board of Education of Topeka (Brown I), 347 U.S. 483 (1954)

<sup>71</sup> Constitutional Law, Second Edition, Stone, Seidman, Sunstein, and Tushnet, 1991, page 759

***Impact of Regulation on the Fundamental Right of Privacy To Make Health Care Choices***

by Diane M. Miller JD, Legal and Public Policy Director, National Health Freedom Coalition

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must enforce those rights. An example is the right of “privacy”. The right of privacy has been acknowledged under the federal constitution as an implied right. In addition, states have expressly acknowledges the right of privacy.<sup>7273</sup>

After a right is acknowledged as express or implied, another question is asked by the court and that is whether a right is “fundamental” and deserving of the Courts highest constitutional scrutiny and protection or is a right “not fundamental” and thus allowing for the court to give deference to the state legislators when making laws according to the state’s rational basis for the regulation.

Great amounts of excitement surround the Court’s work to discern whether a right is fundamental. Persons challenging the law generally want the law to be held to a very high standard because they believe that the law is infringing on what they deem to be their fundamental rights and with the high standard it has a better chance of being struck down. Persons attempting to uphold the law argue that the state has a rational basis for the law and that the right is not fundamental and should be held to the lower standard and should remain intact.

For example the right of privacy. The Court acknowledges a right of “privacy”, and that the right of “privacy” can be “fundamental” if it is within certain areas of personal decision making in which the government should not be involved. Some of these areas include decision-making relating to marriage, procreation, contraception, family relationships and child rearing.

The following is language from the United States Supreme Court acknowledging the fundamental right of “privacy”.

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, Stanley v. Georgia, 394 U.S. 557, 564 (1969); in the Fourth and Fifth Amendments, Terry v. Ohio, 392 U.S. 1, 8-9 (1968), Katz v. United States, 389 U.S. 347, 350 (1967), Boyd v. United States, 116 U.S. 616 (1886), see Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U.S., at 484-485; in the Ninth Amendment, id., at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see Meyer v. Nebraska, 262 U.S. 390, 399 (1923). These decisions make it clear that only personal rights that can be deemed “fundamental” or “implicit in the concept of ordered liberty,” Palko v. Connecticut, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy.<sup>74</sup>

Another example is on opinion from the United States District Court of Texas where the Texas Medical Practice Act was constitutional challenged. The opinion describes the criteria to look at in deciding whether a right falls within the privacy right:

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<sup>72</sup> Constitution of the State of Florida, Section 23, Florida, Right of Privacy.

<sup>73</sup> Montana Constitution, Article II, Declaration of Rights, Section 10, Right of Privacy

<sup>74</sup> Roe v. Wade 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 at 152

“...decisions which will be recognized as among those “that an individual may make without unjustified government interference.” Cary v. Population Services International, *supra*, 431 U.S. at 685, 97 S.Ct. at 2016, must meet two criteria. First, they must be “personal decision.” Id. They must primarily involve one’s self or one’s family. Second, they must be “important decisions.” Id. at 684, 97 S.Ct. at 2015. They must profoundly affect one’s development or one’s life....”<sup>75</sup>

The Texas court also addresses the question of what other personal decisions might be included in the fundamental constitutional right of privacy:

“The outer limits of this aspect of privacy have not been marked by the Court.”” Carey v. Population Services International, *supra*, 431 U.S. at 684, 97 S.Ct. at 2016. The Court has sought, however, to assure that the list of decisions encompassed by the right of privacy, like the “liberty” protected by the Due Process Clause, is not a series of isolated points pricked out in terms of the Bill of Rights but a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints...and which also recognized, what a reasonable and sensitive judgment must, that certain interest require particularly careful scrutiny of the state needs asserted to justify their abridgment and deserving of strict scrutiny.<sup>76</sup>

### **Rights Not Considered Fundamental**

Not every right is considered fundamental. For example, a California Court acknowledged that the Fourteenth Amendment protects some personal relationships like family relationships but goes on to find that the relationship between a client and a psychoanalyst does not rise to the level of a fundamental right even if the client and practitioner meet regularly and the client reveals secrets and emotional thoughts to their practitioner.<sup>77</sup>

The right to practice a profession is often not considered a fundamental right. A UCLA Law Review article addresses in detail the nature of the right to practice and terming it economic regulation deserving rational basis scrutiny citing case law as follows:

“Constitutional challenge to the medical licensing requirement has in the past met with little success. The regulations are considered to involve economic interests rather than fundamental rights and the constitutional test traditionally applied to economic regulation is the rational basis standards. According to this test, minimal rationality is support of legislation is sufficing to sustain it.”<sup>78</sup>

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<sup>75</sup> Andrew v. Ballard 498 F.Supp., 1038, at 1045

<sup>76</sup> Andrew v. Ballard *Id.* at 1045

<sup>77</sup> National Association for the Advancement of Psychoanalysis v. California Board of Psychology, 228 F.3d 1043, 2000 Daily Journal at 1050

<sup>78</sup> UCLA Law Review, Restrictions on Unorthodox Health Treatments in California: A Legal and Economic Analysis, Section B. 1. Right to Practice of the Unlicensed Practitioners: Licensing as Economic Regulation, by Ellen Hodgeson page 675

The courts have not generally interpreted a practitioner's right to practice an occupation as a fundamental right except in a unique Alaska case where they indicated that if it was a common profession not requiring skill that it could be considered a fundamental right.<sup>79</sup>

### **Constitutional Scrutiny Standards: "Strict Scrutiny" and "Rational Basis"**

Identifying the kind of right is the first step before deciphering what standard to apply when deciding whether a law is constitutional. Generally speaking, the more important the right, the higher the standard of scrutiny the Court uses in determining whether a law is constitutional.

Specific standards have been set forth by the Court based on constitutional principles. There are variations of a number of standards but for purposes of this memorandum two primary ones are described below.

Re: Fundamental Rights and Strict Scrutiny: When using strict scrutiny test, first the Court must discern whether there is a fundamental right that is impacted by a challenged law. If there is a fundamental right, then the state must demonstrate to the court that the law being challenged serves a "compelling" state interest. Even if a state is found to have a "compelling" state interest to regulate, the regulation must be narrowly drawn, and the state cannot choose means that unnecessarily burden or restrict constitutionally protected activity. If there are other reasonable ways to achieve the goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference.<sup>80</sup> "If it acts at all, it must choose "less drastic means."<sup>81</sup>

Re: Rights that are not considered Fundamental and Rational Basis Scrutiny: In using the "rational basis" test, the Court first asks whether the law is fundamental. If it is not then the Courts ask whether the law is rationally related to a legitimate state interest. When applying this test a presumption is made that the law is constitutional and those challenging it must convince the court that the law was based on irrationality.

For example: The right to practice hair braiding and the right to practice psychology were both found by a California court to be rights that are not considered fundamental.

The Cosmetology licensing law was successfully challenged and the hair-braiders won because the licensing law that did not allow hair-braiders to practice was considered irrational. The Court applied the "rational basis" test and found that:

"Simply put, it is irrational to require Cornwell to comply with the regulatory framework. Even given due deference, the regulations as applied to Cornwell fail to pass constitutional muster as they "rest on grounds wholly irrelevant to the achievement of the State's objectives."<sup>82</sup>

The Psychology licensing law was challenged because it did not allow a particular kind of psychoanalyst to practice. The challenge was unsuccessful and the law was upheld because it was rational. The Court applied the "rational basis" test and found that:

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<sup>79</sup> Case law on not a fundamental right

<sup>80</sup> Andrews v. Ballard Id. page 1052

<sup>81</sup> Andrews v. Ballard page 1052

<sup>82</sup> Cornwell v. Hamilton, 80 F.Supp.2d 1101, S.D. Cal., 1999

“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it. The day is gone when this court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”<sup>83</sup>

## **Health Freedom Movement**

The goal of the health freedom movement is to make sure that the fundamental right of privacy of Americans, the right to make health care decisions, is protected. Health freedom advocates believe that their privacy right is fundamental and that regulations by governments that decrease the number of health care options by only allowing those government approved options is an infringement on their fundamental decision-making right.

Because they hold their right to make health care decisions to be fundamental they believe that the laws should be held to a strict scrutiny standard and the laws should be narrowly construed to a compelling state interest. Health freedom advocates believe they have the right to choose from all health care options and information and that regulation should be the least amount in order to maximize their options. They believe that government should not regulate those things that they have not been shown by clear and convincing evidence, to pose significant danger warranting police power regulation.

## **Health Freedom Legal Cases**

Challenging the constitutionality of practitioner and drug laws in order to demand more access to practitioners and products is not a new activity in our country. Concepts of health freedom have been discussed in a number of legal cases. However, like many great movements where the people have demanded that the government not make laws that infringe on fundamental rights, it takes a number of actions in local and state courts and legislatures as well as changes in cultural understandings and public policy, to finally bring the full meaning of the constitution home.

Attorney Ellen Hodgeson’s , in her 1982 UCLA Law Review article, summarizes how the courts have struggled over health freedom issues in the past. NHFC recommends it for helpful reading.

The following are more recent comments on how health freedom is progressing to the time when the US Supreme Court might make a finding that the right of a person to make health care decisions of their own preference is a fundamental privacy right deserving of strict scrutiny.

## **Health Freedom Challenges by Practitioners**

Some challenges attempting to protect health freedom have come from practitioners who believe their right to practice a trade are being infringed upon by licensing statutes. In these situations the restrictive laws are scrutinized by the court under the rational basis test and the right to practice a

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<sup>83</sup> National Ass’n for Advancement of Psychoanalysis v. California Bd. Of Psychology, 228 F.3d 1043, 2000 Daily journal D.A.R. 10,685, C.A.9 (Cal.) 2000

trade is often not found to be a fundamental right and the laws are often upheld as legitimate police power by the state.

### **Health Freedom Challenges by Citizens**

However other cases are brought forward in a different manner. They are brought forward by health care clients or patients who believe that their right to choose their own type of practitioner is being infringed upon. They claim that the elimination of a certain practitioner through restrictive occupational laws negatively impacts their individual right to choose their health care treatments and practitioners. In these cases the courts are varied as to whether the right to decide to use a health care practitioner of your own choosing is a fundamental privacy right.

For example in the case of Andrew v. Ballard where the Texas Medical Practice Act was found to be unconstitutional because it limited the practice of acupuncture in Texas to medical doctors, the Court found that the licensing law imposed a burden on and significantly interfered with the decision of patient to obtain acupuncture treatments and that interest was a fundamental privacy right.<sup>84</sup> Because the court found that a patient's right to choose was a fundamental privacy right the Practice Act was held under the standard of strict scrutiny and this area was deemed unconstitutional. The following are words of the Court:

“Indeed, medical treatment decisions are, to an extraordinary degree, intrinsically personal. It is the individual making the decision, and no one else, who lives with the pain and disease. It is the individual making the decision, and no one else, who must undergo or forego the treatment. And it is the individual making the decision, and no one else, who, if he or she survives, must live with the results of that decision. One's health is a uniquely personal possession. The decision of how to treat that possession is of a no less personal nature... The decision can either produce or eliminate physical, psychological, and emotional ruin. It can destroy one's economic stability. It is, for some, the difference between a life of pain and a life of pleasure. It is, for others, the difference between life and death. Andrews v. Ballard (D.C. S.D.Tex. 1980), 498 F. Supp. 1038, 1047 (holding that the decision to obtain or reject medical treatment is encompassed by the right of privacy and that, absent evidence showing that they were narrowly drawn to achieve a compelling state interest, Texas regulations requiring acupuncturists to be licensed physicians imposed a burden on and significantly interfered with the patient's decision to obtain acupuncture treatment and were, therefore, unconstitutional)”<sup>85</sup>.

And in the Montana case of Armstrong v. State, where a regulatory law limited the practices of Physician's Assistances, the court found that the statute was unconstitutional because it prevented a woman from obtaining a medical procedure from the practitioner of her choosing, a Physician's Assistant as opposed to a licensed Physician, based on her individual right of privacy under the Montana Constitution.<sup>86</sup> This case was eloquent in expanding the understanding of privacy to include “bodily autonomy”. These are the words of the lower and higher Courts in Montana:

Few matters more directly implicate personal autonomy and individual privacy than medical judgments affecting one's bodily integrity and health.<sup>87</sup>

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<sup>84</sup> Andrew v. Ballard 498 F.Supp.1038, 1052

<sup>85</sup> Armstrong v. State, 1999 MT 261 (Mont. 10/26/1999) at 90 and 91 citing Ballard

<sup>86</sup> Armstrong v. State, 989 P.2d 364, Mont. 1999, para 14

<sup>87</sup> Armstrong v. State, 989 P.2d 364, Mont., 1999 para 53.

Or, more simply, as John Stuart Mill stated: "Over himself, over his own body and mind, the individual is sovereign." Mill, *On Liberty* (quoted in *Thor v. Superior Court* (Cal. 1993), 855 P.2d 375, 380).<sup>88</sup>

For to say that I am sovereign over my bodily territory is to say that I, and I alone, decide (so long as I am capable of deciding) what goes on there. My authority is a discretionary competence, an authority to choose and make decisions. 3 Joel Feinberg, *Harm to Self* 53 (1986). See also Fisk, at 326-27<sup>89</sup>

Importantly, there is nothing in the Constitutional Convention debates which would logically lead to the Conclusion that Article II, Section 10, does not protect, generally, the autonomy of the individual to make personal medical decisions and to seek medical care in partnership with a chosen health care provider free of government interference.<sup>90</sup>

Accordingly, given Montana's broad, yet undefined, concept of individual privacy--historically predating even the 1972 Constitution; given the Constitutional Convention's unmistakable intent to textualize this tradition by explicitly protecting citizens from legislation and governmental practices that interfere with the autonomy of each individual to make decisions in matters generally considered private; given the Convention's reliance on *Griswold*; and given jurisprudential recognition, following the close of the Constitutional Convention, of a woman's right to seek and obtain a pre-viability abortion, it is clear that the procreative autonomy component of personal autonomy is protected by Montana's constitutional right of individual privacy found at Article II, Section 10.<sup>91</sup>

On the other hand in California in the case of *National Association for the Advancement of Psychoanalysis v. California Board of Psychology*, where a regulatory law limited the practice of certain unlicensed psychological practitioners, the courts said that there is not a fundamental right to choose a mental health professional with specific training.<sup>92</sup>

And in another Maryland case *Hunter v. State*, where the courts did not acknowledge a fundamental privacy right of a woman to choose whomever she wishes to assist her in childbirth. This case challenged the constitutionality of a midwifery licensing statute because it did not allow a lay unlicensed midwife to practice without a license. The Court found that there was no fundamental right of the parents to choose their practitioner involved in the case. The following is language from the case:

“Other States have addressed the specific issue in the case at bar and have refused to extend a woman's right to privacy to include her choice of whomever she wishes to assist her during childbirth. See *Leigh v. Board of Registration in Nursing*, 399 Mass. 558, 506 N.E.2d 91 (Mass. 1987) (rejecting claim that regulation of midwifery interferes with any fundamental rights); *People v. Rosburg*, 805 P.2d 432, 437 (Colo. 1991) (holding that the

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<sup>88</sup> *Armstrong v. State*, 1999 MT 261 (Mont. 10/26/1999) at 65

<sup>89</sup> *Armstrong* 1999 Id. at 89

<sup>90</sup> *Armstrong* 1999 Id. at 75

<sup>91</sup> *Armstrong* 1999 Id. at 81

<sup>92</sup> *National Association for the Advancement of Psychoanalysis v. California Board of Psychology* 228 F.3d 1043, 2000 Dily Journal D.A.R. 10685, [8].

right to privacy "does not include the personal choice of whether to utilize a lay midwife to assist in childbirth"); *State v. Kimpel*, 665 So. 2d 990, 994 (Ala. Cr. App.), cert. denied, 116 S. Ct. 674 (1995) (stating that the argument that midwifery statute is unconstitutional because it constitutes an invasion of privacy is without merit); *Bowland v. Municipal Court*, 18 Cal. 3d 479, 134 Cal. Rptr. 630, 556 P.2d 1081 (1976) (holding that state regulation of midwifery should not be reviewed under strict scrutiny standard)."<sup>93</sup>

### **Health Freedom Advocates: Source of Enlightenment for a Young Nation**

These diverging opinions are not uncommon when a young nation is grappling with the true meaning of the constitution. For health freedom advocates, it is important to understand these issues and claim their fundamental and sovereign rights whenever possible.

In court cases where fundamental rights are acknowledged and strict scrutiny is applied, health freedom advocates should point out to the courts that there are new models of legislation available now that are less restrictive than conventional models of regulation, that it truly is possible to leave many of the healing arts in the public domain for individuals to have access to. States are now designing and passing legislation and laws that take into consideration the maximization of health-seeker options and these new laws better reflect the fact that our decision to choose health care options is a fundamental right.

### **Less Restrictive Legislation and the Public Domain**

Health freedom advocates hold that all health options and information should be in the public domain unless the government has shown by clear and convincing evidence that there is a need for police power regulation and any regulation is of the least restrictive means possible to protect fundamental rights.

When courts do not strike down laws that limit health-seeker options because they hold that they do not involve fundamental rights, then there is no demand at the legislature to pass laws that have the least restrictive means of regulation. New cases such as *Andrews v. Ballard* that hold an individual's right to choose the practitioner of their choice to be fundamental, will stimulate closer scrutiny in the legislature of professional regulation statutes.

Already state health freedom advocates are studying professional regulation laws to see how to expand the areas of practice for unlicensed practitioners as well as expand the ability of licensed health care practitioners to practice complementary and alternative medicine without losing their license. Many new and less restrictive laws have been passed reflecting the fundamental rights to choose health care options.

### **NHFC Recommendations for Regulation**

Given the elements of the governments that citizens live under in the United States and in the individual states and the relationships that have been described in this memorandum between an individual person and the government, NHFC has come to the following position statement.

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<sup>93</sup> *Hunter v. State* 676 A.2d 968, Md. App., 1996 at 976

***Impact of Regulation on the Fundamental Right of Privacy To Make Health Care Choices***

by Diane M. Miller JD, Legal and Public Policy Director, National Health Freedom Coalition

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The following three principles are important basic elements of health freedom to consider when reviewing health care occupational regulation:

1. The right to make health care decisions in the manner and type that one prefers is a fundamental privacy right deserving of constitutional strict scrutiny in the event that such right is in danger of infringement.
2. No regulation should be imposed upon a health care trade or occupation without the government first showing by clear and convincing evidence that the unregulated practice of that trade or occupation causes significant harm or danger to the health, safety and welfare of citizens of the state and that the potential for harm is recognizable and not remote
3. Where regulation of a health care trade or occupation is warranted, that the police power for regulation be invoked in the least restrictive means possible and only to the extent necessary for that purpose which is considered to pose the proven harm.

If governments and health freedom advocates follow these principles when regulating health care practitioners NHFC believes there will be a free and healthy society and a robust information exchange and that those freedoms will support and empower health-seekers to promote their own health and to make sound decisions actively participating in their own health care.

The principles set forth in this document reflect the understanding that health freedom is a fundamental constitutional right of privacy.