

**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
THIRTIETH LEGISLATURE, 2020**

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**ON THE FOLLOWING MEASURE:**

S.B. NO. 2541, S.D. 1, RELATING TO MASSAGE THERAPISTS.

**BEFORE THE:**

HOUSE COMMITTEE ON INTRASTATE COMMERCE

**DATE:** Thursday, March 12, 2020

**TIME:** 9:30 a.m.

**LOCATION:** State Capitol, Room 430

**TESTIFIER(S):** Clare E. Connors, Attorney General, or  
Christopher J.I. Leong, Deputy Attorney General

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Chair Ohno and Members of the Committee:

The Department of the Attorney General provides the following comments.

The purposes of this bill are to (1) require massage therapy licensees to complete twelve hours of continuing education within the two-year period preceding each renewal date, beginning with the renewal for the licensing biennium commencing July 1, 2022 and (2) update advertising restrictions and penalties.

The portion of this bill that prohibits certain advertisements on the internet and social media platforms may be subject to challenge under the Free Speech Clauses of the United States Constitution (First Amendment) and the Constitution of the State of Hawaii (article I, section 4). Both clauses forbid the enactment of laws abridging the freedom of speech. The United States Supreme Court has established that commercial speech, such as advertising, is not stripped of First Amendment protection simply because it proposes a commercial transaction. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980). In the commercial speech context, although a state may prohibit misleading advertising, it may not place an absolute prohibition on potentially misleading information if the information may also be presented in a way that is not deceptive. *See In re R.M.J.*, 455 U.S. 191, 203 (1982).

Thus, we have previously opined that the complete restriction in section 452-23(a)(4), Hawaii Revised Statutes (HRS), against “pictures depicting the human form other than hands, wrists, and forearms” is broader than reasonably necessary to remedy the perceived harm that gave rise to its enactment, because such advertising is

not *per se* misleading or deceptive. See *attached* Attorney General Opinion No. 98-02, dated March 3, 1998. Because section 452-23(a)(4), HRS, may be overbroad and infringe upon commercial speech rights, the amendment to this section on page 4, lines 15-17, may similarly be subject to the same constitutional infirmity.

Thank you for the opportunity to provide comments.

**Testimony of the Board of Massage Therapy**

**Before the  
House Committee on Intrastate Commerce  
Thursday, March 12, 2020  
9:30 a.m.  
State Capitol, Conference Room 430**

**On the following measure:  
S.B. 2541, S.D. 1, RELATING TO MASSAGE THERAPISTS**

Chair Ohno and Members of the Committee:

My name is Risé Doi, and I am the Executive Officer of the Board of Massage Therapy (Board). The Board supports this bill with suggested amendments.

The purposes of this bill are to: (1) require massage therapy licensees to complete 12 hours of continuing education (CE) within the two-year licensing period preceding the renewal date, two hours of which shall include first aid, cardiopulmonary resuscitation, or emergency related courses, beginning with the renewal cycle for the licensing biennium commencing July 1, 2022, and every biennial renewal thereafter; and (2) update advertising restrictions and penalties.

The Board reviewed and discussed S.B. 2541 at its meeting on January 29, 2020. The Board respectfully requests amending the July 1, 2022, commencement date on page 1, line 12, and page 3, line 6 of the bill to July 1, 2024. This date will allow the Board to provide ample notice to affected licensees of the CE requirement and for licensees to meet that requirement prior to license renewal.

In addition, the Board requests language that would require a random audit of the continuing education hours for renewal, similar to language other licensing boards have regarding CE requirements, as this will help the Board enforce the CE requirements while reducing the workload in verifying CE compliance. The Board recommends adding language that would allow massage therapists licensed during the second year of the biennium to begin meeting the CE requirements in the following biennium. To that end, the Board respectfully requests adding a subsection (c) to section 2 of the bill:

(c) The board may conduct random audits of licensees to determine compliance with the continuing education requirement. The board shall provide written notice of an audit to a licensee randomly selected for audit. Within sixty days of notification, the licensee shall provide the board with documentation verifying

compliance with the continuing education requirement established by this section."

Thank you for the opportunity to testify on this bill.



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March 12, 2020

Aloha Chair Ohno, Vice Chair Kobayashi, and Members of the House Committee on Intrastate Commerce:

My name is Olivia Nagashima and I am testifying in my role as the President of the American Massage Therapy Association – Hawaii Chapter. More than 8,000 state licensed massage therapists currently practice in Hawaii.

Our chapter **supports Senate Bill 2541 SD1** with some suggested amendments. We view this bill as an effort to elevate the massage therapy profession to the highest standards of quality and safety. By requiring 12 hours of continuing education courses every two years, including CPR training, Hawaii residents can be assured they are being treated by a professional who has studied the most current trends and best practices of our industry. For context, continuing education is something that many states require when relicensing massage therapists.

We ask that the committee consider two amendments. The first amendment is to delete Section 3 of the bill that updates the advertising restrictions based on the Attorney General's testimony and concerns from some stakeholders. We also support the Board of Massage Therapy's proposed amendment to make the continuing education requirement effective on July 1, 2024.

Thank you for the opportunity to submit testimony and we urge you to pass SB2541 SD1 with the proposed amendments outlined above.

#### **AMTA Board of Directors**

**President** Christopher Deery | **President-Elect** Angela Barker | **Immediate Past President** Joan Nichols

**Directors** Steve Albertson, Christine Bailor-Goodlander, Michaele Colizza, Robert C. Jantsch, Kimberly Kane-Santos, Patty Phillips, Scott Raymond, Ed Sansbury, LaDonna Ward | **Executive Director** Bill Brown

**Re:** SB2541 SD1. Relating to Massage Therapists

**Hearing:** Thursday, March 12, 2020, 9:30am by IAC in Rm 430

**Person Testifying:** Dr. Mark Olson,  
Director, Pacific Center for Awareness and Bodywork. Kauai.

**Position:** Support with Amendments (Otherwise Oppose)

Honorable Rep Takashi Ohno (Chair), Rep Dale Kobayashi (Vice-Chair), and IAC Committee Members,

I support the general intent of SB2541, **but key amendments are essential**. The general purpose of this bill, to require Continuing Education credits for massage licensing renewal, is a small, positive step for promoting professional growth amongst healthcare professionals and aligning the standards of the massage therapy profession in Hawaii to that of most mainland states.

But this bill also contains language that serves to significantly **undermine legitimacy** for all healthcare professionals working as massage therapists and create **undue hardship** for businesses and entrepreneurs. Section 3 takes a discriminatory and demeaning portion of the current law that only allows images of hands, wrists, and forearms in print advertising and expands this restriction to all internet advertising. No other profession, and certainly no other healthcare profession, has laws that restrict practitioners from using an image of one's face in an advertisement, and it makes the least amount of sense to make such a law for a profession where seeing an image of the practitioner helps the client feel comfortable and safe. Quite honestly, it's shocking that adding something this burdensome and absurd would even be considered when the bill should be removing the original language restricting print advertising instead.

I have spoken with the head of the division of the American Massage Therapy Association (AMTA) that works with massage therapy legislation, and he made it clear that this portion of the bill is unconstitutional, unenforceable, and not supported by the AMTA.

Here are some reasons why this bill MUST NOT add the language restricting internet advertising to show only hands, wrists, and forearms:

1. Many forms of massage therapy use feet instead of hands, so an advertisement showing only hands would be inaccurate.
2. Showing one's face is a standard practice in most professions, especially all healthcare professions where seeing one's face helps to establish a human connection. No other profession prohibits showing one's face in any advertising.
3. Most massage therapists already have websites with an image of themselves. Even some of the members of the Hawaii Massage Board who have testified in support of this bill have websites showing their face and the face of other therapists in their clinic. This is normal and shouldn't be changed.

4. It is absolutely impossible to advertise in 2020 without the use one's own professional website and social media (Facebook, Instagram, Yelp, You-tube, Twitter, LinkedIn, TripAdvisor, etc.), and it would be absolutely impossible to not have images of one's face on any of those platforms. This creates an undue hardship for businesses and entrepreneurs.
5. The most effective advertising online involves making educational You-tube videos to be shared. It's simply absurd to think that this would become illegal or that one could somehow post a video that doesn't show more than hands and forearms.
6. Extending an already archaic and backwards restriction into the digital realm is absurd and ridiculous. As noted previously by the Hawaii AG, it's likely a violation of free speech and is unenforceable in both the print and digital realms.

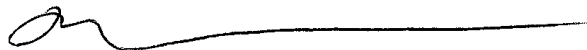
In addition, it should be noted that the current law needs to be modernized to allow practitioners to also use the term "therapeutic bodywork", which is a standard term in the massage and bodywork profession and an important distinguishing term for many practitioners. Note, for instance, that the name of my school includes the term "Bodywork", not "Massage".

Please pass this bill, but don't pass it without making the following amendments:

1. **Remove all new language in Section 3 that extends the advertising restrictions on images (Section 452-23, subsection a-4) to the internet.**
2. **Remove subsection a-4 entirely from Section 452-23.** This advertising restriction has no place in any profession, not just online but for print as well. It should have never been written into law in the first place.
3. **Change 452-23, subsection a-5 to read "By using any term other than therapeutic bodywork, therapeutic massage, or massage therapy to refer to the service"**

Thank you for your time and attention to this matter.

Sincerely,



Mark Olson, Ph.D.  
Director, Pacific Center for Awareness and Bodywork



# Kaua'i Massage Therapy

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March 11, 2020

Re: **SB2541 SD1**

Hearing: March 12, 2020 9:30am by IAC in House Conference Room 430

Position: **Support with Amendments (Otherwise, Oppose)**

Aloha Chair Ohno, Vice Chair Kobayashi and members of the House Committee on Intrastate Commerce,

I have been a licensed massage therapist in the State of Hawaii since 2012, MAT #12742 with no violations and I can only SUPPORT SB2541 SD1 with AMENDMENTS. I support the portion of the bill that requires 12 CE hours including 2 hours of emergency related training. I support the intent of the bill to distinguish legitimate, licensed massage therapists and bodyworkers from those performing illegal activities such as prostitution and sex work. However, the internet advertising requirements would prove to be an undue hardship on many small massage businesses and entrepreneurs in this State. It would also cause in some cases, a misrepresentation of certain legal and accredited modalities in the massage therapy profession, thereby misleading the consumer. I request therefore that this bill **be amended to remove the language pertaining to Internet advertising restrictions and further amend the statute to remove the advertising restrictions on print materials.**

The bill states that it would be a violation to advertise on the internet using pictures "depicting the human form other than hands, wrists, or forearms". Many legal, accredited, licensed and regulated massage modalities, including Lomi Lomi, Step Lomi Lomi, Thai Massage, Ashiatsu, and Sarga Bodywork require the therapist to use his or her entire body, including knees and feet. In order to represent these modalities accurately to the clients, we must be able to visually demonstrate the ways they differ from more commonly understood modalities. How can we accurately represent these modalities if we do not include a picture of the rest of the therapist while working? A picture is worth a thousand words, especially in advertising.

Furthermore, no other profession involving touch is regulated in such a way in the State of Hawai'i. Chiropractors, Physical Therapists, Naturopaths, Midwives, Medical Doctors, etc. are all able to post headshots and/or shots of them working





# Kaua'i Massage Therapy

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with clients without regard for showing their form or face. Why should educated, licensed professionals be restricted and penalized for the illegal activities of other individuals?

This provision would not only be difficult for the business to manage; it is unclear how the Board of Massage Therapy would manage to enforce it. Today's world requires businesses to advertise in a variety of ways. Limiting representation on the "internet" would require a small business to edit and curate photos for over 10 sites and apps and consistently monitor what others may post of them. These sites include Instagram, Facebook, Yelp, TripAdvisor, YouTube, Twitter, Tumblr, and other review and scheduling sites. In some cases, the therapist may not even know that the listing exists for their business.

What if someone has built a brand over years? Are they expected to go back and track down every photo on every site and edit it? In some cases, as with Instagram, it is not possible to retroactively edit photos, so you would be asking the business to damage their brand by deleting all their carefully, and often expensively, curated content. Some sites, such as Trip Advisor and Yelp encourage customers to post photos. For example, sometimes at an outcall session, a client's spouse or friend may take a picture of a therapist while he or she is working or the therapist may be working at a public event and many people take photos or video and post them. How is the therapist to be expected to regulate other people's actions on the internet? The task would be impossible.

The scope of practice of massage therapy allows massage therapists to provide educational information, such as stretching and other self-care tips to their clients. Many therapists and businesses have created videos on YouTube, Facebook, and Instagram for this purpose. How are they supposed to show stretching techniques for different areas of the body and edit out the body?

The bill also mandates that the therapist list their license number on internet advertisements. However, it does not give consideration to the way different internet platforms, including websites, work. For example, does the license number need to be on the profile of a social media site or in every single post? Does the license number need to be on the About page of a website or on every single page? Does it need to be in the footer? Does it need to be in every appointment reminder and newsletter? This is much more straightforward with a print piece but as you can see, quite complex when applied to the "internet".



## Kaua'i Massage Therapy

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Finally, the Hawai'i State Attorney General has written in two separate testimonies to the State Senate that the advertising restrictions "are overly broad and infringe upon the commercial speech rights afforded by the First Amendment" of the U.S. Constitution.

It is for all of these reasons, that I can only support this bill if it is amended to strike the requirement of internet advertising photos to be limited to "forearms, wrists, and hands".

I do support the bi-annual requirement of 12 CE hours including 2 hours of emergency related training and CPR.

Mahalo for your consideration,

Lana Olson

Owner and Principal Therapist, Kaua'i Massage Therapy

**SB-2541-SD-1**

Submitted on: 3/11/2020 7:14:54 AM

Testimony for IAC on 3/12/2020 9:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Lorn	Individual	Support	No

Comments:

Aloha,

Now its time to stand up for the people you represent. In all sincerity the state economy stands on the shouders of the workers. Its time they get a decent wage and \$13 is not a living wage. It would be resposible for you to support at least a \$17 minimum wage is a quick timeframe.

Thanks for your anticiapted support,

Lorn DOuglas

**SB-2541-SD-1**

Submitted on: 3/11/2020 9:05:59 AM

Testimony for IAC on 3/12/2020 9:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Dean Gross	Individual	Oppose	No

## Comments:

I oppose due to language around the use of photographs online. I am licensed in two states, the other being in Oregon, where face pictures are permissible in massage therapy advertising, despite Oregon's otherwise strict enforcements around all things massage-related. It would cause undue hardship as outlined by some of my peers who have also submitted testimony. Also I would like the continuing education requirements to include language that allows credits used to uphold licensure in other states to automatically apply to Hawaii licensure as well. Thank you for understanding.

**LATE**

**SB-2541-SD-1**

Submitted on: 3/11/2020 9:33:04 AM

Testimony for IAC on 3/12/2020 9:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Darci Frankel	Individual	Oppose	No

Comments:

**Re:** SB2541 SD1. Relating to Massage Therapists

**Hearing:** Thursday, March 12, 2020, 9:30am by IAC in Rm 430

**Person Testifying:** Darci Frankel

Massage therapist, Spa Owner, Hanalei Day Spa, Kauai.

**Position:** Oppose

Honorable Rep Takashi Ohno (Chair), Rep Dale Kobayashi (Vice-Chair), and IAC Committee Members,

I oppose this bill and the general intent of SB2541

This bill contains language that will cause serious financial harm to the profession, Massage Therapists, it is likely unconstitutional and enforcement will be impossible and expensive for the Board.

Here are some reasons why this bill MUST NOT add the language restricting internet advertising to show only hands, wrists, and forearms:

1. The State Attorney General gave testimony indicating that this could be a potential violation of the constitutional right to Free Speech.
2. As you may know many forms of massage therapy use feet instead of hands, so an advertisement showing only hands would be inaccurate.

2. Showing one's face is a standard practice in most professions, especially all

healthcare professions where seeing one's face helps to establish a human connection. No other profession prohibits showing one's face in any advertising.

3. It is impossible to advertise in this day and age without the use of one's website and social media (Facebook, Instagram, Yelp, You-tube, Twitter, LinkedIn, TripAdvisor, etc.). It would be impossible to not have images of the person's face on these platforms.

Furthermore, the act of erasing one's face and other's people's faces from these platforms will be equally impossible. Redoing all the marketing material alone would be an extreme financial hardship to people in our profession.

4. Many massage therapists already have websites and profiles with their pictures. In fact members of the Hawaii Massage Board who have testified in support of this bill have websites showing their face and the face of other therapists in their clinic. This is a reasonable and customary practice, which should continue.

5. The board may not know but one of the most contemporary and effective advertising practices is youTube Videos. How could one share educational and therapeutic videos that only show hands and forearms.

6. Has anyone given thought to how this egregious law would be enforced?

7. This aspect of the Hawaii law should not even exist at all, but to extend it into the digital realm is absurd. Furthermore, it is highly likely that it is a violation of free speech and is unenforceable in both the print and digital realms.

Please do not pass this bill

Thank you for your time and attention to this matter.

Sincerely,

Darci Frankel, Hanalei Day Spa

**LATE**

**SB-2541-SD-1**

Submitted on: 3/12/2020 7:25:28 AM

Testimony for IAC on 3/12/2020 9:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
jenica springer	Individual	Oppose	No

Comments:

Position: SUPPORT WITH AMENDMENTS

Aloha Chair Ohno, Vice Chair Kobayashi and members of the House Committee on Intrastate Commerce,

I have been a licensed massage therapist in the State of Hawaii since 2012, MAT #12742 with no violations and I can only SUPPORT SB2541 SD1 with AMENDMENTS as the internet advertising requirements would prove to be an undue hardship on many small massage businesses and entrepreneurs in this State. It also would cause in some cases, a misrepresentation of certain modalities in the profession, thereby misleading the consumer.

The bill states that it would be a violation to advertise on the internet using pictures depicting the human form other than hands, wrists, or forearms. Many legitimate licensed and regulated massage modalities, including Lomi Lomi, Thai Massage, Ashiatsu, and Bodywork require the therapist to use his or her entire body, including knees and feet. How can we accurately represent these modalities if we do not include a picture of the rest of the therapist while working? A picture is worth a thousand words, especially in advertising.

Furthermore, no other profession involving touch is regulated in such a way. Chiropractors, Physical Therapists, Naturopaths, Midwives, Medical Doctors, etc. are all able to post headshots and/or shots of them working with clients without regard for showing their form or face.

The practice of massage therapy allows massage therapists to provide stretches and other self care tips to their clients. Many therapists and businesses have created videos on YouTube, Facebook, and Instagram for this purpose. How are they supposed to show stretching techniques for different areas of the body and edit out the body?

The other parts of this bill requiring the posting of the license number on the Internet are mostly fine, but it would need to be clarified. Does the license number need to be on every single post and page, or just on the about page/profile? This is obviously much simpler with a print piece than it is with the internet.

I can support the 12 CE hours requirement and the 2 hours of emergence related training that goes with it, as well as not writing out physical qualities of the practitioner (although certainly you would want to know that your massage therapist is strong and hygienic and those could be considered physical qualities), however, I must OPPOSE SB2541 SD1 as written with the unrealistic and unnecessary regulation of limiting practitioner photos to hands, wrists, and forearms.

Mahalo for your consideration,

Jenica Springer

Owner and Principal Therapist, Kaua'i Massage