

# LOCAL GOVERNMENT GUIDE

## *Illegal Massage Business Eradication Toolkit*



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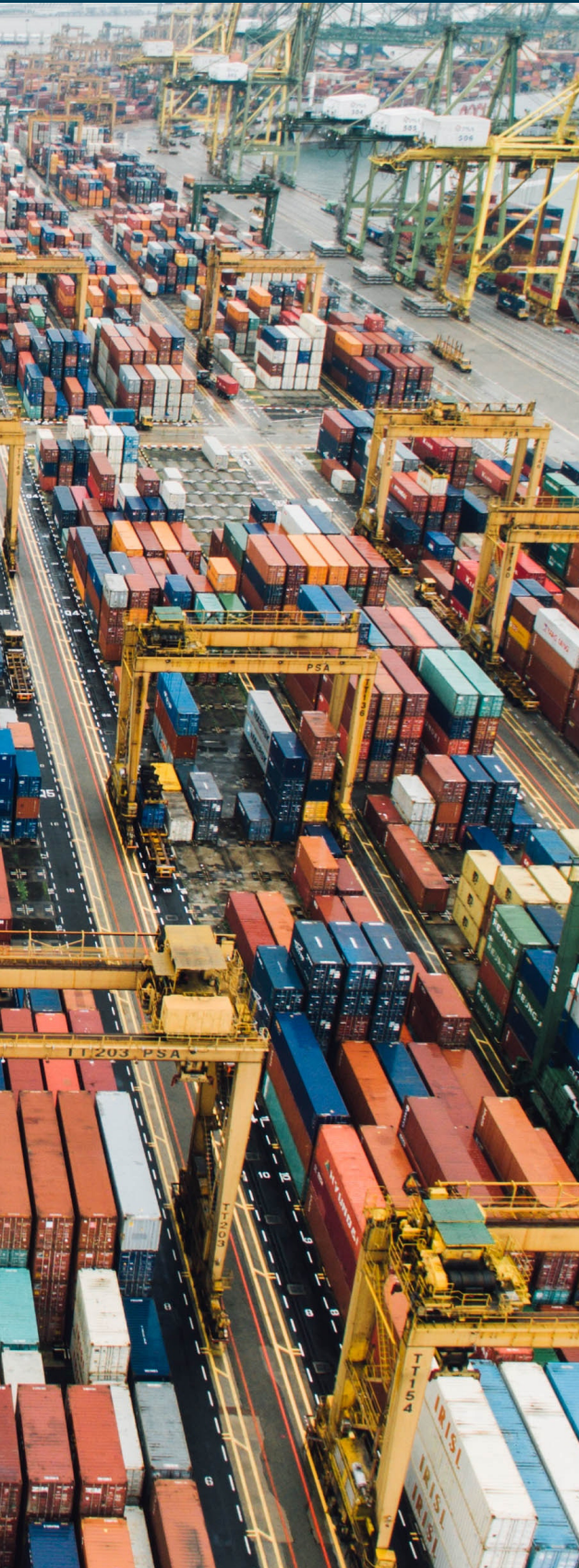
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*"The customers rarely seemed to grasp that the women were captives. They didn't see the other rooms: the kitchen in the back with the overflowing ashtrays, the overloaded electrical outlets for the rice cookers and frying pans, the washer-dryers & the security cameras. These so-called spas were as tightly run as maximum-security prisons: Without permission, no one got in—or out ... Most people who are aware of the existence of human trafficking think that it happens in faraway places, like war-torn countries in the former Soviet Union, Southeast Asia, or Eastern Europe. Few can imagine that slaves are brought into the U.S. to work in restaurants, factories & sexually oriented businesses. In fact, across the country, tens of thousands of people are being held captive today."*

# SCOPE OF THE PROBLEM

There are nearly 9,000 IMBs in the United States and nearly 700 illicit massage businesses (IMBs) blight the Texas landscape. [1-2] These typically unlicensed operations are fronts for prostitution, and many engage in human trafficking. Although IMBs are undeniably prevalent in large cities like Houston and Dallas, they are increasingly infiltrating smaller cities, towns, and suburbs. Law enforcement spends a disproportionate amount of time patrolling these locations, sapping local departments' time and resources, but their proliferation continues, making the communities they inhabit less safe. Meanwhile, the women trapped in these storefronts are forced to provide sexual services to as many as ten men a day. These cash-only businesses attract violent crime, and surrounding neighborhoods and residents suffer an overall poorer quality of life. IMBs also tarnish the reputation of legitimate massage therapy by using a needed and respected service as cover for despicable criminal acts.

Counter to popular perception, IMBs are not relegated to only the seedy parts of town. In fact, when CHILDREN AT RISK mapped out suspected IMBs around the state, we found IMBs were often located in or near affluent areas. [3] This is probably because the men who frequent IMBs come from a wealthier demographic than those who seek to buy prostituted individuals on the street.

IMBs operate out of brick and mortar establishments, and are a contemporary manifestation of a historic brothel. The vast majority occupy leased commercial space. These fronts for human trafficking are located next to daycare centers, beside veterinary offices, and a few doors down from craft stores. In fact, CHILDREN AT RISK estimates that around 35,000 Texas children attend school within 1,000 feet of an IMB, and over 900,000 children attend school within a mile of at least one. [4] Within the larger commercial landscape, IMBs are no longer concentrated in red light districts by social pressures or policing.



*"I didn't know I was the victim of anything except circumstance."*

-Caitlin Kelly Lawrence, sex trafficking survivor (taken from the U.S. Dep't of State Trafficking in Persons Report (2017))



Law enforcement departments typically seek to combat IMBs through sting operations. But these stings usually result only in victim arrests for prostitution. The arrested victims will rarely testify against the IMB owner/operators due to fear, intimidation and other factors and are unlikely to raise trafficking as an affirmative defense to the charges brought against them. Their traffickers often falsely claim to have law enforcement connections, further intimidating their victims, and many of the women are from countries where corruption is commonplace. Even if they do trust the government to protect them, many have family in their home country that could be in danger from the network of exploiters [5].

IMBs violate a wide array of state and federal criminal laws. Not only do they engage in severe forms of trafficking, they are also part of larger hubs of human and sex trafficking networks which flow transnationally. In addition to sex trafficking, these establishments engage in debt bondage, along with organized criminal activities such as money laundering, immigration fraud, smuggling, wage and hour violations, and tax evasion. Each node in this "trafficking hub" presents a possible opportunity for local intervention and prevention.

IMBs are hidden in plain sight in our hometowns and communities. These illicit establishments violate a multitude of state and federal laws. Often, IMBs operate in violation of zoning, licensing, and regulatory municipal ordinances. By adopting a problem-oriented approach to IMBs and human trafficking, cities and towns can take a proactive and preventative approach to shut down existing IMBs and prevent more from opening. Existing state laws can fortify local ordinances and regulations. Local law enforcement can utilize a number of existing laws to inspect and deter IMBs. The following toolkit for municipalities explains how these resources can be maximized to to eradicate IMBs in our cities and in the State.

700+

*700+ Illicit massage businesses  
in Texas*

1,214

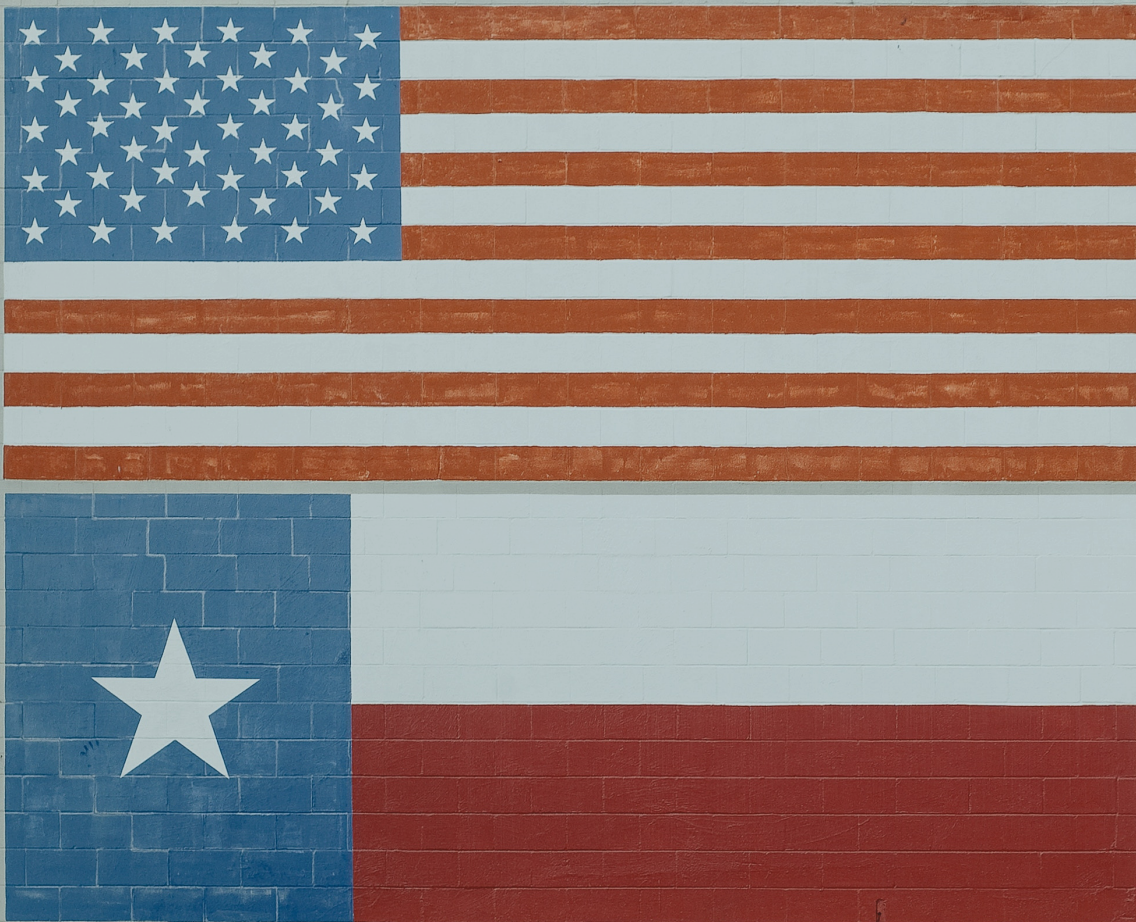
*1,214 incorporated  
municipalities in Texas*

35,000

*35,000 Texas children attend  
school within 1,000 feet of an illicit  
massage business*

# LOCAL GOVERNMENT GUIDE

## *Municipal Ordinance Drafting*



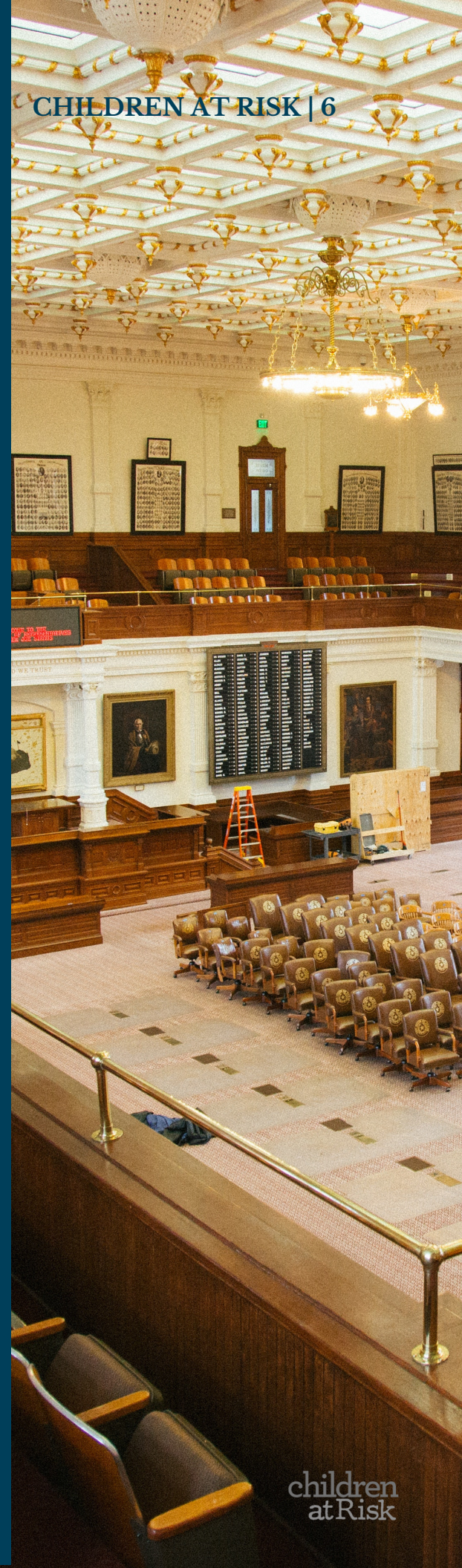


# EXECUTIVE SUMMARY

Municipalities hoping to eradicate illicit massage establishments do not have to rely on the state regulations alone. Texas has been on the forefront of powerful state statutes and regulation aimed at eradicating illicit massage businesses. However, the main regulatory agency—the Texas Department of Licensing and Regulation—is often understaffed and resource constrained. Under delegations of the police power, municipalities can regulate IMBs to protect the public health, welfare, and general safety.

There are nearly 700 IMBs operating in Texas alone, and they are becoming more common in smaller cities and towns. Local governments are uniquely situated to be responsive to the need of their inhabitants. Thus, this ordinance drafting toolkit does not present a one size fits all approach. Rather, it presents several different approaches a municipality can adopt, allowing respective municipal legislators to determine which approach and provisions are appropriate for their community.

This toolkit examines key municipal provisions that target sex trafficking in IMBs and outlines best practices for drafting a municipal ordinance, including purpose, scope, and penalty provisions. The toolkit also analyzes the advantages and disadvantages of adopting a municipal permitting scheme and implementing operational requirements. Finally, the report explores zoning/land use regulations and building code/structural regulations that could be used to regulate IMBs.





# KEY PROVISIONS TO TARGET TRAFFICKING

*Municipalities that have illicit massage establishments in their communities do not have to solely rely on state regulations. Through various delegations of police powers, municipalities have the authority to enact ordinances to regulate these businesses which are fronts for prostitution at the very least & are often fronts for human trafficking. By enacting key provisions, municipalities can regulate these illicit businesses while investigating human trafficking, holding property owners accountable, & avoiding additional victimization of human trafficking victims. For municipalities that wish to adopt a proactive response to eradicating the IMBs in their community, the following provisions are key to targeting & eliminating human trafficking.*

## 01

## Require a State License for Massage Establishments.

Municipalities can regulate IMBs through already-existing authority within state regulations by enacting a provision that would apply to any massage establishment or business advertising massage services. The ordinance should explicitly require that qualifying establishments must possess the required license issued by the Texas Department of Licensing & Regulation (TDLR). Existing State Regulations give municipalities the authority to inspect and enforce regulations under the relevant chapters of the Texas Occupations Code and the Texas Administrative Code.

## 02

## Prohibit an owner/operator of a massage establishment from employing unlicensed practitioners.

Municipalities can track the state requirements, making it illegal for a massage establishment to employ an individual who is unlicensed and performs “massage therapy” or advertise that “massage therapy/services” are performed. Victims of trafficking working in these establishments are usually unlicensed to perform massage. Such a provision holds the owner/operator of the establishment—the trafficker—accountable for the victim’s exploitation.

## 03

## Require all state licenses to be posted, for both massage therapists & establishments.

Municipalities can supplement their provisions by explicitly requiring massage therapist and establishment licenses to be displayed, as required by state regulations.

## 04

**Hours of Operation.**

It is quite common for illicit massage establishments to operate during late night hours when legitimate massage establishments are not in operation. Municipalities wishing to combat human trafficking and IMB activity can implement a municipal ordinance regulating operating hours. These ordinances have been upheld by appellate courts because the massage industry has traditionally been heavily regulated, and, in comparison to other industries, massage establishments are more likely to be subterfuges for prostitution and human trafficking.

*"Department inspection reports described women inside the spas living in tight quarters cluttered with essentials, including rolling bath carts stuffed with toiletries, shelves lined with coffee mugs & cooking pots and stashes of assorted snacks. The women slept on individual cots & in some cases appeared to keep their belongings & blankets inside locked plastic trunks."*

## 05

**Prohibit connection to residential areas or living quarters.**

Many IMBs force trafficked women to live on-site at the premises, often times operating 24 hours/day. While state regulations address access to living areas, IMBs can force victims of trafficking to reside on the premises while remaining compliant with state regulations. Municipalities can adopt a proactive approach and address this gap by implementing municipal regulations. Enacting such ordinances, as an effort to regulate massage therapy, can also enhance the efficacy of the enforcement of zoning ordinances and building code regulations.

## 06

## Unlawful Advertisements.

Municipalities should implement a provision regulate advertisements, similar to the Administrative Code. IMBs advertise themselves as offering legitimate services and/or covertly advertising illicit services. The Texas Administrative Code prohibits any unlicensed person from using “massage” on any sign, display, or other form of advertising, and those advertising massage services must also be compliant with local ordinances. Unlawful IMB advertisements are considered a false, misleading, or deceptive trade practice under the Deceptive Trade Practices Act. Municipal ordinance violations can be introduced as evidence in both a DTPA action and a Chapter 125 nuisance and abatement action.



*"The ubiquity of the massage parlors offers an accessibility & sheen of normalcy not offered by traditional brothels. And as the massage parlors have expanded even into small-town America in recent years, meticulously detailed review sites like Rubmaps have served as the Yelp & Foursquare of the illicit parlor business, with graphic anatomical descriptions of the women & explicit breakdowns of the sexual services proffered."*

Nicholas Kulish, Frances Robles, & Patricia Mazzei, Behind Illicit Massage Parlors Lie a Vast Crime Network & Modern indentured Servitude, N.Y. Times, Mar. 2, 2019.  
available at: <https://www.nytimes.com/2019/03/02/us/massage-parlors-human-trafficking.html>



*More than 9,000 illicit massage businesses operate as fronts for selling commercial sex in the United States*

**8,222**

*Starbucks has approximately 8,222 company-operated stores in the United States.*

# Texas Local Government

**T**he authority of a Texas city to enact and enforce ordinances is conditional to how the city is incorporated. An ordinance is defined as “a local law of a municipal corporation, duly enacted by the proper authorities, prescribing general, uniform, and permanent rules of conduct relating to the corporate affairs of the municipality.”<sup>1</sup>

Municipal corporations are public corporations and political subdivisions of the State of Texas, which are established for the state’s benefit.<sup>2</sup> A political subdivision may exercise whatever portion of state power that the State, under its own constitution and laws, chooses to delegate to the subdivision.<sup>3</sup> Municipalities in Texas can be divided into three general categories—general law, special law, and home rule municipalities. A municipality is not considered a corporation under a state statute governing corporations unless the statute extends its application to a municipality by the express use of the term “municipal corporation,” “municipality,” “city,” “town,” or “village,” regardless of whether the municipality is acting in a governmental or proprietary function.<sup>4</sup> Laws expressly applicable to one category of municipalities are not applicable to the others.<sup>5</sup>

Municipalities in Texas have been able to incorporate as home-rule municipalities, general law municipalities, or special law municipalities. The Texas Local Government Code subdivides general law municipalities into three types: A, B, and C. However, municipalities can no longer incorporate as a municipality under local or special laws, as this is no longer permitted by the Texas

constitution.<sup>6</sup> As a result, cities and towns must now incorporate either under the general laws of the state<sup>7</sup> or under home-rule charters.<sup>8</sup>

To have the authority to enact and enforce specific ordinances, a municipality must derive its authority from some state power. A home rule municipality directly derives its power from the Texas Constitution and has the “full power of local self-government” and of the State.<sup>9</sup> The home rule municipality’s power can only be limited by the Texas Legislature, and only if it is done so with unmistakable clarity and intention.<sup>10</sup> In contrast, general law municipality possesses only those powers and privileges the State expressly confers to them.<sup>11</sup> Once a town is incorporated as a general law municipality, it must look to the general laws of the state (e.g., the Texas Local Government Code) for its authority to act.

## STATE LAW GOVERNING MUNICIPALITIES—THE AUTHORITY TO ENACT ORDINANCES

The Texas Local Government Code functions as an enabling act for municipal and county governments. Specifically, Title 2, Subtitle D of the Local Government Code outlines the general powers municipalities possess in relation to ordinances. The following sections will detail the powers discussed in Chapter 51 and Chapter 54 of the Local Government Code. Chapter 51 delineates the general powers municipalities possess, and Chapter 54 relates to the Enforcement Power of municipal ordinances.

## GENERAL POWER OF MUNICIPALITIES

Chapter 51 of the Texas Local Government Code delineates some of the basic authority which general law municipalities possess to enact ordinances. Both general law and home rule municipalities are granted implied powers under the Local Government Code, Section 51.001:

“The governing body of a municipality may adopt, publish, amend, or repeal an ordinance, rule, or police regulation that is for the good government, peace, or order of the municipality or for the trade and commerce of the municipality ... and is necessary or proper for carrying out a power granted by law to the municipality or to an office or department of the municipality.”<sup>12</sup>

A Type-A general law municipality may adopt an ordinance, act, law, or regulation, “not inconsistent with state law, [as it] is necessary for the government, interest, welfare, or good order of the municipality as the body politic.”<sup>13</sup> By comparison, Type-B general law municipalities the authority to, “adopt an ordinance or bylaw, not inconsistent with state law, that the government body considers proper for the government of the municipal corporation.”<sup>14</sup> Section 51.051 makes either of the above provisions applicable to Type-C general law municipalities, depending upon the size of the municipality.<sup>15</sup>

Additionally, Texas law allows general law municipalities the ability to “borrow” power of a different type of city in many cases. Under section 51.035, Type-B municipalities have the same authority, duties, and privileges as a Type-A municipality, “unless the type-B general-law municipality in exercising the authority or privilege or performing the duty would be in conflict with another provision of this code or other state law that relates

specifically to type-B general-law municipalities.”<sup>16</sup>

## THE MUNICIPALITY’S AUTHORITY TO ENFORCE ENACTED ORDINANCES

Ordinances, like statutes, will normally contain provisions related to penalties.<sup>17</sup> Chapter 54 of the Local Government Code gives the governing body of the municipality the power to enforce each rule, ordinance, or police regulation of the municipality, or punishing violations thereof.<sup>18</sup> The municipality generally cannot impose a fine for a violation of a municipal ordinance which exceeds \$500,<sup>19</sup> unless the ordinance governs fire safety, zoning, or public health and sanitation.<sup>20</sup> A municipality may also enforce an ordinance through a civil action if the ordinances are related to the public health and safety of the municipality. Specifically, the Local Government Code enables municipalities to maintain a civil action for ordinances related to:

- the preservation of public safety, relating to the materials or methods used to construct a building or other structure or improvement, including the foundation, structural elements, electrical wiring or apparatus, plumbing and fixtures, entrances, or exits; the preservation of public health or to the fire safety of a building or other structure or improvement, including provisions relating to materials, types of construction or design, interior configuration, illumination, warning devices, sprinklers or other fire suppression devices, availability of water supply for extinguishing fires, or location, design, or width of entrances or exits;
- zoning that provides for the use of land or classifies a parcel of land



- according to the municipality’s district classification scheme;
- civil penalties under this subchapter for conduct classified by statute as a Class C misdemeanor;<sup>21</sup>

Venue is mandatory in the district court or county court at law of the county where the municipality is bringing the action.<sup>22</sup>

Preference in trial settings are given to actions where the municipality can demonstrate a delay would unreasonably endanger persons or property, which is submitted by a verified motion to the court.<sup>23</sup> Trial courts give primary priority to hearings or trials related to temporary injunctions, among other enumerated instances.<sup>24</sup> The Government Code also outlines secondary priorities in trial settings. These secondary priorities must yield to the instances identified under primary priorities, and include:

- “... matters where delay will cause physical or economic injury to either the parties or the public”;
- “... matters involving substantial substantive or constitutional rights should take precedence over matters involving permits, licenses, or privileges,” and;
- “... matters involving important issues that greatly concern the public or materially affect the public welfare.”<sup>25</sup>

If a municipality elects to bring a civil action to enforce the ordinances listed in Section 54.012, the municipality only needs to allege in its pleadings, “(1) the identification of the real property involved in the violation; (2) the relationship of the defendant to the real property or activity involved in the violation; (3) a citation to the applicable ordinance; (4) a description of the violation; and (5) a statement that this subchapter applies to the ordinance.”<sup>26</sup> However, the standard of proof

remains the same as for other suits of extraordinary relief.<sup>27</sup> Under Chapter 54 of the Local Government Code, a defendant cannot be subject to personal attachment or imprisonment for the failure to pay a civil penalty assessed against them.<sup>28</sup>

## EQUITABLE RELIEF— INJUNCTIONS

The municipality is entitled to several forms of relief, including an injunction. The municipality does not have to meet the stringent common-law standard for injunctive relief. Thus, the municipality does not need to show that no other adequate remedy or penalty for the violation exists, nor does the municipality need to show that a criminal prosecution has occurred or been attempted to obtain the injunction.<sup>29</sup>

To successfully enjoin the defendant’s actions, the municipality must initially show substantial danger or injury, or an adverse health impact to any person, or to the property of any person, other than the defendant.<sup>30</sup> The proper defendants, when seeking an injunction as relief, are the owner or the owner’s representative with control over the premises.<sup>31</sup> The scope of the injunction is limited and can only prohibit specific conduct which violates the ordinance or require specific conduct necessary to comply with the ordinance.<sup>32</sup>

## CIVIL PENALTIES

In some suits, the Local Government Code allows the municipality to recover a civil penalty from the defendant. The municipality may also recover a civil penalty in a suit against the owner (here property owner) or the owner’s representative who exercises control over the premises. In such a case, the municipality must demonstrate that the

defendant was notified of the provisions of the ordinance and, after receiving such notice, committed acts which violated the ordinance

or failed to act in a way necessary to comply with the ordinance.<sup>33</sup>

# Municipal Ordinance Drafting: General Provisions

**I**respective of the type of regulatory scheme a municipality may choose to implement, all enacted municipal provisions will contain the same general provisions. The sections below detail these “general provisions” which includes legislative findings, defining the intent and purpose of the ordinance, penalty provisions, and severability clauses.

## GENERAL PROVISIONS THE NECESSITY FOR LEGISLATIVE FINDINGS

Regardless of the power granted to a municipality, the enactment of an ordinance is still an act of legislation and law. Thus, to survive appellate review the city must possess the power to enact the ordinance vis-a-vis the Texas constitution or from the legislature. A municipal ordinance must yield to the legislative powers above it (i.e. state law) and cannot be inconsistent with the mandates of its superiors.<sup>34</sup> In addition, the legislative body of the municipality must be able to demonstrate a legitimate governmental interest in creating the legislation or risk invalidation.

Specifically, the purpose and intent of a municipal ordinance are compared against the effect on the individual challenging the ordinance.<sup>35</sup> To be upheld, the effect of the ordinance must relate to its purpose. The standard levels of judicial scrutiny—rational basis, intermediate scrutiny, and strict scrutiny—all balance, at varying levels, the purpose and plain language of the ordinance, the impact of the ordinance, and the plaintiff’s asserted constitutional right.<sup>36</sup> To reduce the

likelihood of the ordinance being invalidated, the fit of the ordinance should be as conforming as possible.<sup>37</sup>

To help ensure proper “fit”, ordinances should incorporate legislative findings, both factual determinations and policy decisions, while including additional backup findings, when possible.<sup>38</sup> The ordinance should be tailored to its stated purpose, using common terms to avoid issues related to vagueness. Unbridled discretion to city staff and/or enforcement personnel should be avoided.

## INTENT & PURPOSE—DEFINING THE SCOPE OF MUNICIPAL REGULATION

An ordinance’s intent, purpose, and scope become the legitimate, important, or compelling governmental interests reviewed in a constitutional challenge.<sup>39</sup> The municipality is endowed with police power to protect “public welfare, convenience, and economy” (or more specifically, public order, health, safety, and morals).<sup>40</sup> This breadth of power justifies impositions, restrictions, and prohibitions on individual action and use of property.<sup>41</sup> The police power can extend to the regulation of businesses if the ordinance does not discriminate under the guise of promoting public welfare.<sup>42</sup>

A statement of purpose outlining how the ordinance protects the public’s welfare, general safety of the community, and/or the public’s health insulates the ordinance from federal discrimination and state due course of law challenges. Generally, a challenged ordinance will be subject to a rational basis analysis, unless a fundamental right or suspect class is a target

of the ordinance; it is the court's duty to ascertain the intent behind the regulation. If the court finds the intent reasonable, the court must give it effect.<sup>43</sup> The court may look beyond the text of the ordinance, and look to proceedings before the city council, (or applicable legislative body) to determine its intent in enacting the legislation. A brief recitation of the scope of police power can provide a solid foundation for the argument that the regulation of massage establishments is a justifiable exercise of the municipality's police power.

**One of the most powerful ways to strengthen any ordinance is to support it with legislative fact-findings.**<sup>44</sup> Substantial deference is afforded to a legislative body's fact-findings and determinations of necessity or legitimacy.<sup>45</sup> To successfully challenge such a determination, a plaintiff must convince the court that the facts on which the determination is based could not reasonably be conceived to be true by the legislative body.<sup>46</sup> Legislative conclusions will not be disturbed by the court unless they are clearly arbitrary and unreasonable, as such a disturbance would be a violation of the separation of powers doctrine of the Texas Constitution.<sup>47</sup>

In both Texas and the Fifth Circuit courts, several ordinances regulating massage establishments have survived judicial scrutiny. For example, courts have traditionally agreed that the practice of massage by commercial operators is subject to reasonable regulations.<sup>48</sup> Even a provision of the Dallas ordinance (no longer enforced) prohibiting massage therapists from administering a massage to a patron of the opposite sex has been upheld as a fair exercise of police power.<sup>49</sup> The ordinance was found to be neither discriminatory nor arbitrary, and it did not offend the due process clause of the Texas or the U.S. Constitution. Ordinances regulating masseurs have been upheld, and are

not arbitrary, discriminatory, unreasonable, or offensive of due process or equal protection guarantees.<sup>50</sup>

By contrast, the Fifth Circuit in *Harper v. Lindsay*<sup>51</sup> struck down a provision within Harris County's regulations which required 6-by 6-inch windows in doors within massage establishments. The regulation was intended to curb the steady increase in the number of illicit massage parlors in the area which operate as fronts for prostitution. Applying a rational basis analysis, the Court held this provision unreasonable as the regulations already prohibited locked doors within the establishments.<sup>52</sup> However, the general regulatory scheme targeting massage establishments was upheld as constitutional, along with several other challenged provisions.<sup>53</sup>

## **PENALTIES FOR VIOLATIONS**

The Texas Penal Code requires a culpable mental state (i.e. intentionally, knowingly, recklessly, or with criminal negligence) for there to be an offense committed.<sup>54</sup> For an offense which does not prescribe a culpable mental state, one is still required unless "the definition plainly dispenses with the mental element."<sup>55</sup> These requirements are equivalent for municipal ordinances, except that a municipal ordinance may not dispense with the requirement of a culpable mental state if punishable by a fine exceeding \$500.<sup>56</sup> A penalty can be identified within the specific regulation or can be included as a provision within the chapter regulating massage industry or conduct.

**If the municipality intends to penalize a violation of an ordinance, a penalty provision must be included within the ordinance.** When an ordinance lacks a penal provision, it is beyond the court's power to impose a punishment, because fixing a penalty is a legislative function, not a judicial one.<sup>57</sup> If a

municipality implements a municipal permitting scheme, the legislative body may find that including administrative penalties in relation to these schemes is appropriate.

**SEVERABILITY CLAUSES**

A severability clause (sometimes called a separability clause or a savings clause) is included within legislation which preserves the remaining parts of legislation, if any other part of the act is found invalid.<sup>58</sup> Municipalities who

wish to implement any sort of regulatory scheme, permit or otherwise, can include a severability clause to protect the remaining portion of municipal ordinances. A severability clause can be included in two different ways. For one, the severability clause can be included within the relevant chapter regulating the massage industry itself. A severability clause can also be included as a catch-all in general provisions, which is applicable to the municipal code, within its entirety.

# Municipal Ordinance Drafting: Specific Regulatory Schemes

## MUNICIPAL REGULATION OF OCCUPATIONS & BUSINESSES

**U**nless otherwise preempted by either state or federal law, **Texas cities have a broad authority to regulate varying types of occupations.** Both home rule cities and general law cities have express statutory authority to issue occupational permits for any business which operates within the municipality. The home rule municipality, according to the Local Government Code, may, “license any lawful business or occupation which is subject to the police power of the municipality.”<sup>59</sup>

Home rule municipalities, when acting as a legislative body, are vested with broad discretion in deciding how to deal with public safety, health, morals, and general welfare.<sup>60</sup> A municipality may impose reasonable restrictions on business conduct and limitations on hours and locations.<sup>61</sup>

Municipalities wishing to regulate illicit massage establishments can rely solely on state-level licensing schemes. Alternatively, municipalities may implement their own permitting scheme and accompanying procedures. A localized permitting scheme gives municipalities the opportunity to inspect and exercise oversight over massage establishments on the front-end, when establishments apply for a local permit. In contrast, municipalities who rely exclusively on state regulation will be subject to resource

constraint between the Texas Legislature, the Texas Department of Licensing and Registration (TDLR), TDLR’s enforcement mechanisms and units, and their own law enforcement departments.

**Municipalities can nonetheless elect to regulate massage establishments without implementing a city-level permitting scheme by utilizing the authority contained within existing state regulation.** As a home-rule municipality, Houston has implemented this strategy. Houston’s ordinance explicitly requires that:

a massage establishment or a place of business that advertises massage therapy or offers massage therapy or other massage services must be licensed by the department as provided by Title 25, Texas Administrative Code, Chapter 140 [Texas Department of Licensing and Regulation].<sup>62</sup>

Houston elected to adopt this approach in part to avoid burdening professional, legitimate businesses.<sup>63</sup> Because so few of the identified illicit massage establishments had obtained a state license, the City had no reason to believe the illicit establishments would apply for a city permit. Thus, when Houston amended its ordinances, no municipal permitting scheme was implemented. Municipalities should balance these concerns when choosing the appropriate strategy

### MESSAGE THERAPIST BUY-IN

**Massage therapists must be seen as important stakeholders in the legislative process.** Prior to enacting ordinances, it is important for a municipality’s legislative body to seek support from legitimate practitioners in the massage

industry. By actively including the involvement of professional massage therapists, legislators can ensure both their professional and safety needs are met, without alienating the legitimate practitioners further with duplicative regulation.

Sex trafficking in IMBs effects the practice of the legitimate industry in several ways. Therapists are endangered because the association with prostitution and massage therapy subjects therapists to threats, assaults, harassment, and other forms of intimidation.<sup>64</sup> The cost of doing business is greatly increased for the legitimate practitioner because of the exposure to safety risks and security hazards.<sup>65</sup> Additionally, the amount of fraud surrounding massage education and licensing casts a negative light on legitimate practitioners.<sup>66</sup> Lastly, this negative association increases the need for regulation, while massage therapists are forced to shoulder much of the burden which comes with the increased regulation—including increased financial costs.<sup>67</sup>

## **MUNICIPAL ENFORCEMENT OF STATE REGULATIONS**

Both the Occupations Code and the Administrative Code allow municipal police officers to enforce and inspect under state regulations. The Texas Occupation Code also grants peace officers of the state, including a peace officer employed by a political subdivision of the state (e.g. a municipality) the authority to enforce Chapter 455.<sup>68</sup> The Texas Administrative Code gives enforcement authority to whoever is granted authority to enforce under Chapters 51 (Texas Department of License and Regulation) and 455 of the Texas Occupations Code.

Chapter 455 grants that an authorized representative of The Department of Licensing and Registration (TDLR), or a peace officer employed by the state, may enter the premises of a massage establishment or massage school

to (1) conduct an inspection incidental to the issuance of a license or at (2) other times considered necessary to ensure compliance with Chapter 455.<sup>69</sup> Chapter 455 borrows the definition of peace officer from the Texas Code of Criminal Procedure which includes, but is not limited to:

- (1) Sheriffs and their deputies, and those reserve deputies who hold a permanent peace officer license issued under Chapter 1701, Occupations Code;
- (2) Constables, deputy constables, and those reserve deputy constables who hold a permanent peace officer license issued under Chapter 1701 Occupations Code;
- (3) Marshals or police officers of an incorporated city, town, or village, and those municipal police officers who hold a permanent peace officer license issued under Chapter 1701, Occupations Code;
- (4) Rangers, officers and members of the reserve officer corps commissioned by the Public Safety Commission and the Director of the Department of Public Safety;
- (5) Investigators of the district attorneys', criminal district attorneys' and county attorneys' offices<sup>70</sup>

**Municipal police officers, among others, have the authority to enter the premises of massage establishments, to inspect the premises, and to enforce the regulations contained within Chapter 455 of the Occupations Code.**

Ultimately, the decision to implement a municipal permitting scheme will depend on the unique concerns and circumstances relevant to each individual municipality

## MUNICIPAL PERMITTING SCHEMES

For the sake of clarity, the following section will discuss “permitting” schemes, where the municipality is regulating massage establishments. However, when discussing the state regulation will be referred to as “licensing.” While the section may refer to “permits,” the referenced case law or statutes may make reference to “license.”

### MUNICIPALITY’S AUTHORITY TO LICENSE

As discussed, some municipalities elect to implement their own massage establishment permitting schemes, to complement already existing state-level regulations. The police power of the state, when delegated to the state’s political subdivisions, authorizes municipalities to exercise permitting powers, with respect to health and safety.<sup>71</sup> The Local Government Code expressly grants the governing bodies of Type-A municipalities the authority to “grant and issue [permits], direct the manner of issuing and registering [permits], and set the fees to be paid for [permits].”<sup>72</sup>

This grant of authority to license does not necessarily authorize the city to impose a permit fee—but courts have nonetheless upheld such fees.<sup>73</sup> A permit fee is the amount exacted for the privilege of carrying on an occupation or business.<sup>74</sup> This fee can be collected for regulatory purposes, pursuant to its delegated police power.<sup>75</sup> An ordinance which imposes a permit requirement, under the authority of the police power, is prima facie valid and is presumed to be both reasonable and valid.<sup>76</sup> If an ordinance with a permit fee is challenged, these presumptions will not preclude the court from ascertaining the reasonableness of the ordinance, because it raises a question of fact.

When a fee is challenged, the court will consider whether the municipality’s primary purpose for the fee is regulation or raising revenue.<sup>77</sup> To be reasonably needed for regulation, and thus not a tax under the state constitution, the license cannot be excessive—the fee should cover the cost of granting the permit.<sup>78</sup> Even if a fee is low, the permit fee must still bear some reasonable relationship to the legitimate object of the permitting ordinance, as an exercise of police power.<sup>79</sup> If the court finds the primary purpose of the exaction is to raise revenue, it is considered an occupation tax, regardless of the label given, and is impermissible.<sup>80</sup> The Texas Constitution prohibits a municipality occupation tax which exceeds “one-half of the tax levied by the state for the same period on such profession or business.”<sup>81</sup>

If municipalities choose to implement a city permitting scheme, care should be taken when drafting provisions related to permitting fees; they must be reasonable and may cover the cost of issuing the license. When drafting such provisions, municipalities should be clear and precise within their respective ordinance that the authority to license originates from the Local Government Code and is collected for regulatory purposes pursuant to the police power.

### ISSUANCE OF PERMIT, APPLICATION & THE CORRESPONDING INVESTIGATION

Municipalities will only need to include provisions related to the issuance of a permit if it chooses to implement a city permitting scheme. The provisions related to issuance of a permit, and the corresponding investigation, should outline:

- (1) the general timeline for issuing a permit<sup>82</sup>;
- (2) conditions which must be met prior to a permit being issued;
- (3) grounds for which a permit may be denied<sup>83</sup>; and



- (4) lack of conviction for certain sex crimes.

## DISPLAY OF PERMIT & LICENSE

State regulations require massage establishments to display its permit both openly and in a prominent location in the place of business.<sup>84</sup> A massage establishment can only employ or contract licensed massage therapists.<sup>85</sup> Any person who holds a massage therapist license must publicly display that license.<sup>86</sup> State regulations also require that each massage establishment and massage therapist must present the license on request of TDLR, an authorized representative, or a police officer.<sup>87</sup>

Municipalities who implement a permitting scheme, should implement a similar requirement to publicly display the municipal permit.<sup>88</sup> Municipalities who elect to not implement a permitting scheme can still mandate that massage establishments display the state issued license.

## AUTHORITY FOR REGULATORY INSPECTIONS

Inspections of massage establishments are critical to identifying illicit activities and practices. Inspections that are authorized by a municipal regulatory scheme and conducted to regulate legitimate business are a lawful exercise of the municipality's delegated police power. Therefore, such inspections are inherently differently from an evidentiary search conducted with the purpose of finding and collecting evidence.

For example, San Antonio's relevant municipal ordinance explicitly authorizes periodic warrantless administrative searches to ensure compliance with sanitation and health requirements. The ordinance specifically reads, "All premises used pursuant to this chapter

[massage businesses] shall be periodically inspected during regular business hours by the chief of police or his authorized representative for safety of structure and adequacy of plumbing ventilation, heating and illumination."<sup>89</sup>

In *Pollard v. Cockrell*<sup>90</sup>, the Fifth Circuit upheld an earlier enacted version of this San Antonio ordinance which authorized warrantless administrative searches.<sup>91</sup> The *Pollard* Court noted the U.S. Supreme Court has held that, except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."<sup>92</sup> However, industries with a history of pervasive regulation have no reasonable expectation of privacy, and they are therefore exempted from the administrative search warrant requirements.<sup>93</sup>

Industries cited as examples of this exception included the liquor industry and the firearms industry. When an entrepreneur embarks in such a business, he has voluntarily subjected himself to a "full arsenal of governmental regulation."<sup>94</sup> In effect, the Fifth Circuit recognized the massage industry was analogous to the liquor and firearm industry, and there was no reasonable expectation of privacy for the purpose of maintaining health and sanitation (the cited purpose of the ordinance).<sup>95</sup>

In a later case, the Fifth Circuit reviewed a similar municipal provision enacted in New Orleans. In *Oster v. City of New Orleans*,<sup>96</sup> plaintiffs appealed a judgement which held that the new ordinance governing the permitting and operation of massage establishments was constitutional, in response to various Fourth and Fourteenth Amendment challenges.<sup>97</sup> The provisions challenged in *Oster* were similar to the provisions challenged in *Pollard*.<sup>98</sup>

The appellants argued that the warrantless administrative provision challenged in *Pollard* was only an “administrative” provision which did not impose criminal sanctions for its violation, and was thus distinguishable from the provisions challenged.<sup>99</sup> The appellants’ arguments were unsuccessful, and the Fifth Circuit found the ruling in *Pollard* to be controlling.<sup>100</sup> Although the Fifth Circuit agreed a distinction existed between the ordinances (that the challenged New Orleans provision ultimately amounted to a general, criminal search warrant while the provision in *Pollard* did not) the court also found that this same argument had been rejected by the Supreme Court, and weren't instructive in their holding.<sup>101</sup> Ultimately the Fifth Circuit affirmed the challenged provisions as constitutional.<sup>102</sup>

Municipalities may simply refer to the relevant state law provisions. Specifically, Houston’s ordinance states, “A peace officer appointed or employed by a law enforcement agency of this state may enter the premises of a massage establishment pursuant to Sections 455.104 [Presiding Officer] and 455.353 [Enforcement by Peace Officers] of the Texas Occupations Code.”<sup>103</sup> Additionally, it mandates that if access and entry are denied, authority will be given under a warrant to inspect the massage establishment.<sup>104</sup> This additional language incorporates the state regulations while providing notice to establishments that if access is denied, law enforcement officers be granted a warrant.

Municipalities can choose language which limits warrantless inspections to all business hours and other reasonable times, even though this is not necessarily required by the Fourth Amendment. However, by electing to leave the time of inspection at the sole discretion of police officers, municipalities may make themselves more vulnerable to appellate challenges.

If a municipality, or applicable law enforcement agency, feels it is necessary to take immediate action, it should be heavily emphasized that Chapter 455 of the Occupations Code gives sufficient authority for any peace officer of the State the authority to carry out regulatory inspections.

Thus, the municipality does not necessarily need to include authority within its respective municipal regulations, in order to have the right to access massage establishments. Nevertheless, by including a provision referencing authority, a municipality will make clear its intent to carry out regulatory inspections, while providing more than sufficient notice to businesses of its authority.

## LICENSE REVOCATION & SUSPENSION

Currently, the regulatory agency overseeing the licensure of the massage industry is the Texas Department of Licensing and Regulation. **If a municipality elects to implement its own municipal permitting scheme, violation of the ordinance regulating massage establishments can be considered a ground for the suspension or revocation of a permit.**

Municipalities should take care to outline the process for suspension or revocation hearings and should also identify the proper department for determining suspensions and revocations. The Local Government Code also allows Type-A general law municipalities to revoke municipal permits. The Local Government Code states:

A judge of the municipal court, in addition to imposing a fine, may institute proceedings to suspend or revoke the license of a person if: (1) the person is required, by law or by a municipal ordinance adopted under a law, to obtain the license from the municipality for an occupation, business, or avocation; and (2) the judge finds the person guilty of

violating a municipal ordinance relating to the occupation, business, or avocation.<sup>105</sup>

Regulations instituting a procedural process for permit revocation and suspension have been upheld as constitutional. In *Harper v. Lindsay*,<sup>106</sup> both massage establishments and massage practitioners challenged the constitutionality of comprehensive regulations implemented by the Commissioner's Court in Harris County. The original complaint alleged the Commissioner's Court had exceeded its legislative authority, and the subsequent enforcement of the regulations violated the plaintiffs' constitutional and statutory rights.<sup>107</sup>

The district court concluded the county's massage parlor regulations were constitutional under both the Texas and United States Constitutions.<sup>108</sup> The district court did find that one challenged provision exceeded the scope of authority delegated by the Texas Legislature.<sup>109</sup> However, because the county's regulations included a severability clause,<sup>110</sup> the court permanently enjoined the enforcement of the offensive regulation, while preserving the remaining regulations.<sup>111</sup>

On appeal, the appellants argued to the Fifth Circuit Court of Appeals that the regulations offended procedural due process because the county sheriff was able to suspend or revoke an establishment's or a practitioner's permit for a violation without a prior hearing.<sup>112</sup> This argument was unsuccessful because the regulations provided for the right to appeal, which would stay the revocation or suspension pending a final determination.<sup>113</sup> The appeal procedure provided the aggrieved party a hearing by an appointed examiner, and both the sheriff and the aggrieved party were allowed to present witnesses, documents, and exhibits at the hearing, without being bound by formal rules of evidence.<sup>114</sup> If either party was

dissatisfied, they were entitled to additional review by the Commissioner's Court.<sup>115</sup>

The court found that the regulations' silence regarding representation by counsel, cross-examination of witnesses, evidentiary rules, and the right to a jury, also did not amount to a denial in procedural due process because the administrative hearing was purely civil in nature.<sup>116</sup> In sum, because the Harris County regulations provided specifically for notice, hearing, and the right to appeal, the fundamentals of due process were satisfied and the failure to *explicitly* provide additional procedural safeguards did not amount to a constitutional deprivation.

Municipalities can adopt a variety of procedures for permit suspension and revocation to ensure the fundamental guarantees of procedural due process—notice and opportunity to be heard—are met. For example, in San Antonio a municipal permit may be suspended or revoked when any of the massage establishment provisions are violated.<sup>117</sup> A municipal permit can also be revoked or suspended when an employee or permittee is engaged in *any* conduct which violates *any* of the state laws, regulations, or city ordinances at the permittee's place of business.<sup>118</sup> Thus, this provision presumes the permittee to have actual or constructive knowledge of the grounds for revocation or suspension, if due diligence is exercised.<sup>119</sup> **It would be the best practice of a municipality to include provisions, within its applicable regulations, which outline the grounds and the procedure for which a permit may be suspended or revoked.**

## **EXEMPTING PROFESSIONS FROM THE SCOPE OF MUNICIPAL REGULATION**

To prevent the over-regulation of legitimate practitioners, and to clarify which professions

and activities are the targets of the regulation, some municipalities include a stand-alone provision which specifically exempts certain professions from regulation. For example, San Antonio includes such a provision:

The provisions of this chapter shall not apply to hospitals, nursing homes, sanitariums or persons holding an unrevoked certificate to practice the healing arts or persons working under the direction of any such person or in any such establishment, nor shall this chapter apply to barbers, cosmetologists, physical therapists, assistant physical therapists or athletic trainers, lawfully carrying out their particular profession or business and holding a valid unrevoked license or certificate of registration issued by the state.<sup>120</sup>

Additionally, municipalities can include these exemptions when they define what is a massage establishment. Houston's ordinance, for example, exempts certain professions from regulation within its definition of massage establishment:

This term shall not include beauty parlors or barbershops duly licensed by the state, or licensed hospitals, medical clinics, or licensed physical therapy facilities or establishments wherein registered physical therapists treat only patients recommended and referred by a licensed physician and operate only under such physician's direction. Additionally, the term shall not include a place of business where a licensed massage therapist practices as a solo practitioner in a manner consistent with the applicable provisions of Section 455.155 of the Texas Occupations Code, as amended.<sup>121</sup>

Either method is sufficient, but exempting certain regulations from the scope of

enforcement decreases the likelihood of the ordinance being challenged as overbroad. Regardless of the adopted method, the exempting language must be consistent with the regulation's purpose, as identified by the municipality's legislative body.

## PROVISIONS RELATED TO OPERATIONAL REQUIREMENTS

The provisions listed and described below regulate the operations of a massage establishment, and need not be implemented simultaneously with a city-permitting scheme. Houston elected such a course of action in implementing its comprehensive regulations on operational requirements.

### UNLAWFUL ADVERTISEMENTS

Illicit massage establishments often purport to advertise massage services while covertly advertising illicit activity. The Texas Administrative Code prohibits any unlicensed person from using "massage" on any sign, display, or other form of advertising. Sexually oriented business can *never* use "massage" or "bath" on any form of advertising.<sup>122</sup>

Additionally, a licensee is prohibited from using any false, misleading, or deceptive advertising.<sup>123</sup> Some municipalities, such as Houston, implicitly cover this concern by requiring that "any massage establishment or a place of business that advertises massage therapy or offers massage therapy or other massage services must be licensed by the department, as required under Title 25, Texas Administrative Code, Chapter 140."<sup>124</sup>

Municipalities can easily implement similar language to target unlawful advertising. The inclusion of such provisions allows local law enforcement to issue municipal citations for violations, in addition to criminal penalties

which can be issued under the Occupations Code, and for violations of the Admin code, which can be forwarded to TDLR<sup>125</sup>

The “laundry list” of the Deceptive Trade Practices Act specifically includes advertising as a massage establishment when not in compliance with applicable state and local requirements.<sup>126</sup> Citations issued by the applicable enforcement agency for unlawful advertising will also bolster a later action authorized under the DTPA, brought by the Consumer Protection division of the Attorney General’s office, and/or the county, city, or district attorneys. Additionally, municipal ordinance citations can be admitted as evidence in a nuisance and abatement action brought by the county, district, or city attorney.

Municipalities should have little concern for opening its ordinance to judicial scrutiny by including a provision explicitly prohibiting false, misleading, or deceptive advertising. While commercial speech is entitled to some First Amendment protection, it is “lesser protected” than political, ideological, or artistic speech.<sup>127</sup> For commercial speech to come within the protection of the First Amendment, it must concern lawful activity and it must not be misleading.<sup>128</sup> The government must assert a substantial governmental interest, the regulation must directly advance the government interest asserted, and the regulation must be no more extensive than necessary.<sup>129</sup>

Such challenges will have little, if any, likelihood success because the target of the provision is unlawful activity—prostitution and human trafficking. However, municipalities should take care to anticipate possible issues of vagueness or overbreadth in future challenges.

## **EMPLOYING AND CONTRACTING MASSAGE PRACTITIONERS**

Municipalities may include provisions that explicitly state that it is illegal for a massage establishment to allow an unlicensed individual to provide massage services. It is recommended that municipalities track the language of state regulations to ensure consistency among regulations and avoid any concerns related to conflict of laws or supremacy of state law.

The Occupations Code and the Administrative Code imposes the general requirement on massage establishments to employ or contract licensed massage therapists.<sup>130</sup> Those who ultimately work within these illicit massage establishments—potential victims—typically have no license to administer massage therapy. Ordinances should clearly state that a massage establishment can be held accountable for violating the ordinance—not just the massage practitioner alone.

## **MAINTENANCE OF BUSINESS RECORDS**

Municipalities may also track state-level record-keeping requirements in their ordinances. Current state-level regulations require that massage establishments maintain a record of client session information, including session notes and billing records.<sup>131</sup> State regulations also require that establishments maintain records on employees including a full name, a copy of the employee’s massage license, proof of eligibility to work in the United States, and a completed I-9 form.<sup>132</sup> These records must be maintained and presented to the inspectors.

## **INDECENT CONDUCT**

Arguably, one of the most important aims of a municipality’s massage establishment ordinance is to target human trafficking. Municipal ordinances can follow the language contained in the state regulations, related to indecent conduct, to implement an additional layer of

protection against sexual exploitation and victimization. The Texas Administrative Code prohibits massage establishments from allowing any individual (including massage therapists) to engage in sexual contact in the massage establishment<sup>133</sup> or to practice massage therapy nude or in clothing designed to arouse or gratify the sexual desire of any individual.<sup>134</sup>

## HOURS OF OPERATION

It is quite common for illicit massage establishments to operate during late night hours when legitimate massage establishments are not in operation. Many municipalities include restrictions on the hours of operations for massage businesses. For example, Houston includes a provision within its ordinances regulating massage establishments that, “no massage establishment shall be kept open for any purpose between the hours of 10:00 p.m. and 8:00 a.m. on any day.”<sup>135</sup> These restrictions on hours of operation have been upheld as constitutionally valid by appellate courts.

One such challenge was examined by the Fifth Circuit in *Pollard v. Cockrell*.<sup>136</sup> Massage parlor owners, licensed massage therapists, and patrons challenged the constitutionality of San Antonio’s massage ordinance, arguing several points of error by the trial court. The appellants argued that San Antonio’s ordinance unconstitutionally discriminated against massage parlors and thus violated equal protection guarantees, because other establishments performing similar services operated under no similar burden.<sup>137</sup> The challenged San Antonio provision entails “No massage business shall be kept open for any purpose between the hours of 10:00 P.M. to 8:00 A.M.”<sup>138</sup> The provision explicitly exempts hospitals, nursing homes, sanatoriums, or any persons who held an unrevoked certificate to practice healing arts under the laws of the State of Texas.<sup>139</sup> The provision also exempted

barbers, cosmetologists, physical therapists, assistant physical therapists or athletic trainers, who were lawfully carrying out their profession or business and held a valid, unrevoked license or certificate issued by the state.<sup>140</sup>

The Fifth Circuit ultimately found that this provision did not violate the federal Equal Protection Clause. Because the action affected neither fundamental rights nor made a distinction based on a traditionally suspect classification, the challenged provisions had to only bear a “rational relationship to the broad purposes of the ordinance.”<sup>141</sup> The fact that San Antonio’s ordinance singled out massage parlors for restrictive treatment did not offend equal protection guarantees because the distinction between massage parlors and other institutions was neither arbitrary nor irrational.<sup>142</sup> The City of San Antonio enacted the ordinance regulating massage parlors, finding “sexual conduct or the intimation of sexual conduct, rather than the massage of the body, has become the business in fact of many massage businesses.”<sup>143</sup> The court noted in drafting the ordinance that the council

probably reasoned that nursing homes, sanitariums, cosmetologists, and others listed are already regulated by state law, and additional regulation locally is not needed, and the exempted institutions are thus not in need of additional local regulation and are not likely to pose the danger which the ordinance was intended to alleviate (massage parlors serving as subterfuges for prostitution).<sup>144</sup>

As such, the Fifth Circuit concluded that San Antonio’s provision limiting hours of operation for massage parlors did not amount to invidious discrimination. The institutions and practitioners exempted from regulation are concerned with physical therapy or personal grooming, and are also highly regulated by state law, and are not in

need for additional local regulations.<sup>145</sup> As well, the exempted industries are unlikely to pose as subterfuges for prostitution like illegitimate massage establishments.<sup>146</sup>

## **CONNECTION WITH LIVING OR SLEEPING QUARTERS**

Many illicit massage establishments force women to remain on the premises and live on site. Municipalities can attack this pattern of behavior by disallowing direct passageways to living quarters. Utilizing zoning land-use regulations and building code requirements for structures can also be an indirect method of regulating unwanted behaviors.<sup>147</sup> Current state regulations require that rooms used wholly or in part for residential purposes must be separated from the business by a solid wall or a solid wall with a door that remains locked during business hours.<sup>148</sup>

One simple method for municipalities to employ is to follow the language contained in the state regulations.<sup>149</sup> This can help address the concern that victims of trafficking are often forced to reside at the illicit business, although victims could still be forced to live in a closed-off but on-site area. Alternatively, municipalities could include a provision which explicitly prohibits the location and operation of a massage establishment in a residential area. Dallas is one such municipality that has elected to include such a provision, which states, “it shall be unlawful for any massage establishment to be operated in any section of the city which is zoned for residential purposes.”<sup>150</sup>

## **SANITATION AND MAINTENANCE REQUIREMENTS**

Provisions within the massage establishment ordinance related to sanitation and maintenance can increase the coverage of regulations by allowing for additional

opportunities to make health inspections and, ultimately, to identify potential signs of trafficking. Current state regulations cover requirements related to sanitation and maintenance, but a municipality can still include its own such provisions as a proper exercise of municipality police power. For example, both Houston and San Antonio provide that floors shall be free of any accumulation of dust, dirt, and refuse. Both provisions also provide that the doors must be free of dust, dirt, and refuse; walls, ceilings, windows, and doors must be free of dust, dirt, refuse and mold.<sup>151</sup> Additionally high humidity areas (e.g. toilets, showers, locker rooms, etc.), walls, ceilings, and floors must be constructed and covered in nonabsorbent material which can easily be cleaned.<sup>152</sup>

The mechanisms and methods of oversight are also clear within both Houston and San Antonio’s ordinances. which provides for periodic inspections during regular business hours for safety of structure and adequacy of plumbing, ventilation, heating, and illumination.<sup>153</sup> Aside from the specific provision on sanitation, other provisions target this aim as well. One provision provides that towels, cloths, and sheets shall not be used on more than one person, and soiled linens and towels must be stored in a clearly marked receptacle and cannot be reused prior to laundering.<sup>154</sup> Another provision requires that all equipment used for the treatment of patrons at massage establishments must be kept in clean and sanitary condition, and in good and safe state of repair at all times.<sup>155</sup> San Antonio’s ordinance includes a provision specifically related to sanitation, which provides for periodic inspections during regular business hours for safety of structure and adequacy of plumbing, ventilation, heating, and illumination.<sup>156</sup>

# Municipal Ordinance Drafting: Zoning Regulations & IMBs

## ZONING GENERALLY

**Z**oning is a legislative division of a region, most often a city, into separate districts with different regulations for land use, building size, etc.<sup>157</sup>

Historically municipalities have utilized land use regulations as authority to control, or attempt to control, particularly “obnoxious businesses and occupations” with the central aim being at regulating the location of offensive businesses.<sup>158</sup>

Today, zoning is often a phase of city planning. The current statutory provisions regarding the zoning powers of municipalities are within Chapter 211 of the Local Government Code. The legislative purpose behind the chapter is to, “promot[e] the public health, safety, morals, or general welfare and protecting and preserving places and areas of historical, cultural, or architectural importance and significance.”<sup>159</sup>

Zoning ordinances have been applicable to all cities and towns, and permit the adoption of regulations which address and control the following aspects:

- (1) the height, number of stories, and size of buildings and other structures;
- (2) the percentage of a lot that may be occupied;
- (3) the size of yards, courts, and other open spaces;
- (4) population density; and
- (5) the location and use of buildings, other structures, and land for business, industrial, residential, or other purposes.<sup>160</sup>

Once a municipality has adopted a comprehensive plan, it may adopt zoning regulations and implement zoning districts. Single use zoning districts, or Euclidian zoning, controls the use of land in a municipality as residential, commercial, or industrial use. Such a plan includes, but is not limited to provisions on land use, transportation, and public use facilities.<sup>161</sup> The plan may consist of either a single plan or a coordinated set of plans organized by subject and geographic area, which may also be used to coordinate and guide the establishment of development regulations.<sup>162</sup> Within each district the municipality establishes, the governing body may regulate the erection, reconstruction, alteration, repair, or use of buildings, other structures, or land.”<sup>163</sup>

All zoning actions must find their justification in some aspect of the municipality’s police power.<sup>164</sup> The police power is not absolute—it is subordinate to the right to acquire and own property and to deal and use the property as the owner chooses, so long as the use is not harmful to others.<sup>165</sup> For a zoning ordinance to be held as valid, the ordinance must bear a substantial relation to the promotion of public health, safety, morals, or general welfare,<sup>166</sup> and it will not be invalidated unless it is clearly unrelated to the police power<sup>167</sup> and has no reasonable tendency to promote any lawful object of that police power.<sup>168</sup>

## ENFORCEMENT OF ZONING ORDINANCES

Violations of zoning ordinances and/or regulation are penal because the ordinances declare unlawful uses and unauthorized



construction.<sup>169</sup> Chapter 54 of the Local Government Code grants a municipality the general authority to enforce ordinances.<sup>170</sup> A violation of a zoning ordinance authorized under Chapter 211 of the Local Government Code is a misdemeanor offense, punishable by fine, imprisonment, or both.<sup>171</sup> The fine levied cannot exceed \$2000.<sup>172</sup> The Local Government Code also enables a municipality to provide for civil penalties for a violation of zoning ordinances adopted under Chapter 211.<sup>173</sup>

Ordinances will typically provide that each day a violation continues constitutes a separate offense.<sup>174</sup> Municipal ordinances can impose criminal liability on persons other than the property owner, including persons such as all architects, builders, contractors, agents, persons, or corporations who assist in violations.<sup>175</sup> However, when municipalities seek a criminal prosecution under a contested ordinance, landowners may be able to obtain an injunction in order to suspend criminal proceedings until the validity of the ordinance is determined.<sup>176</sup> If the landowner is successful in seeking a declaratory judgement against the

municipality, the municipality is not likely to continue its efforts in enforcing the ordinance.<sup>177</sup>

Injunctions are normally the preferred method of enforcement which provides specific relief against zoning offenders, as authorized by Chapter 211 of the Local Government Code.<sup>178</sup> A municipality is entitled to injunctive relief if it proves there is a violation of the zoning ordinance (under Chapter 211 of the Local Government Code).<sup>179</sup> Section 54.012(3) of the code expressly authorizes the municipality the authority to bring a civil suit against those who violate the zoning ordinances. Civil penalties of up to \$1000 per day are authorized under Chapter 54.017 of the Local Government Code. A municipality can seek to obtain a temporary restraining order, pending a final judgement, by showing the defendant is “guilty of a clear violation of a valid ordinance”<sup>180</sup>

## SCOOBY DOO MASSAGE—A CASE STUDY OF A SUSPECTED IMB & ZONING REGULATIONS



A suspected IMB, “Scooby Doo Massage,” opens shop in Fort Worth, Texas, at 123 Archie Lane. Based on this *fictional* location of Scooby Doo Massage, it is located in the ER district. Velma Dinkely, Fort Worth City Attorney, has received complaints from one citizen about Scooby Doo Massage, because, “it meddles with my artisanal knitting business.” Later, Velma learns from local law enforcement that Scooby Doo Massage violated state regulations relating to the massage industry—it was unlicensed—and that Scooby Doo Massage was violating the zoning ordinances of Fort Worth, Texas. Several women, employed at Scooby Doo Massage, were unlicensed as massage therapists and were arrested for prostitution, and for performing massage therapy in the nude. Velma also learns from law enforcement that the arrested women lived at the premises of Scooby Doo Massage.

### DETERMINING VIOLATIONS

First, Velma must determine how Scooby Doo Massage is violating the zoning ordinances. The Fort Worth Municipal Zoning Regulations provide instructions on how to apply the municipal zoning ordinances. After identifying the **base district** and any applicable overlay district, one should reference:

- Chapter 4 of the zoning regulations for details on minimum lot size, required yards and other district standards.
- Chapter 6 for various development standards, including general parking, landscaping, or sign regulations.
- Chapter 4, Article 8 for guidance on what nonresidential uses are permitted within the particular district.
- Chapter 5 for any supplemental use standards which may apply.

- If there is an overlay district which is applicable, Chapter 4 contains regulations related to overlay districts.

Below is the various zoning regulations which would apply to Scooby Doo Massage:

Scooby Doo Massage	
<b>Base District</b>	<p><b>“ER” District</b>, a neighborhood commercial restricted district.<sup>181</sup></p> <ul style="list-style-type: none"> <li>● The Purpose of the ER district is to provide areas for neighborhood serving limited commercial, institutional and office uses.<sup>182</sup></li> <li>● Most restrictive commercial zone.<sup>183</sup></li> </ul>
<b>Permitted Uses in ER District</b>	<ul style="list-style-type: none"> <li>● Beauty and barber shops</li> <li>● Bookstores</li> <li>● Drug stores</li> <li>● Studios and offices,</li> <li>● Public and civic uses (education, government office or museum)</li> <li>● Nursing homes</li> <li>● Some health care uses</li> </ul>
<b>Non-Permitted Uses</b>	<ul style="list-style-type: none"> <li>● Massage therapy and spas are not permitted uses within the ER district.<sup>184</sup></li> <li>● Sexually Oriented Businesses are not permitted in the ER district.<sup>185</sup></li> </ul>

Scooby Doo Massage is violating the zoning regulations because it is explicitly operating as a business which is not permitted within the ER district. Scooby Doo Massage would not be able to operate as a SOB because of the conduct occurring at the premises (prostitution). As well, Scooby Doo is in violation of the municipal zoning ordinances—the employees of Scooby Doo massage were living on the premises, which is residential in use and the ER district provides areas for limited commercial uses.

### ENFORCING ZONING ORDINANCES

Law enforcement informs Velma that the property owner of 123 Archie Lane is Fred Jones. Velma reaches out to Fred, to try and obtain a copy of the lease between Fred Jones, and the Owner of Scooby Doo Massage, but he is unwilling to give her a copy of the lease. Velma verifies the establishment license of Scooby Doo Massage through the TDLR and learns Shaggy

Rogers is listed as the owner/operator. Later, Velma checks the D/B/A listing of Scooby Doo Massage with the Secretary of State, and Shaggy Rogers is again listed as the owner.

Violation of the statutes regarding zoning regulation, the municipality's zoning ordinance, or regulations adopted under the ordinance, are offenses punishable as a misdemeanor, by fine, imprisonment, or both, as provided in the ordinances adopted for enforcement by the governing body.<sup>186</sup> Chapter 8 of the Fort Worth zoning regulations outlines the enforcement of its zoning regulations. The maximum fine for any person, firm, or corporation who “violates, disobeys, omits, neglects or refuses to comply with or who resists the enforcement of any of the provisions of this ordinance” cannot exceed \$2,000 per offense (Each day that a violation of a zoning ordinance exists constitutes a separate offense).<sup>187</sup> Here, Velma can bring criminal charges against Fred Jones and Shaggy Rogers

because they are both proper defendants, as defined in Fort Worth’s Municipal Ordinances.

Similar to the grants of power in the Local Government Code (Ch. 211), the municipality also has additional remedies available to enforce the zoning ordinances. If a building or structure is used in violation of any of the city’s ordinances, an action may be commenced to: (a) prevent the unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance or use; (b) restrain, correct or abate the violation; (c) prevent the occupancy of the building, structure or land; or (d) prevent any illegal act, conduct, business or use on or about the premises.<sup>188</sup> Thus, civil actions can be maintained against Fred Jones and Shaggy Rogers if Velma finds it is appropriate to prevent and restrain the unlawful use. Additionally, the language in the municipal ordinance says a civil action can be maintained, “in addition to any other remedies” which suggests that remedies defined in Fort Worth’s zoning regulations are cumulative in effect.

## REGULATING IMBS AS SEXUALLY ORIENTED BUSINESSES

States and municipalities have sought to regulate illicit massage establishments as sexually oriented businesses. The Texas Legislature, in the Local Government Code, explicitly grants both counties and municipalities the authority to regulate sexually oriented

businesses because it finds that the, “unrestricted operation of certain sexually oriented businesses may be detrimental to the public health, safety, and welfare by contributing to the decline of residential and business neighborhoods and the growth of criminal activity.” Tex. Local Gov’t Code Ann. § 243.001(a).

Despite the seemingly plenary authority which is granted to municipalities and counties to regulate sexually oriented businesses, **CHILDREN AT RISK does not recommend municipalities utilize a SOB regulatory scheme to regulate illicit massage businesses.** Under Chapter 455 of the Occupations Code, a “sexually-oriented massage establishment” is a logical impossibility, as Texas law prohibits massaging persons in a way intended to arouse or gratify sexual desire or massaging while dressed in a titillating manner.<sup>189</sup>

Because prostitution often occurs on the premises, these businesses can never qualify to obtain a permit as a legitimate sexually oriented business, under municipal regulatory schemes. Additionally, legitimate massage therapy has been subjected to stereotypes which sexualize providers and is harmful to the profession.<sup>190</sup> Despite the fact these stereotypes are not condoned by the professional massage associations, many legitimate massage therapists are harassed, propositioned, and assaulted.<sup>191</sup>

# Municipal Ordinance Drafting: Building Code Violations & Other Misc. Violations

**B**uilding regulations are based on the police power of the State to protect the public welfare, similar to zoning regulations.<sup>192</sup> However, building regulations protect the public welfare in a manner different from zoning regulations.<sup>193</sup> Specifically building codes regulate the safety and structure of the buildings themselves, including the details of construction, materials used, and specifications for varying elements of the structures (e.g. plumbing, heating, and electrical facilities).<sup>194</sup>

Law enforcement can utilize these regulations to enhance its investigations and regulatory inspections of IMBs. For a full discussion of these tactics, see [CHILDREN AT RISK's IMB Eradication Toolkit – Law Enforcement Manual](#).

## MUNICIPAL REGULATION OF BUILDINGS & OTHER STRUCTURES

Chapter 214 of the Local Government Code entails a municipalities' authority to regulate housing and other structures. A municipality is authorized by the Local Government Code to establish procedures to adopt local amendments and procedures for the administration and enforcement of the International Building Code (IBC).<sup>195</sup>

### COMMON BUILDING CODE VIOLATIONS

#### General Penalty Provisions

Some provisions within the IBC contain specific penalties for their violations. However, Chapter 1, Section 114 of the IBC contains general provisions for violations, notice of violation, and prosecution of violation. The IBC defines "unlawful acts" as follows:

"It shall be unlawful for any person, firm or corporation to erect, construct, alter, extend, repair, move, remove, demolish or occupy any building, structure, or equipment regulated by this code, or cause same to be done, in conflict with or in violation of any of the provisions of this code."<sup>196</sup>

The IBC is fundamentally use (occupancy) based. The use of the building or structure will determine which occupancy classification it belongs to. Each occupancy classification may have specific requirements related to the structure, which other requirements may apply.

Section 114 of the IBC, absent local amendments, only sets forth penalties in general terms: "any person who violates a provision of this code or fails to comply with any of the requirements thereof ... or of a *permit* or certificate issued under the provisions of this code, shall be subject to penalties prescribed by law"<sup>197</sup>

Because the IBC is silent on the specific penalties for violations, municipalities will utilize local amendments to address gaps that exist in the model code. For example, Houston's local amendments provide that when no specific penalty is addressed within the code, a violation constitutes a misdemeanor offense punishable upon conviction by a fine no less than \$500.00 and not to exceed \$2000.00.<sup>198</sup> Each day a violation continues constitutes a separate offense;<sup>199</sup> if the code also constitutes an offense under state penal law, the offense will be punished according to the applicable state law.<sup>200</sup>

### No Certificate of Occupancy

Chapter 1 of the IBC addresses the scope and application of the IBC, along with the administration and enforcement of the code. Specifically, Section 111 addresses the requirement for a certificate of occupancy, the information must be included within the certificate of occupancy<sup>201</sup> and the authority for revocation or suspension of the certificate.<sup>202</sup> The intended use or occupancy of a building is a fundamental consideration to the building code.<sup>203</sup>

When a certificate of occupancy is issued, the issuing government agency is certifying that the building is compliant with the relevant law and is suitable for a designated occupancy type-an identified, specific use. For example, a building intended to be used as an assembly area (e.g. a movie or performing arts theater, with fixed seats and often low lighting levels) will have different requirements to obtain and maintain its certificate of occupancy than a structure with an industrial intended use. Because industrial spaces are assumed to be closed to the general public, the occupants are presumed to be familiar with the surroundings.<sup>204</sup>

The IBC mandates that all buildings or structures must obtain a certificate of occupancy:

“no building or structure shall be used or occupied, and no change in the existing occupancy classification of a building or structure or portion thereof shall be made, until the *building official* has issued a certificate of occupancy for therefore as provided herein.”<sup>205</sup>

Thus, it is a citable offense when a building is occupied and lacks either a certificate of occupation entirely or possesses a certificate of occupancy inconsistent with the building’s use. These citations can be sought in addition to any

penalties which are identified within the municipal regulations.

### Failure to Post Certificate of Occupancy

The IBC itself does not include an express provision requiring the certificate of occupancy to be posted on the premises. However, municipalities can implement a local amendment to the IBC creating such a requirement. Houston’s local amendments to the 2012 IBC include such a provision, which reads, “The certificate of occupancy shall be posted in a conspicuous place on the premises and shall not be removed except by the *building official*.”<sup>206</sup>

## **BUILDING CODE VIOLATIONS & IMBS**

Many IMBs that participate in human trafficking often force trafficked women to live on-site at the IMB. This conduct can violate state regulations, zoning (land use) regulations, along with building code (structure) regulations. State regulations provide that within a massage establishment, separation between residential and sleeping areas must be maintained by a wall or a wall with a door which remains locked during business hours.<sup>207</sup>

If the residential room(s)/area attached to an IMB remained “separated” from the massage establishment during business hours, this would be a permissible use, according to the state regulations. The state regulations, standing alone, are under-inclusive in targeting this conduct which is unique to sex trafficking, especially within the context of IMBs. Thus, to truly target this conduct, it is necessary to make use of both zoning ordinances and building regulations.

The enforcement of zoning ordinances alone may still be insufficient target this conduct. If an

IMB is located in a zoning district which allows residential uses, the “residential” use of the property will not directly violate the zoning ordinance. Thus, in instances such as these, it will also be necessary to also utilize building code regulations to target this conduct.

When a certificate of occupancy is issued, it is generally issued for one particular use (some jurisdictions may allow for mixed-use occupancies). Thus, if an IMB is issued a certificate of occupancy for some commercial use, and the building is being used for residential purposes, the IMB will be violating the building code regulations for two possible reasons. For example, if an IMB is issued a certificate of occupancy for commercial use only, it is in violation because the building structure is being utilized for a use inconsistent with the issued certificate of occupancy.

Furthermore, because the structure was issued a certificate of occupancy for a commercial use, it is very likely that the structure does not comport with the requirements related to residential uses. Thus, it is a citable offense which can be maintained against both the property owner and the owner/operator of the massage establishment.

**OTHER BUILDING REGULATIONS**

Regulations relating to the structure of a building that are outside of the building code can be utilized to enforce regulations against IMBs. These provisions may be county level regulations or may be included within a municipal level ordinance. Thus, the language and the location of these regulations can vary between jurisdictions.

- Owner or person in control or in possession of the building fails to

maintain the building in good operating condition.

*Specific provisions could include: (1) Floor not maintained in good repair; (2) Ceiling not maintained in good repair; (3) Door, window, skylight, or similar fixture not in good repair; (4) Wall not in good repair; (5) Grass ordinance (high weeds); (6) Property owner/representative allows or permits visual blight graffiti; (7) Bulk container visible from the street or right of way.*

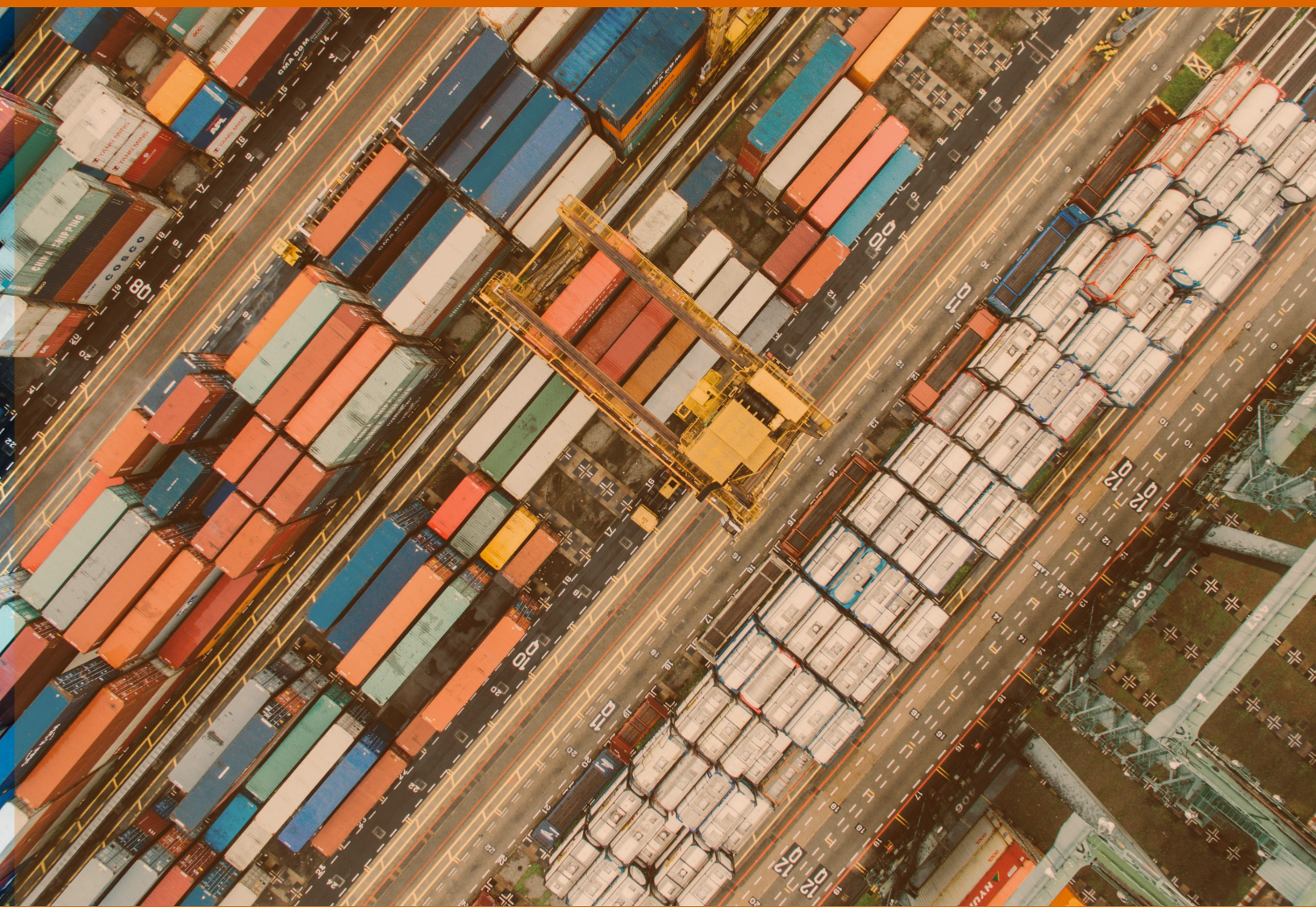
- Owner or person in control or in possession of the building permits illegal activity or conduct, such as public intoxication, gambling, prostitution, consumption of alcohol in public places during prohibited hours.

# LOCAL GOVERNMENT GUIDE

## *State Regulation: Licensing*







*“I sense there are a lot of professionals in our industry that reflexively reject this issue (human trafficking) as an affront to our sensibilities. But like prostitution, it is real & must be met head-on to protect our reputation. We need to start being more realistic over the fact that traffickers are using our profession as a shield & adjust policies accordingly, instead of fighting against progress to combat it—which ultimately hurts our reputation. It does not have to be seen as “offensive” when therapists are asked to produce documentation of legitimacy. It can be seen as a way to protect the massage therapists themselves.”*

# EXECUTIVE SUMMARY

The Texas Department of Licensing and Regulation oversees the licensing and regulation of massage therapy. Massage therapy is statutorily defined as the manipulation of soft tissue by hand or through a mechanical or electrical apparatus for the purpose of body massage. It is important to distinguish between legitimate, licensed massage therapists and establishments and illicit, usually unlicensed massage establishments operating as fronts for organized commercial sex enterprises.

In the state regulation, massage establishments includes a place of business which advertises or offers massage therapy or services. Thus, despite the distinction between legal and illicit practices, IMBs still fall within the scope of state regulation. The following section discusses the relevant state statutes and regulation: Chapter 455 of the Texas Occupations Code and Title 6 Chapter 117 of the Texas Administrative Code. The requirements for licensure and the framework for state regulation are also discussed in this section.



# State Level Regulation—Licensing

**T**he licensing of massage therapy in Texas is the subject of Chapter 455 of the Texas Occupations Code and Chapter 117 of the Texas Administrative Code (TAC). The Texas framework for licensing and regulation outlines the requirements and rules for massage therapists and massage establishments.<sup>208</sup> The regulation of massage falls under the authority of the Texas Department of Licensing and Regulations (TDLR).

Massage therapy, as defined by the Texas Occupations Code is, “the manipulation of soft tissue by hand or through a mechanical or electrical apparatus for the purpose of body massage.” Massage therapy encompasses techniques such as:

- effleurage (stroking)
- petrissage (kneading)
- tapotement (percussion)
- compression
- vibration
- friction
- nerve strokes
- Swedish gymnastics.<sup>209</sup>

The terms "massage," "therapeutic massage," "massage technology," "myotherapy," "body massage," "body rub," or any derivation of those terms are synonyms for "massage therapy."<sup>210</sup> The practice of massage therapy includes the use of oil, salt glows, heat lamps, hot and cold packs, and tub, shower, or cabinet baths.<sup>211</sup>

## THE SCOPE OF STATE LICENSING

Massage therapists must possess a state license to administer massage therapy or massage services, and massage

establishments, unless otherwise exempted, must possess an establishment license.

## MASSAGE THERAPIST LICENSE & APPLICATION

Under chapter 455 and chapter 117, a practicing therapist must have a Texas massage therapist license if they are a practicing therapist. Massage therapists are defined as “a person who practices or administers massage therapy or other massage services to a client for compensation” and includes titles such as “therapeutic massage practitioner, massage technician, masseur, masseuse, myotherapist, body massager, body rubber, or any derivation of those titles.”<sup>212</sup>

Not included within the definition of massage therapists includes reflexologists, who are defined as practicing “energy work on the hands and feet only which involves holding or touching on the energy points.”<sup>213</sup> However, reflexologists cannot use massage or any other derivations of that word in advertisements.<sup>214</sup>

First-time massage therapists are required to go through the application process as outlined in the Occupations Code and Administrative Code to get their state license.<sup>215</sup> Massage therapists who have a license from another state cannot use that state’s massage license to practice in Texas.<sup>216</sup> Out-of-state licensed massage therapists must apply for a Texas massage therapist license with the same form as first-time therapists before they can begin to practice or advertise massage therapy within Texas. Credentials and schooling from other states can fulfill Texas’ massage therapist requirements.<sup>217</sup>

Solo practitioners only need a therapist license to practice and are not required to hold an establishment license.<sup>218</sup> If the therapist uses a business or assumed name, they must also “provide the massage therapist’s full legal name or license number in each advertisement and each time the business name or assumed name appears in writing.”<sup>219</sup> For example, if there is a massage therapist working in a salon, and they are the sole therapist there, and all the advertising for massage therapy and/or services includes their full name or license number, then the salon is not required to obtain an establishment permit.<sup>220</sup>

To apply for a massage therapist license, an applicant must be an individual and must:

- Complete a minimum of 500 hours (including internship hours) of supervised instruction at an accredited massage school;<sup>221</sup>
- Pass the required examinations: (1) the Massage and Licensing Board Examination “MBLEX” (administered nationally by the Federation of State Massage Therapy Board); (2) and the Texas Jurisprudence Exam.<sup>222</sup> Upon passage, therapists must complete a massage therapist license application<sup>223</sup> through the TDLR, which includes reporting social security number and past criminal history. A criminal background check is also conducted upon receiving an application; and,
- Pay all applicable fees<sup>224</sup>

## MESSAGE ESTABLISHMENT LICENSE & APPLICATION

A massage establishment is defined as a place of business that “advertises or offers massage therapy or other massage services.”<sup>225</sup> Massage establishments must complete a massage establishment application form

which includes their assumed name (DBA) along with including the establishment mailing address, which can be a P.O. box.<sup>226</sup> The establishment’s physical address must also be included in the application for the license.<sup>227</sup> If the physical address of the establishment changes, the licensee must apply for a new license.<sup>228</sup> The partners or corporation members, who own a massage establishment must provide personal information as well, which includes social security numbers, and for partners specifically, a mailing address.<sup>229</sup> A criminal background check is also conducted on all owners of the establishment.<sup>230</sup>

Owners which have multiple massage establishments must get individual licenses for each establishment—licenses cannot be transferred between locations.<sup>231</sup> Additionally, if there is a change in ownership (i.e. the addition or deletion of a person defined as an owner), the TDLR must be notified 30 days prior to the change for the owner to complete a partial application for an establishment license, in lieu of a complete one.<sup>232</sup> However, if the Department has reason to believe that the change in ownership will affect the establishment’s ability to meet criteria for license approval, then it may require the completion of a full application.<sup>233</sup>

**Until the application is accepted, and a license is issued, an establishment cannot legally operate.**<sup>234</sup> One of the general requirements for a massage establishment, as defined by the Texas Administrative Code, is that no massage establishment “shall be operated until the department as approved and licensed the establishment.”<sup>235</sup>

## LICENSURE EXEMPTIONS

There are some instances in which the general requirement to be licensed is not applicable. Individuals or groups that are exempted from the scope of Chapter 455’s regulation include:

- A person licensed in this state as a physician, chiropractor, occupational therapist, physical therapist, nurse, cosmetologist, or athletic trainer or as a member of a similar profession subject to state licensing while the person is practicing within the scope of the license;
- A school approved by the Texas Education Agency or otherwise approved by the state; or
- An instructor otherwise approved by the state to teach in an area of study included in the required course of instruction for the issuance of a massage therapist license.<sup>236</sup>
- Professionals who “hold a license, permit, certificate, or other credential issued by this state under another law and offers or performs massage therapy under the scope of that credential” are exempt from the requirement to obtain a license as a massage therapist.<sup>237</sup>
- A licensed massage therapist, practicing as a solo practitioner is not required to have a license for the massage establishment,<sup>238</sup> nor do establishments that are otherwise licensed or certified with the state, who employ or contract with a licensed massage therapist as a part of their practice.<sup>239</sup> *For example, if a chiropractor enters into contract with a licensed massage therapist to perform massage as a part of the chiropractor’s practice, there is no need for the chiropractor to obtain a massage establishment license at his place of business.*
- A place of business is not required to obtain a massage establishment license if a person offers to perform or performs massage therapy at the place of business for no more than 72 hours in a six-month period, or otherwise offers massage as a public or charity event “the primary purpose of which is not to provide massage therapy.”

**Sexually oriented businesses (SOBs) are expressly prohibited from holding a massage establishment license or operate a massage establishment, under Chapter 455 of the Occupations Code.**<sup>240</sup> Chapter 243 of the Local Government Code contains the definition of a sexually oriented business, which provides a list of sexually oriented businesses, along with the catch-all provision. The catch-all provides that a sexually oriented business is “... any other commercial enterprise the primary business of which is the offering of a service or the selling, renting, or exhibiting of devices or any other items intended to provide sexual stimulation or sexual gratification to the customer.”<sup>241</sup>

In *Ma v. State*,<sup>242</sup> the defendant was charged with acting as an owner and operator of a massage establishment that employed an individual who performed massage therapy while unlicensed, but the defendant was also charged with owning and operating a massage establishment that constituted a sexually oriented business.<sup>243</sup> The defendant was found guilty and was sentenced to 20 days confinement in jail and a \$500 fine for each count.<sup>244</sup> On appeal, the defendant argued there was insufficient evidence to support the conviction.<sup>245</sup> He contented there was no evidence introduced to show the business met the definition of a sexually oriented business,

nor evidence to show the defendant in fact owned or operated the business.<sup>246</sup> The Court of Appeals affirmed the trial court's judgment and held there was sufficient evidence to support both charges.<sup>247</sup>

The defining characteristic of a sexually oriented business is a "commercial enterprise where the primary business is the offering of a service ... intended to provide sexual stimulation of sexual gratification to the customer."<sup>248</sup> The establishment at issue fell within the catch-all provision of Chapter 243's definition of a sexually oriented business.<sup>249</sup>

Testimony and evidence introduced to show the business in question, the Traveler Spot Spa, operated as a sexually oriented business included (1) employees were required to come to work with hair and makeup done; (2) employees had to notify management if a customer left before thirty minutes had elapsed; (3) employees were reminded that customers had to pay for a full hour; (4) the spa had notified customers that it was not a massage establishment, and if a customer asked for a massage the request was refused; and (5) the spa advertised on backpage.com and naughtyreviews.com under adult entertainment and erotic massage parlor.<sup>250</sup> When the Court of Appeals viewed the evidence in the light most favorable to the prosecution, it ultimately held there was sufficient evidence to support the finding the business was in fact a sexually oriented business.<sup>251</sup>

### **MESSAGE THERAPIST & MESSAGE ESTABLISHMENT RENEWAL**

Licenses for Massage Therapists and Establishments are valid for two years.<sup>252</sup> Therapists must complete a Renewal Application form,<sup>253</sup> pay the \$75 renewal fee,

and take 12 hours of continuing education.<sup>254</sup> Establishments must also complete an application and pay the renewal fee.<sup>255</sup> Establishments must be inspected at least once every two years.<sup>256</sup>

## **OPERATIONAL REQUIREMENTS**

Under the State schemes outlined under Chapter 455 and Chapter 117, there are several mandatory operational requirements for both massage establishments and therapists.

### **WORKER REQUIREMENTS**

Massage establishments may only hire licensed massage therapists to administer massage therapy or other massage services.<sup>257</sup> Licensed therapists must also be a US citizen or legal resident with a work permit.<sup>258</sup>

### **DISPLAY OF LICENSE & COMPLAINT INFORMATION**

For both establishments and therapists, licenses must be displayed openly and prominently in the place of business.<sup>259</sup> License holders under the licensing scheme must also "notify each client of the name, mailing address, telephone number, and web address of the department for the purpose of directing complaints to the department."<sup>260</sup>

### **SANITATION REQUIREMENTS**

Establishments are required to maintain clean and sanitary environments. Chapter 117 of the Administrative Code outlines a [list of sanitation requirements \(appendix a\)](#) that must be maintained, including clean furniture and equipment and disinfected towels and sheets for each customer.<sup>261</sup>

Massage establishment employees are required to maintain professional conduct and appearance. Establishments are prohibited from allowing therapists to engage in massage therapy in inappropriate clothing, such as lingerie.<sup>262</sup> Therapists are not allowed to engage in massage therapy in the nude, partially nude, or “in clothing designed to arouse or gratify the sexual desire of any individual.”<sup>263</sup> The TAC defines nude as a person who is entirely unclothed or in a manner that leaves uncovered or visible any portion of the breasts below the top of the areola, or any portion of the genitals or buttocks.<sup>264</sup>

## RECORD KEEPING

Massage establishments must maintain a record of client session information including consultation documents, session notes, and billing records.<sup>265</sup> Additionally, massage establishments must maintain records on employees that include full name, a copy of the massage license and its expiration date, proof of eligibility to work in the US, and a completed I-9 form or contract of employment.<sup>266</sup> These records must be maintained and presented to the inspector.<sup>267</sup>

## SEPARATION OF RESIDENTIAL ROOMS

The physical conditions and daily life within an IMB play a significant role in strengthening traffickers’ influence on their victims. Those who are trafficked and forced to work in an IMB are usually forced to live either on-site or in housing provided by the trafficker.<sup>268</sup> When victims are forced to live on the premises, they are expected to be on-call whenever the premises are open—often, this can be from 15 to 24 hours a day.<sup>269</sup>

Under the current state licensing scheme, rooms used wholly or in part for residential

purposes must be separated from the business by a solid wall or by a solid wall with a solid door that is to remain locked during business hours.<sup>270</sup> Therefore, within a massage establishment, rooms or areas may be used for residential purposes but still nonetheless comply with state regulations.

In these cases, building code citations or other municipal citations will be necessary to target and ultimately penalize unwanted and impermissible uses within the IMB.<sup>271</sup> For example, if a certificate of occupancy is issued to a suspected IMB for commercial uses, and mixed used tenancies are not allowed or authorized, using the building code to issue a citation is more effective than issuing a citation for violating the Occupations Code.

The special protection afforded to residential premises arguably means that a warrant for commercial premises may be limited to the commercial area, and police officers could be acting outside of the scope of the warrant by searching areas where people live.<sup>272</sup> Therefore, if it is necessary to gain access into separated residential areas, obtaining a search warrant prior to entry would be the most prudent course of action. Care should be taken to specify with particularity that the scope of the warrant includes residential areas, if applicable.<sup>273</sup>

## ADVERTISING

Under Chapter 455 and 117, those who are not licensed as massage therapists or establishments cannot use the word “massage” in any form of advertisements.<sup>274</sup> Licensees may not use false, misleading, or deceptive advertising.<sup>275</sup> This includes material misrepresentations of fact, testimonials, unsubstantiated comparisons, and other advertising that is “not readily subject to verification.”<sup>276</sup> Solo practitioners or

massage therapists who advertise under an assumed name must display their full legal name or license number on the advertisement.<sup>277</sup>

## SEXUAL MISCONDUCT

Therapists are not allowed to engage in sexual contact in the practice of massage therapy.<sup>278</sup>

Sexual contact includes: touching genitalia, sexual intercourse, indecent exposure, behaviors or expressions that may be interpreted as “inappropriately seductive or sexual” and inappropriate sexual comments, among other conduct.<sup>279</sup> Therapists are also not allowed to practice massage therapy in the nude or in clothing “designed to arouse.”<sup>280</sup> Sexual contact is not permitted on the premises of a massage establishment, and establishment owners must not allow these activities.<sup>281</sup>

## ENFORCEMENT & PENALTIES

Massage establishments are subject to inspections, licensing requirements, and criminal and civil penalties.

### INSPECTIONS OF ESTABLISHMENTS

A massage establishment is subject to inspection by authorized personnel at any reasonable time.<sup>282</sup> They are usually inspected both periodically and as a result of a complaint,<sup>283</sup> and they must be inspected at least once every two years.<sup>284</sup>

### LICENSE DENIAL OR REVOCATION

The TDLR or the executive director may refuse to issue a license to a person, revoke or suspend the license of a person, or place a person licensed on probation if the licensee:

- (1) obtains a license by fraud, misrepresentation, or concealment of material facts;
- (2) sells, barter, or offers to sell or barter a license;
- (3) violates a rule adopted by the commission;
- (4) engages in unprofessional conduct that endangers or is likely to endanger the health, welfare, or safety of the public;
- (5) violates an order or ordinance adopted by a political subdivision under Local Government Chapter 243; or
- (6) violates this chapter.<sup>285</sup>

The commission or executive director is mandated to revoke the license of a person if:

- (1) the person is convicted of, enters a plea of nolo contendere or guilty to, or receives deferred adjudication for trafficking of persons, Chapter 43 of the Texas Penal Code, including prostitution, or any other sexual offense; or
- (2) TDLR determines the person as practiced or administered massage therapy at or for a sexually oriented business.<sup>286</sup>

The commission or executive director is mandated to revoke the license of a person licensed as a massage establishment if:

- (1) the establishment is a sexually oriented business; or,
- (2) an offense involving prostitution or another sexual offense that resulted in a conviction for the offense, a plea of nolo contendere or guilty to the offense, or a grant of deferred adjudication for the offense occurred on the premises of the establishment.<sup>287</sup>



## INJUNCTIVE RELIEF & CIVIL PENALTIES—TEXAS OCCUPATION CODE

Under Chapter 455 of the Texas Occupations Code, the attorney general, a district attorney, a county attorney, a municipal attorney, and the TDLR can bring an action for injunctive relief against a defendant who appears to be in violation of or is threatening to violate Chapter 455.<sup>288</sup> A civil action seeking injunctive relief can also be maintained against the owner/operator of an establishment that offers massage therapy or other massage services and is unlicensed.<sup>289</sup>

In addition to injunctive relief, a civil penalty can be imposed on the defendant who is in violation of Chapter 455. The amount of the civil penalty cannot be less than \$1000 nor can it exceed \$10,000.<sup>290</sup> Each day the violation occur or continues to occur is a separate violation for which a civil penalty can be assessed.<sup>291</sup> If an injunction is issued, a court has the discretion to include reasonable requirements to prevent future violations.<sup>292</sup> Government attorneys and the TDLR, if successful in obtaining injunctive relief or civil penalty, may recover reasonable expenses incurred, including court costs, reasonable attorney's fees, investigative costs, witness fees, and deposition expenses for obtaining the relief.<sup>293</sup>

Under a Chapter 455 civil action, a person cannot continue carrying out the prohibited activity pending appeal or if there is a trial on the merits and an injunctive order was entered.<sup>294</sup> The applicable court must hear an appeal no later than 90 days after the enjoined party has taken the right to appeal.<sup>295</sup> If an appeal is not taken, the parties are entitled to a trial on the merits no later

than 90 days after the date of the temporary injunctive order.<sup>296</sup>

## CRIMINAL PENALTIES

Chapter 455 criminalizes the violations of several of its provisions. The violations that can be penalized are related to illicit massage establishments, prostitution, and/or human trafficking. See [criminal penalties](#) for a full discussion of criminal penalties available under the Texas Occupations Code.

## EFFECT ON LOCAL LAW

Chapter 455 of the Occupation Code will generally supersede any regulation that is adopted by a political subdivision related to the licensing or regulation of massage therapists.<sup>297</sup> However, Chapter 455 does not affect local regulations that:


- (1) relate to zoning or similar requirements for massage establishments;
- (2) require a background investigation into the owner, operator, or investor, of a massage establishment; or
- (3) do not relate directly to the practice of massage therapy as performed by a licensed massage therapist, while the licensed therapist performs under the applicable licensing law.<sup>298</sup>

A municipality also cannot adopt an ordinance that is more restrictive for massage therapists or massage establishments than for healthcare professionals or establishments, except for regulation of establishments that offer bathing or showering services and regulations that are authorized by Chapter 243 of the Local Government Code (which describes municipal and county authority to regulate sexually oriented businesses).<sup>299</sup>

# LOCAL GOVERNMENT GUIDE

## *Criminal Offenses & Penalties*





2.5 billion dollars in revenue is generated by IMBs annually in the United States.

107 million dollars in revenue is generated by IMBs annually in Houston, Texas.

*Roughly 2,869 daily customers per day at approximately 292 IMBs in Houston generates around 107 million dollars in annual revenue.*

"While massage parlors may appear to be individual businesses they are often part of larger organized crime networks, which participate in every aspect of the business.

*The key facets of these operations are linked to businesses that allow for both economies of scale in the massage businesses & money laundering through connected legal businesses."*



# EXECUTIVE SUMMARY

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IMBs exist openly and notoriously in our state. Illicit massage businesses, by definition, are criminal in nature. An IMB operation violates municipal ordinances, state statutes and regulations, and federal law. From the various stages of trafficking—recruitment, entry, transportation, and exploitation—to the laundering of money and violation of state regulations, an IMB is dependent on criminal activity to thrive and see profits.

IMBs use massage and bodywork as a front for human trafficking. Unlicensed IMBs are in violation of the Texas Occupations Code and subject to criminal penalties. Moreover, the continuum of conduct necessary for IMBs, e.g., prostitution, smuggling, trafficking, violates multiple state laws. The following section outlines state penal code offenses and Texas Occupations Code offenses related to the regulation of massage therapists and the massage industry.



*"Sex trafficking cases are also very hard to prosecute ... The women who are rounded up rarely speak English & are hesitant to provide information on their traffickers if they do. They know the danger to themselves & their families & most come from places where the police are as corrupt as the people who sold them into slavery ... In a world where women's rights are slowly becoming a part of the global agenda, it is not surprising that the women trafficked are those from not just the poorest countries but the ones where women are still extremely subservient to men."*



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Mini Swartz, The Lost Girls, Texas Monthly, April 2010

<https://www.texasmonthly.com/articles/the-lost-girls/>

# Criminal Penalties

Offenses Defined in Texas Penal Code		
Offense	Punishment	Notes
<p><b>Prostitution</b></p> <p>The person knowingly</p> <ul style="list-style-type: none"> <li>(A) offers or agrees to receive a fee from another to engage in sexual conduct</li> <li>(B) offers or agrees to pay a fee to another person for the purpose of engaging in sexual conduct with that person, or another<sup>299</sup></li> </ul>	<ul style="list-style-type: none"> <li>Class B misdemeanor<sup>300</sup></li> <li>Class A misdemeanor, if 1-2 prior convictions<sup>301</sup></li> <li>State Jail felony if 3 or more convictions<sup>302</sup></li> </ul>	<p><i>It is a defense to prosecution for an offense under subsection (A) if the actor engages in the conduct that constitutes the offense if the actor was a victim of conduct that constitutes an offense under § 20A.02 (Trafficking of Persons) or § 43.05 (Compelling Prostitution).<sup>303</sup></i></p>
<p><b>Promotion of Prostitution</b></p> <p>A person, acting other than a prostitute receiving compensation for personally rendered services, knowingly</p> <ul style="list-style-type: none"> <li>(1) Receives money or other property pursuant to an agreement to participate in the proceeds of prostitution; or,</li> <li>(2) solicits another to engage in sexual conduct with another person for compensation<sup>304</sup></li> </ul>	<ul style="list-style-type: none"> <li>State jail felony<sup>305</sup></li> <li>3d degree felony if the defendant has a prior conviction<sup>306</sup></li> </ul>	
<p><b>Aggravated Promotion of Prostitution</b></p> <p>A person knowingly owns, invests in, finances, controls, supervises, or manages a prostitution</p>	<ul style="list-style-type: none"> <li>2d degree felony<sup>308</sup></li> </ul>	

<p>enterprise that uses two more prostitutes.<sup>307</sup></p>		
<p><b>Compelling Prostitution</b></p> <p>A person knowingly</p> <ul style="list-style-type: none"> <li>• (1) causes another by force, threat, or fraud to commit prostitution<sup>309</sup></li> </ul>	<ul style="list-style-type: none"> <li>• 2d degree felony<sup>310</sup></li> </ul>	<p><i>If conduct constituting an offense under this section also constitutes an offense under another section of this code, the actor may be prosecuted under either section, or both sections.<sup>311</sup></i></p>
<p><b>Trafficking of Persons</b></p> <p>Any person who knowingly</p> <ul style="list-style-type: none"> <li>• (1) Traffics another person with the intent that the trafficked person engages in forced labor or services;</li> <li>• (2) Receives a benefit from participating in a venture that involves an activity described in (1), including by receiving labor or services the person knows are forced;</li> <li>• (3) Traffics another person and, through force, fraud, or <u>coercion</u>, causes the trafficked person to engage in conduct prohibited by (A) § 43.02 (Prostitution); (B) § 43.03 (Promotion of Prostitution); (C) § 43.04 (Aggravated Promotion of Prostitution); (D) § 43.05 (Compelling Prostitution); or,</li> <li>• (4) Receives a benefit from participating in a venture that involves an activity described in (3) or engages in sexual conduct with a person</li> </ul>	<ul style="list-style-type: none"> <li>• 2d degree felony<sup>313</sup></li> <li>• 1st degree felony if the commission of the offense results in the death of the victim of trafficking, or the death of an unborn child of the victim of trafficking.<sup>314</sup></li> </ul>	<p><i>If conduct constituting an offense under this section also constitutes an offense under another section of this code, the actor may be prosecuted under either section, or both sections.<sup>315</sup></i></p>



<p>trafficked in a manner described in (3).<sup>312</sup></p>		
<p><b>Continuous Trafficking of Persons</b></p> <p>A person commits an offense if during a period of time 30 days or more, engages in conduct prohibited by § 20.02A (trafficking of persons) two or more times, against one or more victims.<sup>316</sup></p>	<ul style="list-style-type: none"> <li>• 1st degree felony, with minimum imprisonment of 25 years and a maximum 99 years.<sup>317</sup></li> </ul>	
<p><b>Unlawful Restraint</b></p> <p>A person commits an offense if he intentionally or knowingly restrains another person.<sup>318</sup></p>	<ul style="list-style-type: none"> <li>• Class A Misdemeanor<sup>319</sup></li> <li>• 3d degree felony if the actor recklessly exposes the victim to a substantial risk of serious bodily injury.<sup>320</sup></li> </ul>	
<p><b>Smuggling of Persons</b></p> <p>A person, with the intent to obtain a pecuniary benefit, knowingly</p> <ul style="list-style-type: none"> <li>• (1) uses a motor vehicle, aircraft, watercraft, or other means of conveyance to transport an individual with the intent to: (a) conceal the individual from a peace officer or investigator; or, (b) flee the person the actor knows is a peace officer or special investigator attempting to lawfully arrest or detain the actor; or,</li> <li>• (2) encourages or induces a person to enter or remain in this country in violation of federal law by concealing, harboring, or shielding that person from detection.<sup>321</sup></li> </ul>	<ul style="list-style-type: none"> <li>• 3d degree felony<sup>322</sup></li> <li>• 2d degree if the actor commits the offense in a manner that creates a substantial likelihood that the smuggled individual will suffer serious bodily injury or death<sup>323</sup></li> <li>• 1st degree felony, if at trial it is shown that as a direct result of the commission of the offense, the smuggled individual was a victim of sexual assault (§ 22.011 TPC) or aggravated sexual assault (§ 22.021 TPC), or the smuggled individual suffered serious bodily injury or death.<sup>324</sup></li> </ul>	<p><i>If conduct constituting an offense under this section also constitutes an offense under another section of this code, the actor may be prosecuted under either section, or both sections.<sup>325</sup></i></p>

<p><b>Continuous Smuggling of Persons</b></p> <p>A person commits an offense if during a period of 10 or more days in duration the person engages in conduct that constitutes “smuggling of persons” (§ 20.05).<sup>326</sup></p>	<ul style="list-style-type: none"> <li>• 2d degree felony<sup>327</sup></li> <li>• 1st degree felony if the offense is conducted in a manner that creates a substantial likelihood that the smuggled individual will suffer serious bodily injury or death, or victim became a victim of sexual assault or aggravated sexual assault, and is punishable with a minimum of 25 years imprisonment.<sup>328</sup></li> </ul>	
<p><b>Sexual Coercion</b></p> <p>A person intentionally threatens, including by coercion or extortion, to commit an offense under: Chapter 43 (including any prostitution offense), Section 20A.02 (a)(3) (Sex Trafficking), Section 20A.02 (a)(4) (receives a benefit from participating in a venture involving activity described 20A.03(a)(3) ... <a href="#">Section 21.15</a> (Invasive Visual Recording), <a href="#">Section 21.16</a> (Unlawful disclosure of Promotion of Intimate Visual Material), to obtain, in return for not committing the threatened offense, or in connection with the threatened offense, any of the following benefits: (1) intimate visual material, (2) an act involving sexual conduct causing arousal or gratification, (3) a monetary benefit or other benefit of value.<sup>329</sup></p> <p>A person Intentionally threatens, including by coercion or extortion, to commit an offense under Chapter 19 (Criminal Homicide) or Section 20A(a)(1) (labor trafficking), 20A(a)(2)</p>	<ul style="list-style-type: none"> <li>• State Jail Felony<sup>331</sup></li> <li>• 3d degree Felony if it is shown at trial that the defendant has been previously convicted under this section.<sup>332</sup></li> </ul>	<p><i>This section applies to a threat regardless of how that threat is communicated, including a threat transmitted through e-mail or an internet website, social media account, or chat room and a threat made by other electronic or technological means.</i><sup>333</sup></p>

<p>(receiving a benefit from participating in a venture which involves labor trafficking) ... to obtain in return for not committing the threatened offense or in connection with the threatened offense, either or the following benefits: (1) intimate visual material; or (2) an act involving sexual conduct causing arousal or gratification. <sup>330</sup></p>		
<p><b>Money Laundering</b></p> <p>A person <i>knowingly</i></p> <ul style="list-style-type: none"> <li>• (1) acquires or maintains in interest in, conceals, possesses, transfers, or transports the proceeds of criminal activity;</li> <li>• (2) conducts, supervises, or facilitates a transaction involving the proceeds of criminal activity;</li> <li>• (3) invests, expends, or receives, or offers to invest, expend or receive, the proceeds of criminal activity; or,</li> <li>• (4) finances or invests or intends to finance or invest funds that the person believes are intended to further the commission of criminal activity<sup>334</sup></li> </ul>	<ul style="list-style-type: none"> <li>• State jail felony if the value of the funds is more than \$2,500 but less than \$30,000.<sup>335</sup></li> <li>• 3d degree felony if the value of the funds is \$30,000 or more but less than \$150,000.<sup>336</sup></li> <li>• 2d degree felony if the value of the funds is \$150,000 or more but less than \$300,000.<sup>337</sup></li> <li>• 1st degree felony if the value of the funds is \$300,000 or more.<sup>338</sup></li> </ul>	<p><i>Knowledge of the specific nature of the criminal activity giving rise to the proceeds is not required to establish a culpable mental state under this subchapter<sup>339</sup></i></p> <p><i>If the proceeds of criminal activity are related to one scheme or continuing course of conduct, whether from the same or several sources, the conduct may be considered one offense and the value of the proceeds can be aggregated in determining the classification of the offense.<sup>340</sup></i></p>
<p><b>Organized Criminal Activity</b></p> <p>(a) A person commits an offense if, with the intent to establish, maintain, or participate in a combination or in the profits of a combination, or as a member of a criminal street gang, the person</p>	<ul style="list-style-type: none"> <li>• An offense under this section is one category higher than the most serious offense committed in subsection (a).<sup>342</sup></li> <li>• If the most serious offense is a Class A misdemeanor,</li> </ul>	

<p>commits or conspires to commit one or more of the following:</p> <ul style="list-style-type: none"> <li>● (3) promotion of prostitution, aggravated promotion of prostitution, or compelling of prostitution;</li> <li>● (10) Any offense under Chapter 34 (Money Laundering);</li> <li>● (12) Any offense under Chapter 20A (trafficking of persons);</li> <li>● (13) Any offense under <a href="#">Section 37.10</a> (Tampering With Governmental Record);</li> <li>● (17) Any offense under Section 20.05 (Smuggling of Persons) or 20.06 (Continuous Smuggling of Persons);</li> <li>● (18) Any offense classified as a felony under the Tax Code.<sup>341</sup></li> </ul>	<p>the offense is then a state jail felony.<sup>343</sup></p> <ul style="list-style-type: none"> <li>● An offense is a 1st degree felony for and is punishable by imprisonment in the TDCJ punishable for 30-99 years if the most serious offense is smuggling of persons where the smuggled person suffers from serious bodily injury or death or is a victim of aggravated sexual assault.<sup>344</sup></li> </ul>	
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## Texas Occupation Code

<i>Offenses Defined in Tex. Occ. Code Ann. § 455</i>			
	<b>Proper Defendant</b>	<b>Offense</b>	<b>Punishment</b>
1	Any person required to be licensed	Knowingly collects a fee or any other form of compensations for massage therapy without being licensed. <sup>345</sup>	<ul style="list-style-type: none"> <li>● Class C Misdemeanor<sup>346</sup></li> <li>● Class A misdemeanor if shown at trial the defendant has been previously convicted of an offense defined under § 455.352.<sup>347</sup></li> </ul>
2	Any person required to be licensed	Knowingly acts as a massage therapist without holding the appropriate license, unless he or she is otherwise exempt. <sup>348</sup>	<ul style="list-style-type: none"> <li>● Class C Misdemeanor<sup>349</sup></li> <li>● Class A misdemeanor if shown at trial the defendant has been previously convicted of an offense defined under §</li> </ul>

			455.352. <sup>350</sup>
3	Any person required to be licensed	Knowingly represents his or herself as a massage therapist without holding the appropriate license. <sup>351</sup>	<ul style="list-style-type: none"> <li>● Class C Misdemeanor<sup>352</sup></li> <li>● Class A misdemeanor if shown at trial the defendant has been previously convicted of an offense defined under § 455.352.<sup>353</sup></li> </ul>
4	Any person required to be licensed	Knowingly performs or offers to perform any service with a purported health benefit which involves physical contact with a client. <sup>354</sup>	<ul style="list-style-type: none"> <li>● Class C Misdemeanor<sup>355</sup></li> <li>● Class A misdemeanor if shown at trial the defendant has been previously convicted of an offense defined under § 455.352.<sup>356</sup></li> </ul>
5	Owner or Operator of Massage Establishment	Knowingly operates as a massage establishment without obtaining the required state license. <sup>357</sup>	<ul style="list-style-type: none"> <li>● Class B Misdemeanor (No prior convictions).<sup>358</sup></li> <li>● Class A Misdemeanor (1-2 prior convictions)<sup>359</sup></li> <li>● State Jail Felony (3 or more prior convictions)<sup>360</sup></li> </ul>
6	Any person required to be licensed	<i>Knowingly</i> uses the word “massage” or “bath” on a sign or any form of advertising for a Sexually Oriented Business 455.205(d). <sup>361</sup>	<ul style="list-style-type: none"> <li>● Class C Misdemeanor<sup>362</sup></li> <li>● Class A Misdemeanor if shown at trial the defendant has been previously convicted of an offense defined under § 455.352.<sup>363</sup></li> </ul>
7	Owner or Operator of a Sexually Oriented Business	<i>Knowingly</i> uses the word “massage” or “bath” on a sign or any form of advertising. <sup>364</sup>	<ul style="list-style-type: none"> <li>● Class B Misdemeanor (No prior convictions)<sup>365</sup></li> <li>● Class A Misdemeanor (1-2 prior convictions)<sup>366</sup></li> <li>● State Jail Felony (3 or more prior convictions)<sup>367</sup></li> </ul>
8	Owner or Operator of a Sexually Oriented Business	<i>Knowingly</i> holds a license issued under Chapter 455 or operates as a massage establishment. <sup>368</sup>	<ul style="list-style-type: none"> <li>● Class B Misdemeanor (No prior convictions)<sup>369</sup></li> <li>● Class A Misdemeanor (1-2 prior convictions)<sup>370</sup></li> <li>● State Jail Felony (3 or more prior convictions).<sup>371</sup></li> </ul>
9	Owner or Operator of a Massage Establishment	<i>Knowingly</i> employs individuals who are unlicensed massage therapists who do not qualify for license exemptions. <sup>372</sup>	<ul style="list-style-type: none"> <li>● Class B Misdemeanor (No prior convictions)<sup>373</sup></li> <li>● Class A Misdemeanor (1-2 prior convictions)<sup>374</sup></li> </ul>

			<ul style="list-style-type: none"> <li>State Jail Felony (3 or more prior convictions)<sup>375</sup></li> </ul>
10	Any person required to be licensed	<i>Knowingly</i> (1) employs an individual who is not a U.S. citizen nor an LPR with a valid work permit; (2) employs a minor without parent or legal guardian authorization; (3) allows nude or partially nude employees to provide massage therapy or services to patrons; (4) allows any individual to engage in sexual contact in the massage establishment; (5) allows any individual to practice massage therapy nude or in clothing designed to arouse or gratify sexual desire of any individual. <sup>376</sup>	<ul style="list-style-type: none"> <li>Class C Misdemeanor<sup>377</sup></li> <li>Class A misdemeanor if shown at trial the defendant has been previously convicted of an offense defined under § 455.352.<sup>378</sup></li> </ul>
11	A massage therapist	<i>Knowingly</i> performs massage therapy, with or without compensation, at or for a sexually oriented business. <sup>379</sup>	<ul style="list-style-type: none"> <li>Class B Misdemeanor.</li> <li>Class A Misdemeanor (1-2 prior convictions).</li> <li>3 or more convictions—State Jail Felony.<sup>380</sup></li> </ul>
12	Any person required to be licensed	<i>Knowingly</i> fails to post in plain sight the license for each massage therapist who practices in the establishment. <sup>381</sup>	<ul style="list-style-type: none"> <li>Class C Misdemeanor.<sup>382</sup></li> <li>Class A misdemeanor if shown at trial the defendant has been previously convicted of an offense defined under § 455.352.<sup>383</sup></li> </ul>
13	Owner or Operator of a Massage Establishment	<i>Knowingly</i> fails to post in plain sight the license for each massage therapist who practices in the establishment. <sup>384</sup>	<ul style="list-style-type: none"> <li>Class B Misdemeanor (No prior convictions)</li> <li>Class A Misdemeanor (1-2 prior convictions)</li> <li>State Jail Felony (3 or more prior convictions)<sup>385</sup></li> </ul>
14	Any person	<i>Knowingly</i> fails to present each person's license on request of the TDLR, authorized TDLR representative, or peace officer. <sup>386</sup>	<ul style="list-style-type: none"> <li>Class C Misdemeanor<sup>387</sup></li> <li>Class A misdemeanor if shown at trial the defendant has been previously convicted of an offense defined under § 455.352<sup>388</sup></li> </ul>
15	Owner or Operator of a Massage Establishment	<i>Knowingly</i> fails to present each person's license on request of the TDLR, authorized TDLR representative, or peace officer. <sup>389</sup>	<ul style="list-style-type: none"> <li>Class B Misdemeanor (No prior convictions)</li> <li>Class A Misdemeanor (1-2 prior convictions)</li> </ul>

			<ul style="list-style-type: none"> <li>State Jail Felony (3 or more prior convictions)<sup>390</sup></li> </ul>
16	Any Person	who is unlicensed and <i>knowingly</i> uses the word "massage" on any form of advertising. <sup>391</sup>	<ul style="list-style-type: none"> <li>Class C Misdemeanor<sup>392</sup></li> <li>Class A if shown at trial the defendant has been previously convicted of an offense defined under § 455.352.<sup>393</sup></li> </ul>

# LOCAL GOVERNMENT GUIDE

## *Civil Enforcement*





# EXECUTIVE SUMMARY

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IMBs are fronts for organized, commercial sex enterprises that operate hidden in plain sight in our hometowns and communities. Within a single IMB network, multiple people will play different roles at different stages of trafficking. Thus, it is not only manager and the network owner who may be implicated, but landlords, property owners, real estate agents, and even attorneys.

Although law enforcement aims to bring traffickers to justice, other actors within this network often act with impunity. Civil enforcement and business regulatory mechanisms are critical in holding property owners accountable.

The following section details how such mechanisms in Texas, namely the Deceptive Trade Practices Act (DTPA) and Ch. 125 nuisance and abatement, can be used to hold these actors accountable. This section concludes with a blueprint of Project AWESOME (Attorneys Working to End Sexually-Oriented Massage Establishments) for local governments, NGOs, and private attorneys to collaborate and take a proactive role in eradicating sex trafficking in their communities.



*"Sexual slavery takes place right in front of us, its victims hidden in plain sight. The brothels don't limit their business to our city streets; you can find them in the back of alternative papers in ads for massage parlors, many of which promise a "grand opening," because as soon as the police manage to close one shop, another opens down the road under a new name. And, of course, there are Web sites where you can sort through dozens of massage parlors & spas, looking for the one that's most convenient, perhaps & selecting a girl that perfectly fits your specifications—height, weight, breast size, hip size, body type, along with the type of sex acts she will perform—and then, after the fact, rating her, just like a product on Amazon.com"*

Mimi Swartz, *The Lost Girls*, Texas Monthly, April 2010  
<https://www.texasmonthly.com/articles/the-lost-girls/>

*False, misleading, or deceptive acts or practices in the conduct of any trade or commerce hereby declared unlawful and are subject to action by the consumer protection division operating, maintaining, or advertising a massage establishment, as defined by Section 455.001, Occupations Code, that is not appropriately licensed under Chapter 455, Occupations Code, or in compliance with the applicable licensing and other requirements of that chapter; or is not in compliance with any applicable local ordinance relating to the licensing or regulation of massage establishments*

# RUBMAPS.COM

## 325,000 UNIQUE VISITORS MONTHLY

## Civil Enforcement: Consumer Protection

### THE DECEPTIVE TRADE PRACTICES ACT

**P**rior to 1973, “consumer protection” law in Texas amounted to *caveat emptor*, or “buyer beware.”<sup>392</sup> In 1973 Texas passed the Deceptive Trade Practices Act (DTPA) with the goal of protecting consumers from deceptive acts and practices while making it easier, and more lucrative, for consumers to seek recovery. The DTPA provides consumer protection and remedies from harm that is suffered by false, misleading, or deceptive trade practices. The DTPA provides for four causes of action:

- Breach of express or implied warranty;
- Violations of the specifically enumerated deceptive trade practices, or the so-called “laundry list”,<sup>393</sup>
- Unconscionable action; and
- Violations of Chapter 541 of the Insurance Code.<sup>394</sup>

The laundry list is a long collection of specific acts and practices deemed to be unfair and deceptive.<sup>395</sup> Currently, there are thirty-three specifically enumerated acts considered to be unfair and deceptive by the Texas Legislature. The 85th legislature (2017) added an additional act to the laundry list relevant to massage businesses:

“Except as otherwise provided in Subsection (d) of this section, the term, false, misleading, or deceptive acts or practices, **includes, but is not limited to, the following acts...** [o]wning, operating, maintaining, or advertising a **massage establishment**, as defined by Section 455.001, Occupations Code, **that is not appropriately licensed under Chapter 455, Occupations Code, or is not in**

**compliance with the applicable licensing and other requirements of that chapter; or is not in compliance with applicable local ordinance relating to the licensing or regulation of massage establishments.”<sup>396</sup>**

The provision focuses on the marketing and advertising of the massage establishments which are unlicensed or otherwise non-compliant with state regulations and/or local ordinances. These actions taken in the public interest, and are commenced by the Attorney General, or county or district attorneys (seeking injunctive relief only). DTPA actions can also follow regulatory enforcement and referrals by TDLR and/or local law enforcement.<sup>397</sup>

There is great utility for government attorneys to seek relief under both Ch. 125 nuisance and abatement<sup>398</sup> and the DTPA. The relief sought from a DTPA action is generally the same as a nuisance and abatement action—injunctive relief. Moreover, when seeking relief under the DTPA, this additional cause of action does not increase the burden of proof or production on government attorneys, because the center of the DTPA action is that the establishment is advertising as a massage establishment and is noncompliant with appropriate regulations.

Additionally, much of the same evidence used in a nuisance and abatement action can be used for a DTPA action. Moreover, this burden can be lower than many nuisance and abatement actions (e.g. proving that a defendant maintains a common nuisance where a place is maintained for the purpose of prostitution). Verification of licensing through TDLR, and introducing advertisements from the business, can be enough to satisfy this burden.

## STATE ACTORS

### THE ATTORNEY GENERAL

The Attorney General has the capacity to act in matters of consumer protection. This role is created by the DTPA.<sup>399</sup> The Attorney General’s capacity to act is fundamentally different from the role of a lawyer in a private matter because the Attorney is pre-authorized to act on behalf of the State when it is in the State’s or the public’s interest.<sup>400</sup>

Unlike a private consumer’s action, the governmental claim does not require a showing that the deceptive conduct was relied on to the consumer’s detriment, or that the conduct was the producing cause of economic or mental anguish damages.<sup>401</sup> The Attorney General, “must exercise judgment and discretion, that will not be controlled by other authorities.”<sup>402</sup> This is because the governmental claim has a regulatory purpose, as opposed to a restorative purpose of the private cause of action.<sup>403</sup> A governmental claim accrues, and thus liability attaches, when a person has violated or is about to violate the “laundry-list” of unlawful acts enumerated in the statute.<sup>404</sup>

While the private litigant is afforded attractive remedies for recovery under the DTPA<sup>405</sup>, they do not amount to the same level of recovery that is afforded to the attorney general under the DTPA. The Attorney General seeks relief on behalf of the State of Texas and the public, as opposed to commencing a lawsuit on behalf of the private litigant.<sup>406</sup>

The Attorney General has the following remedies available under the DTPA:

- Reasonable attorneys’ fees and costs;<sup>407</sup>
- Temporary Restraining Orders;
- Temporary or Permanent; Injunctions;

- Court orders or judgments “necessary to compensate identifiable persons for actual damages or to restore money or property, real or personal, which may have been acquired by means of any unlawful act or practice;”<sup>408</sup>
- Civil penalties, up to \$20,000 per violation,<sup>409</sup> and,
- Assurance of voluntary compliance.

The DTPA gives the Attorney General its broad investigative powers.<sup>410</sup> Section 17.60 of the DTPA authorizes investigation by examination of oral testimony<sup>411</sup> and merchandise.<sup>412</sup> Section 17.61 of the DTPA details the authority for a more detailed civil investigation, including the discovery of documents and business records.<sup>413</sup>

Other state regulatory agencies have some duties and powers related to consumer protection, although the vast majority of which are licensing agencies, which includes the Texas Department of Licensing and Regulation.<sup>414</sup> However, these powers are still second to those endowed to the Consumer Protection division of the AG’s office.<sup>415</sup> These regulatory agencies, such as the TDLR, will have the power to take and investigate complaints.<sup>416</sup> However, these agencies will have little, if any, power of enforcement, other than the suspension, revocation, or denial of the relevant license.<sup>417</sup>

### THE DISTRICT OR COUNTY ATTORNEYS

The District and County attorneys have the duty to lend the consumer protection division any assistance requested in commencing and prosecuting actions under the DTPA.<sup>418</sup> A district or county attorney, with prior written notice to the Consumer Protection Division, may institute and prosecute actions seeking injunctive relief for violation of the DTPA,<sup>419</sup> if there is “reason to believe that any person is engaging in, has engaged in, or is about to engage in any act or

practice declared to be unlawful [by the DTPA] ... and that proceedings would be in the public interest.”<sup>420</sup> **Under the DTPA, city attorneys are not specially enumerated in the statute as having standing to commence a DTPA action.**<sup>421</sup>

If a county or district attorney seeks injunctive relief under the DTPA, they can proceed either alone, or with the attorney general as co-plaintiffs. If the district or county attorney requests assistance in a DTPA action, the attorney general must assist the requesting office.<sup>422</sup> If a county or district attorney chooses to commence an action alone, a full report must be sent to the consumer protection division, which includes the final disposition of the matter.<sup>423</sup>

For actions commenced for public interest, general DTPA pre-suit notice (written notice given at least 60 days prior to commencing a *private* DTPA action)<sup>424</sup> is not required prior to commencing an action. Both the consumer protection division and district or county attorneys only need to provide at least seven days’ notice prior to commencing the action, to inform him or her, generally, of the alleged unlawful conduct.<sup>425</sup> The complaint is actionable regardless of whether the unlawful conduct is halted prior to commencement of the action.<sup>426</sup>

### **GAPS IN THE DTPA**

Section 17.48 of the DTPA which outlines the duties of both county and district attorneys, does not require prior permission from the Consumer Protection Division to commence an action for only one laundry list violation— notario fraud.<sup>427</sup> This is the only laundry list violation where a county or district attorney can

seek a civil penalty as a form of relief, as opposed to seeking injunctive relief only. This same exception could easily be expanded to include massage establishments operating without a license, or any laundry list violation which a government attorney would commence an action in the interest of the public (e.g., price gauging during a natural disaster).<sup>428</sup> This expansion could help incentivize county and district attorneys to commence DTPA actions against these illicit businesses, especially where nuisance and abatement actions are already being utilized against these businesses.

### **PARTNERSHIPS & COLLABORATION**

Partnerships with local attorneys and local law enforcement are critical for the success of both a DTPA/nuisance abatement action. The Attorney General often partners with the city and/or county attorneys and local law enforcement to maximize the benefit of civil enforcement mechanisms against these illicit businesses. For example, the Attorney General’s office can offer their knowledge of the DTPA, and the city and/or county attorney can provide their knowledge on nuisance abatement.<sup>429</sup>

The Attorney General generally does not receive many public complaints of illicit massage establishments, and most of their cases originate as referrals arising from enforcement actions.<sup>430</sup> Government attorneys, private attorneys, and the general public should be educated on human trafficking and illicit massage businesses and encouraged to call the consumer protection division of the Attorney General’s office.



*"Law enforcement & criminal prosecutors are effective in punishing the criminal offenders, but the businesses profiting from these illegal acts too often stay in business, leading to a cycle of more arrests & more criminal prosecutions ... The job of law enforcement at these crime-ridden properties seems to be never-ending. Frequent criminal activity has a negative impact on the quality of life & property values in our neighborhoods.*

*These businesses & criminal actors are nuisances to law enforcement & everyone living near them. Nuisance abatement is one of the most effective ways to bring to task property owners who have failed to take reasonable steps to stop crime on their property ... The law states & we believe, that a business owner has a duty to protect the neighborhoods of which they are a part."*

# Civil Enforcement: Nuisance & Abatement

## NUISANCE & ABATEMENT GENERALLY

**N**uisance is a comprehensive term referring to conditions that substantially interfere with the use and enjoyment of land that would cause a person of ordinary sensibilities unreasonable discomfort or annoyance.<sup>431</sup> The term “nuisance” does not refer to the defendant’s conduct but rather to the legal injury that resulted in an interference with the use and enjoyment of real property.<sup>432</sup> The use of nuisance and abatement has been a success in Harris County, particularly in Houston, which has no zoning ordinances to specifically target the use of land by property owners.<sup>433</sup>

Assistant county attorneys for Harris County said:

We have obtained injunctions requiring “massage parlors” and “spas” to shut down, as well as settlements that force property owners to take steps to prevent prostitution and human trafficking ... Many times these businesses are a front for perpetuating the most serious offenses—the exploitation of vulnerable individuals. Not only are the people working at these locations victims of crime, but so are the people living nearby. These businesses act as havens for habitual criminal activity and adversely affect everything that surrounds them. Our office files nuisance lawsuits to eradicate and expose these criminal enterprises. Too often, the landlords and owners of these locations turn a blind eye to what is happening on their property. Using civil remedies, we can uncover the truth.<sup>434</sup>

Chapter 125 of the Texas Civil Practices and Remedies Code (TCPRC) provides specific remedies for both a common nuisance (statutory) and public nuisance. According to Chapter 125.0015 of the CPRC, an individual maintains a common nuisance if **they maintain a place to which persons habitually go for prohibited purposes** (outlined below), **knowingly tolerate the activity**, and furthermore **fail to make reasonable attempts to abate the activity**.

The enumerated prohibited Purposes, relevant to IMBs, listed in [TCPRC Chapter 125](#) include:<sup>435</sup>

- (2) Engaging in organized criminal activity as a member of a combination<sup>436</sup>;
- (6) Prostitution,<sup>437</sup> promotion of prostitution,<sup>438</sup> or aggravated promotion of prostitution;<sup>439</sup>
- (7) Compelling prostitution;<sup>440</sup>
- (10) [Sexual assault](#);
- (11) [Aggravated sexual assault](#);
- **(18) *Massage therapy or other massage services in violation of Chapter 455, Occupations Code***;
- (20) Trafficking of persons;<sup>441</sup>

Under Chapter 125 of the TCPRC, a private individual, the attorney general, or a district, county, or city attorney have authority to file suit to enjoin and abate a common nuisance as described by the statute.<sup>442</sup> Unlike the DTPA, a city attorney does have standing in the statute to commence a nuisance and abatement action. The attorney general, district, or county attorney will bring suit in the name of the State, while a suit maintained by a city attorney is brought in the name of the municipality.<sup>443</sup> The statute also mandates venue in the county where the nuisance is alleged to exist and against the person who is

maintaining or about to maintain the nuisance.<sup>444</sup>

Generally, when a plaintiff is seeking injunctive relief, the Texas Rules of Civil Procedure (TRCP) require that the plaintiff verify the petition by an affidavit.<sup>445</sup> However, Chapter 125 does not require the petition to abate a common nuisance be verified by affidavit,<sup>446</sup> nor does proof of the personal injury need to be shown. A nuisance action maintained under Chapter 125 can be brought in rem, against the property itself, in addition to any named defendants.<sup>447</sup>

## BURDEN OF PROOF

Under Chapter 125, the government or deputized attorney, bringing the statutory common nuisance must prove the defendant:

- (1) **maintained a place where persons habitually frequent** for the purposes of committing the statutorily-enumerated crimes;
- (2) **knowingly tolerated this activity;** and,
- (3) **failed to make reasonable attempts to abate the activity.**

There is no bright line test enumerated by the courts to determine whether the plaintiff has sufficiently met its evidentiary burden, and the test is very fact dependent. This is because what is generally reviewed by appellate courts in these cases is the issuance of an injunction--temporary or permanent--and is reviewed under abuse of discretion standards.

## NUISANCE & ABATEMENT UNDER APPELLATE REVIEW

The appellate courts have examined whether it was proper for the trial court to issue an injunction (temporary or permanent) under Chapter 125 nuisance and abatement. The court's review is limited to determining

whether the trial court clearly abused its discretion<sup>448</sup> and does not include a review of the merits of the underlying case.<sup>449</sup> In considering whether there is an abuse of discretion, the reviewing court must decide whether the trial court's order was arbitrary and unreasonable or is without reference to any guiding principles or rules.<sup>450</sup> Any factual issues decided by the trial court in reaching its decision are not reviewed under the usual legal or factual sufficiency standards. Instead, the facts determined by the court must have some support in the evidence.<sup>451</sup> If there is some evidence in the record that supports the trial court's decision, an abuse of discretion has not been shown.<sup>452</sup>

Because of the great amount of deference afforded to the trial courts on review, there are many instances in which the evidence in the record supports the granting of an injunction. For example, in *Deblo v. State*,<sup>453</sup> the Harris County attorney brought suit to abate and enjoin the appellants who were allowing and permitting the premises to be used for prostitution, promotion of prostitution, and aggravated promotion of prostitution.<sup>454</sup> The trial court issued a temporary injunction against the appellants and ordered the premises to be closed and padlocked by the Harris County Sheriff's Office until a trial on the merits, or until a \$5,000.00 bond was posted.<sup>455</sup>

On interlocutory appeal, following the temporary injunction, the appellants contended there was no evidence—or in the alternative, insufficient evidence—to support the trial court's findings of fact that the premises were used for prostitution. Thus, with the incorrect finding of fact, the trial court had erred in granting the temporary injunction. When findings of fact are challenged for factual sufficiency, the



reviewing appellate court must consider *all* evidence in the record to ascertain whether the challenged portion of the order is against the great weight and preponderance of the evidence as to be manifestly wrong or unjust.<sup>456</sup> Here, the court disagreed with the appellants, and found the evidence within the record sufficiently established that the premises in question was in fact a brothel and was frequented for that very purpose.<sup>457</sup> In holding there was factual sufficiency to support the findings of fact of the trial court, the court noted, "[t]he evidence is replete with testimony of solicitations for prostitution on these premises."<sup>458</sup> The record reflected the property was purchased by Deblo Inc. on May 5, 1982, and the first of 11 instances of solicitation began roughly a month and a half after the purchase.<sup>459</sup> In the record, five convictions for prostitution were also introduced to prove the nature of the premise—that it was operating for impermissible purposes (prostitution).<sup>460</sup>

In reaching its decision in *Deblo*, is *Morgan v. State*.<sup>461</sup> There, the state brought an action to abate a public nuisance, specifically, the use of a club for the promotion of prostitution. In this interlocutory appeal, the appellant contended the trial court had erred in finding the club was operating as a public nuisance, because there was insufficient evidence to support the findings of fact.<sup>462</sup> During the hearing to determine whether the temporary injunction should be granted, two vice officers from the Harris County Sheriff's Department and a civilian testified they were repeatedly solicited to engage in sexual activities at the club.<sup>463</sup> The testimony indicated the solicitations occurred on three separate occasions.<sup>464</sup> However, the appellant contended this testimony evidence violated the rule against hearsay.<sup>465</sup>

The Court of Appeals ruled the testimony evidence did not violate the rule against hearsay and was properly admitted.<sup>466</sup> The testimony was introduced for a purpose other than for proving the truth of a matter asserted; rather, it was introduced to prove operative legal fact and more akin to testimony indicating the existence of a contractual offer.<sup>467</sup> Moreover, the testimony regarding the solicitations was ultimately derived from the witness' personal knowledge and did not amount to hearsay.<sup>468</sup> Thus, there was no evidence to indicate that the trial court abused its discretion when it issued the temporary injunction.

Additionally, in *Benton v. City of Houston*,<sup>469</sup> the appellant contended that the trial court had erred in enjoining him from further maintaining his premises for the purposes of prostitution (as described under the predecessor statute to Chapter 125).<sup>470</sup> The case in front of the Court of Appeals was a consolidated case of five separate cases which were based on substantially the same pleadings and similar evidence.<sup>471</sup> The City of Houston and the City Attorney, as plaintiffs in the suit, alleged that prostitutes were permitted to reside on the premises, for the purposes of prostitution, and the premises were maintained, both actually and habitually, for the purpose of prostitution, and that the defendants had both allowed and maintained the premises for the promotion of prostitution.<sup>472</sup>

On appeal, the appellant maintained that the trial court had erred in granting the injunction because there was only statutory authority to abate a public nuisance for the purpose of promoting prostitution, and because the statute (the predecessor to Chapter 125) did not authorize the abatement of a public nuisance for habitually maintaining a house of

prostitution.<sup>473</sup> The appellant also argued the city attorney did not have the authority to bring suit to abate the public nuisance.<sup>474</sup> Ultimately the temporary injunction was affirmed, after the trial court's order was reformed. The city attorney only had statutory authority to bring an action to enjoin a nuisance under the strict language contained within the provisions of the statute.<sup>475</sup> The trial court had erred in enjoining the defendant from maintaining or using the premises for the purposes of prostitution and reformed the judgment to comply with the statutory provisions.<sup>476</sup>

The Court of Appeals also noted there was sufficient evidence on the record to find the appellants guilty of the offense of promotion of prostitution, and that the appellants maintained, controlled, and supervised the premises for the promotion of prostitution. Reports from undercover officers indicated that when a patron entered the premise, a girl would come and sit on their lap and ask the patron for to buy her a drink, at an inflated price, ranging from \$16.00 to \$200.00.<sup>477</sup> The higher priced drinks included a visit to a "party table" at the back of the club, where patrons were promised a "good time," which included sexual relations.<sup>478</sup> The drink money was deposited into the cash register at the bar, and the owners of the establishment participated and benefited from the proceeds of prostitution.<sup>479</sup>

## ADMISSIBLE EVIDENCE

Chapter 125 generally states, "Proof that an activity described by Section 125.0015 [common nuisance defined] is frequently committed at the place involved or that the place is frequently used for an activity described by Section 125.0015 is prima facie evidence that the defendant knowingly

tolerated the activity."<sup>480</sup> Evidence to establish the existence of a nuisance at a premise can be presented in various forms, including arrests and convictions, witness testimony, general reputation of the business, law enforcement or emergency assistance, and various code violations (Chapter 455 of the Occupations Code). The various forms of admissible evidence are described below.

## ARRESTS & CONVICTIONS

Evidence that persons *have been arrested for or convicted of* activities described as a common nuisance at the premises is only admissible to show the defendant had knowledge of the acts that occurred on the premises.<sup>481</sup> Proof of the arrests and/or convictions must be introduced as originals or as certified copies of the papers and judgements in a suit for injunction.<sup>482</sup> Additionally, oral evidence is admissible to show that the arrests/convictions was committed at the premise involved.<sup>483</sup>

A person's arrest or testimony by a law enforcement agent that prostitution, promotion of prostitution, or compelling prostitution has occurred at a place required to be licensed under Chapter 455<sup>484</sup> is **prima facie evidence that the defendant knowingly tolerated that activity**.<sup>485</sup> However, for arrest evidence to be admissible, the requisite notice of arrest<sup>486</sup> must be sent to the defendant.<sup>487</sup>

An arrest without an accompanying conviction is **not admissible to show that the nuisance existed**, because those arrested are presumed innocent until proven guilty.<sup>488</sup> For the plaintiff to successfully introduce the arrests and convictions as evidence, the plaintiff must also introduce evidence that an arrest on the alleged nuisance property stems from the nuisance activity occurring on the property

and is not merely an arrest that occurs while the arrestee is present on the premise.<sup>489</sup>

Subsequent arrests and convictions for prostitution, which occur at an IMB after a property-owner defendant has received the requisite notice of arrest, is also admissible as evidence in a suit maintained under Chapter 125. This is admissible to prove that a premises is operating as massage establishment, in violation of Chapter 455 of the Occupations Code, maintained by the defendant **after notice of the arrest(s) is provided to the defendant (1) knowingly tolerated the activity; and (2) did not make a reasonable attempt to abate the activity.**<sup>490</sup>

### NOTICE OF ARREST FOR CERTAIN ACTIVITIES

If a law enforcement agency makes an arrest for prostitution, promotion of prostitution, aggravated promotion of prostitution, or compelling prostitution, at a premises which falls within the scope of regulation of Chapter 455, the arresting agency, “must send written notice of the arrest, no later than the seventh day after the date of the arrest” by CMRRR to each person maintaining the property where the arrest took place.<sup>491</sup> However, there is currently proposed changes to this rule before the Texas Legislature, which if approved, would be required to send written notice of arrest no later than the *fourteenth* day after arrest to the *property owner* by CMRRR.<sup>492</sup>

### WITNESS TESTIMONY

Witness testimony can be utilized to establish the elements of a common nuisance under Chapter 125. The witness testimony can be introduced to establish facts of legal significance, indicating that illegal activity is taking place at the premises in question. This

witness testimony can be introduced for the purpose of proving the character of the property (general reputation evidence).

### GENERAL REPUTATION EVIDENCE

Chapter 125 explicitly states that evidence of the general reputation of the place involved is admissible to show the existence of the nuisance.<sup>493</sup> Moreover, reputation evidence is an exception to the general rule against the admissibility of hearsay and does not necessarily reflect the opinion of the witnesses.<sup>494</sup> Online reviews may be admissible as general reputation evidence. However, it is unclear what the best method of authentication may be for such reviews.

The TREs provide that to authenticate evidence, the proponent of the evidence must provide “evidence which is sufficient to support a finding that the item is what the proponent claims it is.”<sup>495</sup> If online reviews (such as the ones that may be obtained from Rub Maps, and the like) cannot be self-authenticated under Texas Rule of Evidence (TRE) 902 or Texas Rules of Civil Procedure 193.7,<sup>496</sup> extrinsic evidence must be produced prior to the evidence being admitted.<sup>497</sup>

The proponent of the evidence must only make a prima facie showing that the evidence seeking to be admitted is what the proponent claims it to be.<sup>498</sup> This showing does not have to be, “... on par with more technical evidentiary rulings, such as hearsay exceptions, governing admissibility;” in other words, there is no need for a full argument regarding admissibility.<sup>499</sup> Texas Courts have recognized that there is no broad procedure for authenticating electronic evidence, and the means for authentication will vary case to case, depending on the nature of the evidence and the relevant facts.<sup>500</sup>

TRE 902 specifically provides that the extrinsic evidence of authenticity is *not* required for types of documents specifically enumerated in the rule.<sup>501</sup> In applying the authentication standard to website evidence, three questions must generally be answered (explicitly or implicitly):

- What was actually on the website?
- Does the exhibit or testimony, sought to be admitted, accurately reflect what is on the website?
- If yes, is it attributable to the owner of the site?<sup>502</sup>

The TREs which are most likely to apply to the context of IMBs and online reviews (either alone or in combination) and are most likely to satisfy the condition precedent of authentication, include:<sup>503</sup>

- TRE 901(b)(1)—**Testimony of a Witness with Knowledge**, “testimony that an item is what it is claimed to be.”<sup>504</sup>
- TRE 901(b)(3)—**Expert Testimony**, “a comparison by an expert witness or the trier of fact with a specimen that the court has found to be genuine.”<sup>505</sup>
- TRE 901(b)(4)—**Distinctive Characteristics**, “the appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.”<sup>506</sup>
- TRE 901(b)(9)—**Evidence About a Process or System**, “Evidence describing a process or system and showing that it produces an accurate result.”<sup>507</sup>

## LAW ENFORCEMENT ASSISTANCE

Evidence that the defendant or defendant's agent requested law enforcement or

emergency assistance is not admissible to show that the defendant failed to make reasonable attempts to abate the nuisance.<sup>508</sup> However, this evidence can be admissible for the purpose of showing that a crime in Section 125.0015 (Common Nuisance Defined) occurred.<sup>509</sup>

Evidence that the defendant refused to cooperate with law enforcement, with respect to the contested activity is admissible evidence.<sup>510</sup> The posting of a sign which prohibits the activity alleged to be a nuisance is not *conclusive* evidence that the defendant did not tolerate the activity.<sup>511</sup>

## OCCUPATION CODE VIOLATIONS

Specific code violations can be introduced as evidence of a common nuisance under Chapter 125. Chapter 125 specifically lists providing massage therapy or massage services in violation of Chapter 455 of the Texas Occupations Code as a common nuisance.<sup>512</sup>

Other common Occupation Code violations, which can be introduced as evidence of a common nuisance, include:

- Employing an individual who is not a U.S. Citizen or legal permanent resident;<sup>513</sup>
- Not displaying the license for each massage therapist employed and practiced;<sup>514</sup>
- A massage establishment changing the location of the establishment without obtaining a new license;<sup>515</sup>
- Allowing a nude or partially nude employee to provide massage therapy;<sup>516</sup> and,
- Allowing any individual, including an employee or client, to engage in sexual contact in the massage.<sup>517</sup>

This list is not exclusive, and any possible Occupations Code violation can be introduced as evidence of a common nuisance. Like prior arrests and convictions, this evidence should be admitted into evidence as originals, or certified copies, which is authenticated as a public record.<sup>518</sup> Law enforcement or code enforcement should testify that the arrest and/or violation occurred on the premise, in relation to the alleged nuisance.

## PREVIOUS CH. 125 SUIT & JUDGMENT

Evidence of a previous nuisance and abatement suit resulting in a judgement against a landowner is admissible in a subsequent N&A action to demonstrate that a landowner knowingly tolerated the activity and did not make a reasonable attempt to abate the activity.<sup>519</sup>

## REMEDIES

An injunction is an equitable remedy which grants relief against the violation or threatened violation of a right when other legal remedies are inadequate.<sup>520</sup> Injunctive relief can be based on equitable principles or by an express authorization contained within the statute, as is the case with an action commenced under Chapter 125 of the TCPRC.<sup>521</sup> The express language of Chapter 125 allows for the plaintiff to enjoin the defendant's activity.<sup>522</sup>

The statute's express language will supplant the common law injunctive relief elements, such as imminent harm, irreparable injury, and lack of adequate remedy at law.<sup>523</sup> When a party seeks injunctive relief authorized by a statute, here Chapter 125, the traditional principles, practices, and procedures are

controlling in all actions for injunctive relief, so long as they are not in conflict with Texas statutes or rules of procedure.<sup>524</sup>

The express terms of the statute can limit the relief available, and when an action is brought under statutory authority—as is the case with Chapter 125 nuisance—only those activities expressly enumerated in the statute may be enjoined.<sup>525</sup> Thus, the plaintiff must specifically plead the statutory ground and submit the theory to the trial court.<sup>526</sup> Additionally, a petition and application for equitable injunctive relief does not preserve a statutory ground that is left unpled on appellate review.<sup>527</sup>

## TEMPORARY INJUNCTION

A purpose of a temporary injunction is to preserve the status quo of the subject matter of the litigation prior to a trial on the merits.<sup>528</sup> The status quo may be a condition of either action or rest<sup>529</sup> but it cannot preserve a condition that violates the law.<sup>530</sup> Prior to seeking an injunction, the applicant should be sure to join all parties who are indispensable in the injunction proceeding, which must be done prior to the court granting injunctive relief.<sup>531</sup>

If, after notice and hearing on a request by a petitioner for a temporary injunction, a court determines the petitioner is likely to succeed on the merits of a suit brought under Chapter 125 to abate a common nuisance, the court may:

- Include in its order reasonable requirements to prevent the use or maintenance of the place as a nuisance, and;
- Must require that the defendant executes a bond.<sup>532</sup>

The bond must:

- Be payable to the State at the county seat of the county in which the place is located;
- Be in the amount set by the court, at a minimum of \$5,000 but not to exceed \$10,000;
- Have sufficient sureties approved by the court; and
- Be conditioned that the defendant will not knowingly maintain a common nuisance to exist at the place.<sup>533</sup>

### **PERMANENT INJUNCTION**

A permanent injunction is intended to give final relief after a trial on the merits.<sup>534</sup> The permanent injunction can be perpetual in nature or it can extend until a date set by the trial judge.<sup>535</sup>

### **VIOLATION OF INJUNCTION— TEMPORARY OR PERMANENT**

Under Chapter 125, after a temporary or permanent order of injunction is entered, a court determines a condition of the injunctive order is violated, the court may:

- Order a political subdivision to discontinue the furnishing of utility services to the place at which the nuisance exists;
- Prohibit the furnishing of utility service to the place by any public utility holding a franchise to use the streets and alleys of the political subdivision;
- Revoke the certificate of occupancy of the place;
- Prohibit the use of city streets, alleys, and other public ways for access to the place during the existence of the nuisance or in furtherance of the nuisance;
- Limit the hours of operation of the place, to the extent that the hours of operation are not otherwise specified by law;
- Order a landlord to terminate a tenant's lease if the landlord and the tenant are parties to the suit and the tenant has violated a condition of the injunctive order; or
- Order any other legal remedy available under the laws of the State.<sup>536</sup>



*Most illicit massage businesses rent, as opposed to buy, the properties they occupy. This is a strategy that allows them to easily relocate to a new city, or even state, if they come under pressure from law enforcement. This preference for renting puts landlords in the position of being either a key enabler, turning a blind eye to trafficking, or serving as a key ally toward ending it.*



P R O J E C T

# AWESOME

*Attorneys Working to  
End Sexually-Oriented  
Massage Establishments*



# Project AWESOME

**N**uisance and abatement lawsuits (“N&A”) are one of the most effective ways to capitalize on the hard work of law enforcement to put an end to the underground sex economy.<sup>537</sup> Project AWESOME creates a partnership between private practice attorneys, NGOs, and the county or city, utilizing pro bono service to aid local government in shutting down these illicit businesses.

Unfortunately, many jurisdictions have based N&A suits on prostitution arrests. Under this model, undercover law enforcement officers enter an IMB, choose or are offered a female masseuse, and then negotiate with the provider for sex in exchange for a fee. Once this transaction reaches certain sufficiency to trigger Texas Penal Code section 43.02(a), the provider is arrested.

It is exceptionally rare for the provider (who is often a trafficking victim) to give evidence against the owner. The owner will always deny any knowledge of the illegal activity. The result is that a victim is arrested, and the true criminals escape punishment. Even worse, because multiple prostitution arrests are usually required to support a N&A action, this scenario will be repeated in order to provide sufficient evidence of a nuisance.<sup>538</sup>

Project AWESOME (Attorneys Working to End Sexually-Oriented Massage Establishments) completely changes this dynamic. **Project AWESOME uses trained pro bono attorneys to bring N&A lawsuits against IMBs based solely on the establishments’ failure to be licensed.** An NGO acts as coordinator to help recruit attorneys, collect evidence, and facilitate communication. The local government provides advice, guidance, resources and standing.

Project AWESOME (“the Project”) has the potential to exponentially increase the number of N&A actions brought to shutter these commercial-front brothels, which in turn will result in a significant cost savings for local governments in the form of free legal services and reduced expenditure of law enforcement resources. An increase in N&A actions will improve public health, increase public safety; moreover, Texas must remain a state that encourages tourism, respects gender equality, is a leader in the fight against human trafficking, and is attractive to families.

The Project concerns the filing of an initial N&A lawsuit against a target massage establishment (ME) that is known to be noncompliant with state licensing requirements. **Pro bono counsel work under the auspices of their local government to bring N&A lawsuits against target IMBs using only publicly available records.**<sup>539</sup>

In essence, Project AWESOME is a partnership between an NGO and a local government under which:

- Private practice attorneys are recruited, trained, and deputized;
- Target IMBs are selected based on their reputation and admissible proof of their lack of licensure, which is obtained from the state;
- The volunteer attorneys commence lawsuits under chapter 125 against their assigned targets based on the targets’ failure to be properly licensed;

The goal is IMB closure. Often, landlords or property owners are persuaded to evict through a demand letter and subsequent conversations without suit being brought, requiring fewer pro bono hours.

## WHAT IS NUISANCE & ABATEMENT?

Nuisance and Abatement (“N&A”) is a type of civil lawsuit that is brought to enjoin an activity that is occurring at an actual physical location. These lawsuits are permitted by Chapter 125 of the Texas Civil Practices and Remedies Code. The lawsuit can be filed against the tenant or lessee at the location, the property owner, and even against the land itself. Prohibited activities that can form the basis of an N&A lawsuit include gang activity, gambling, trafficking of persons, prostitution, and, as is salient to this Project, **operating as a massage establishment without being properly licensed and staffed**. Of importance to Project AWESOME is the provision prohibiting “**massage therapy or other massage services in violation of Chapter 455, Occupations Code.**”<sup>540</sup> For more information on N&A actions and required licensure, please see sections \_\_\_\_\_ and \_\_\_\_\_ of this Toolkit.

## THE ROLES IN PROJECT AWESOME

The following is a detailed explanation of the three distinct roles that Project AWESOME partners play: Local Government Authority, Coordinating NGO, and Volunteer Attorneys.

**Local Government Authority (“LGA”):** The original Project AWESOME program is a partnership between CHILDREN AT RISK and the Office of the Harris County Attorney. However, a similar, effective partnership could also be had through a city attorney’s office. Resources, receptiveness, and experience are important factors to remember when choosing a local partner. Contacted both offices to discuss the program in order to determine the best fit for each area.

The LGA’s role is to provide standing for the pro bono attorneys (explained in greater detail below), give guidance and support, help with target selection, and provide resources in the form of service of process and case filings.

**Coordinating NGO:** The Coordinating NGO is responsible for recruiting the pro bono attorneys, assisting with developing and administering attorney trainings and project protocols, helping with site selection, handling conflict checks with law enforcement (although the LGA may want to do this), ensuring that the pro bono attorneys meet their obligations both prior to and during litigation, tracking cases and case progress, and reporting to the LGA on a periodic basis. Additionally, if the Coordinator employs attorneys, it can assist with the actual litigation, when necessary.

**Volunteer/Pro Bono Attorneys:** Under the auspices of Project AWESOME, the pro bono attorneys will act as volunteer county attorneys. As part of representing the LGA in these suits, the pro bono attorneys will be required to:

- Submit to a background check;
- Comply with any applicable substance abuse policy;
- Enter into a pro bono representation agreement with the LGA;
- Perform all necessary internal conflict of interest checks;
- Agree to abide by all Project protocols established by the LGA and NGO;

- Affirm that they are in compliance with all State Bar requirements;
- Agree to undergo any applicable trainings or CLEs that the County Attorney deems necessary.

When recruiting volunteer attorneys, it may be helpful to explain the benefits of participation. These include courtroom experience for new attorneys and positive press for the firm. Also, N&A litigation is plaintiff-driven, and the volunteer attorneys can largely decide when hearings take place and how quickly a case progresses.

### **THE REPRESENTATION AGREEMENT:**

Partner law firms will need to enter into a pro bono representation agreement with the LGA. This process can sometimes be time consuming, as many large firms may have litigated against the LGA on the behalf of clients. However, representation agreements can usually be tailored to manage conflicts of interest (COIs). **One solution to COIs is to mutually agree that Project AWESOME shall not be mentioned, referred to, or otherwise brought into any non-Project AWESOME suit .**

## **PROJECT AWESOME STEP-BY-STEP**

### **STEP 1) GATHER DATA AND PACKAGE IT INTO A COMPELLING REPORT.**

Before approaching potential partners for Project AWESOME, a compelling and accurate survey of scope and size of the IMB problem in the area is needed. This task may be performed by the Coordinating NGO or the LGA or jointly. Rubmaps.com is an excellent data source for creating this report. However, Rubmaps.com does require a paid subscription. While this paywall increases the veracity of buyer input and the quality of IMB data available through the site, it also adds a financial and ethical hurdle. As of this writing, the subscription cost is \$99.00 annually. Additionally, if paid, this money will support a website whose business model is to enable the exploitation of trafficked persons.

In order to compile this data without purchasing a subscription, the IMB Map available at [www.childrenatrisk.org](http://www.childrenatrisk.org) may be used.<sup>541</sup> The map is interactive, and a user can zoom in to the desired locality and obtain information on the number of IMBs in the area, as well as the IMBs' proximity to nearby public schools. The disadvantage to using the map is that actual review language will not be available to help paint a comprehensive picture of the activity occurring inside the IMBs and, because it is not updated frequently, the map may not capture new IMBs.

Once an accurate count of active IMBs has been created, law enforcement should be approached in order to get their understanding of the size and impact of the IMB problem in the target area. If they are willing to provide de-identified data, this should be included in the initial proposal. If law enforcement is unwilling to provide data, this may be requested through a public information request. Relevant data includes "call sheets" indicating the number of times that a call for service has been requested at each IMB and all arrests that have occurred at the IMBs, including dates and offense types.

Last, for each IMB in the target area, an initial massage establishment license check should be performed. This does not replace the public information request that should be sent to TDLR prior to assigning target sites to the pro bono attorneys but is only a preliminary step to help gauge the

anticipated efficacy of the project. IMB licenses can be checked at <https://www.tdlr.texas.gov/LicenseSearch/>. Remember that Project AWESOME focuses on unlicensed massage establishments, and the license status of the target locations is of **primary importance**.

## **STEP 2) APPROACH LOCAL GOVERNMENT PARTNERS.**

As mentioned, the original Project AWESOME program is a partnership between CHILDREN AT RISK (Coordinating NGO) and the Office of the Harris County Attorney (LGA) and private law firms. However, a similar effective partnership could also be formed through a city attorney's office.<sup>542</sup> It is recommended that both city and county offices be contacted to discuss the project in order to determine the best fit for each area.

Local government buy-in is crucial for the following reasons:

- a) **Standing:** Chapter 125 is unclear on standing. Deputizing the Volunteer Attorneys is crucial, as Chapter 125 permits local governments and private individuals to bring N&A lawsuits but is silent as to whether entities such as non-profits can bring these suits; safety (and other) concerns prohibit their being brought under an individual's name.

Two cases were found where an entity brought a Chapter 125 action, but the standing of the entity (i.e. not being an "individual") was not challenged, so this issue remains uncertain.<sup>543</sup> By becoming deputized and acting as volunteer "deputy" county or city attorneys, pro bono counsel can bring the N&A lawsuits under the imprimatur of the local government, thereby alleviating any concerns with both safety and standing.<sup>544</sup>

- b) **Familiarity in the courts:** Suits brought under the auspices of the county or city attorney and on behalf of the "People of the State of Texas" will be familiar to district court judges. Having the imprimatur of the local government in these suits will be of enormous benefit in court as it minimizes confusion and adds legitimacy to the project.
- c) **Filing Fees and Costs:** Pro bono attorneys will be able to rely on the local government for filing petitions and other court documents and for service of process through constables or other means, thus eliminating a significant amount of hard costs.
- d) **Guidance:** Because the county or city attorney's office will have a depth of experience in bringing Chapter 125 suits, these offices are able to guide and assist the pro bono attorneys, especially early on, and even after their first few actions when and if an usual situation or issue arises.

**NOTE:** if entering into a partnership with a county attorney's office, it may be advisable for the parties to seek an order or other authorization from the county commissioners court before proceeding with deputizing attorneys.<sup>545</sup>

The report generated in Step One will be important in securing local government buy-in. If law enforcement has been receptive, invite them to the initial meeting with local government. For county and city employees desiring to implement Project AWESOME who need a Coordinating Entity, this data can be used to approach anti-trafficking NGOs.

### STEP 3) THE COORDINATING NGO (“CNGO”).

The CNGO is responsible for recruiting the pro bono attorneys, assists with developing and administering attorney trainings and project protocols, helps with site selection, ensures that the pro bono attorneys meet their obligations both prior to and during litigation, handles case management and ensures all deadlines are met, and reports to the county attorneys on a periodic basis. Additionally, if the CNGO employs attorneys, they can assist with the actual litigation when necessary.

### STEP 4) CONFLICT CHECKS.

The CNGO may be made responsible for conflict checks. Conflict checks involve the practice of informing law enforcement of target sites under the Project, thus preventing Project AWESOME from interfering with ongoing investigations. Usually, the local police department can inform all other law enforcement after being informed of the targets themselves.

## EVIDENCE USED:

### AFFIDAVIT

The bedrock evidence of the N&A lawsuits brought under Project AWESOME is the nuisance business’s failure to be licensed. Admissible proof that the business is unlicensed can be obtained through a Public Information Request (PIR) sent to the Texas Department of Licensing and Regulation (TDLR). The PIR should include a list of as many target locations as practicable. The list **must** include the **entity name and the address**. The PIR should request that TDLR provide its response in affidavit form, affirmatively stating that the following entities do not have a massage establishment license and follow this statement with a list of the unlicensed businesses and their respective addresses. **A sample PIR is attached as Appendix A.**

Additional evidence can include:

- Recent reviews obtained from Rubmaps.com showing that commercial sex is taking place on the premises. Chapter 125 permits the introduction of reputation evidence; however, these reviews may be deemed inadmissible hearsay, but they are nonetheless extremely probative.
- Internet Advertising: many IMBs will post ads for their services on various websites, so it is always a good idea to at least do a search for the IMB’s name and address on the Internet. Usually this advertising is provocative and inappropriate and helps to establish their reputation. In addition, the ads can aid in proving that the IMB purports to offer massage, which cannot always be ascertained from a name alone.
- Constable reports: in many jurisdictions constable precincts will cite IMBs for their failure to be licensed.
- Prostitution arrests: while the N&A suits under Project AWESOME are license-based, evidence of arrests for prostitution should be used if they are available.

## CAUSES OF ACTION

The “meat” of an N&A suit brought under the auspices of Project AWESOME is the violation of Texas Civil Practices and Remedies Code § 125.0015(18). This is the provision that states that a business holding itself out as a massage establishment is a nuisance if not properly licensed. However, another,

additional cause of action may be added to a given petition if the facts so warrant such as Texas' Deceptive Trade Practices Act.

## PROJECT AWESOME IN ACTION

After the CNGO/LGA partnership is formed, volunteer attorneys have been recruited and trained, the PIR is received from TDLR, and a list of unlicensed targets is created and assigned, the Volunteer Attorneys can begin their actions.

- 1) Determine the proper parties to sue. The first step is the issuance of a cease and desist letter ("C&D") to the **property owner ("PO")**. Under Chapter 125, the PO is a proper party to be sued. The intent of the C&D is twofold: it gives the PO notice that the PO is leasing to an unlicensed massage establishment and it is the first step in determining the defendant in the N&A action with respect to the establishment itself. The C&D **must include a demand for the relevant lease between the PO and the IMB**. The person who signed the lease may be named as the defendant in the N&A action. The C&D letter should be on the LGA's letterhead and the signature block should be signed by the Volunteer Attorney as "Deputy Attorney, [applicable LGA]." The C&D letter should include:
  - a. A statement that the LGA has received verification that the property is offering or advertising massage services without meeting the licensing requirements imposed by chapter 455 of the Texas Occupations Code;
  - b. A mention that the property is also the subject of online reviews at the website [www.rubmaps.com](http://www.rubmaps.com) [or other site] indicating that prostitution is occurring on the premises and that this illegal activity could place the PO in violation of Chapter 125 of the Texas Civil Practice and Remedies Code, as well as, the Texas Penal Code;
  - c. The relevant code sections from chapter 455;
  - d. A statement to the effect that the PO is accountable for activities that take place on the property and that it is incumbent upon them to ensure that persons on the property do not engage in habitual criminal conduct. Remind the PO that they have a legal duty to make reasonable attempts to abate criminal activity.
  - e. Include the following (in bold): "**Please be advised that you now have actual notice of the nuisance occurring on the Property.**"
  - f. Explain the consequences of a N&A lawsuit.
  - g. Provide the relevant DTPA Code sections and the possible penalties.
  - h. Provide the eviction statute located at Texas Property Code
  - i. Request the PO's assistance: e.g., "We would like to solicit your assistance in an effort to resolve these problems and avoid litigation. **We are requesting that you produce a copy of the current lease concerning the Property to our office within fourteen (14) days of your receipt of this letter.** If these problems cannot be resolved, the only remaining option is to seek the assistance of a court of law."

It is important to engage with the PO through follow up conversations. While property owners are proper parties, and sometimes should be the primary defendant, it may be difficult to persuade a judge to keep them in an N&A lawsuit, especially if the PO is an "absentee" owner. Also, POs will usually retain legal counsel. It is important to use the C&D letter and follow up communications to

engage the PO as the PO may evict of his or her own accord (rather than face suit) and regardless, the PO must produce the lease. If the identity of the proper party with respect to the IMB cannot be determined, the suit should proceed as follows:

- 1) Commencing the N&A action. If the PO does not evict and the IMB owner/operator has been determined, suit must be filed. Often, the LGA will be able to provide filing and service of process.
- 2) Set and prepare for the initial injunction hearing. For a full explanation of the N&A process, please see [Nuisance & Abatement](#)
- 3) The defendants may wish to settle, especially if the PO is brought into the suit. Any settlement agreement should include **proof that the offending business has been evicted**. This commonly takes the form of a copy of the eviction notice and pictures of the property, once vacated.

### **ADDITIONAL POINTS TO CONSIDER**

Under Texas Occupations Code chapter 455, a **solo practitioner** is not required to possess a massage establishment license. Suits against a solo practitioner must be based on that person's failure to be licensed as a massage therapist, or exclude them from Project AWESOME

A search should be done with the Texas Secretary of State's "Business Filings" section to determine if the IMB is incorporated (this is unlikely but does happen). Additionally, check in the county records to determine if the IMB is operating under a d/b/a.

*"Why should I slap them when I can just use words to destroy them mentally?"*

– Romanian trafficker in the United Kingdom, speaking on why he doesn't need to use violence against the women he forces into commercial sex (2017, pg. 29)

*"Not everybody gets a chance to be a survivor & there are girls out there right now that don't even know that they're victims ... But maybe, just maybe, they'll see one of us & they'll hear one of us & they'll know that there is help, there is hope & there is a way out."*

– Angela Ritter, survivor of trafficking (2016, pg 53)

*From the ground to the top we need to create network[s]. From governments, legal, medical, social institutions, businesses to schools, local communities, individuals. We have to involve all. Traffickers are extremely well connected. We need to be, too."*

– Jana, survivor of sex trafficking, in her address to the UN Human Rights Council (2015, pg. 12)

I was lied to about my job. I wanted to leave but at some point, I realized I wasn't allowed to go. Nobody had to tell me but I knew I was trapped," says ... I didn't know where I was or how to go home."

- Vietnamese human trafficking survivor (2018, pg. 11)

*"Money may be able to buy a lot of things, but it should never, ever be able to buy another human being."*

- John F. Kerry (2015, pg. 1)

To the men who buy us, we are like meat. To everybody else in society, we simply do not exist.

-Kiya, survivor of trafficking (2015, pg. 18)





# 792

*792 total cases of human trafficking in Texas were reported to Polaris' National Human Trafficking Hotline during 2017.*

*Of those, 792 cases, 551 of those cases were sex trafficking.*

# 551

# 100

*Of the 551 sex trafficking cases, 100 of the cases occurred in an IMB. IMB was the top venue/industry for sex trafficking from Texas Calls to the hotline, during 2017.*

*Do you suspect that someone you know is a victim of human trafficking? Do you suspect there is an illicit massage business in your community?*

## NATIONAL HUMAN TRAFFICKING HOTLINE

# 1.888.373.7888

The National Human Trafficking Hotline, operated by Polaris, is a national, toll-free hotline, available to answer calls, texts & live chats from anywhere in the United States, 24 hours a day, 7 days a week, in more than 200 languages. The National Hotline's mission is to connect human trafficking victims & survivors to critical support and services to get help & stay safe & to equip the anti-trafficking community with the tools to effectively combat all forms of human trafficking. The National Hotline offers round-the-clock access to a safe space to report tips, seek services & ask for help.

Domestic Violence: National Domestic Violence Hotline

**1.800.799.7233**

Sexual Abuse: Rape, Abuse & Incest National Network

**1.800.656.4673**

Suicide: National Suicide Prevention Lifeline

**1.800.273.8255**

Dating Violence: National Dating Abuse Helpline

**1.866.331.9474**

Runaway & Homeless Youth: National Runaway Safeline

**1.800.786.2929**

Missing Children & Child Pornography:

**1.800.843.5768**

National Center for Missing & Exploited Children

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<sup>1</sup> *Ordinance*, Black’s Law Dictionary (10th ed. 2014).

<sup>2</sup> 52 Tex. Jur. 3d, Municipal Corporations § 2 (2018); *See e.g.*, “Municipalities are mere creatures and subdivisions of the State” Houston Chronicle Publishing Co. v. Hardy, 678 S.W.2d 495, 501 (Tex. App. Corpus Christi, 1984) rehearing denied (citing, Security Trust Co. v. Lipscomb County, 180 S.W.2d 151, 159 (1944)); *See also*, Boozier v. Hambrick, 846 S.W.2d 593 (Tex. App.–Houston [1st Dist.] 1993).

<sup>3</sup> City of Columbus v. Ours Garage and Wrecker Service, 536 U.S. 424, 428-29 (2002).

<sup>4</sup> Tex. Local Gov’t Code Ann. § 5.904

<sup>5</sup> Laidlaw Waste Systems Inc. v. City of Wilmer, 904 S.W.2d 656, 659 (Tex. 1995).

<sup>6</sup> The Texas Constitution was amended in 2001 to prevent the legislature from enacting special or local laws in 30 specific categories unless authorized by the Texas Constitution. (*e.g.*, The legislature shall not ... pass any local or special law authorizing ... [the] incorpora[ion of] cities, towns or villages, or changing their charter. Texas Const. Art. III, § 56 (a)(11). A “special” law is a law which does not apply uniformly to all similarly situated subjects, providing special privileges to certain persons, corporations (*e.g.*, municipal) or other businesses. A local law is one which applies to a particular geographical segment of the state, providing special privileges to one local area or political subdivision over other portions of the state. Section (b) of Article 56 in the Texas constitution is a “catch-all” provision barring the legislature from enacting local or special laws, “in all other cases where a general law can be made applicable. Charles W. “Rocky” Rhodes, THE TEXAS CONSTITUTION IN STATE AND NATION: COMPARATIVE STATE CONSTITUTIONAL LAW IN THE FEDERAL SYSTEM, Vandepas Publishing LLC (2014), pg. 506 (citing, Tex. Const. Art. III § 56 (b)) [hereinafter Rhodes, The Texas Constitution].

<sup>7</sup> For incorporation as a type “A” general-law municipality, *See* Tex. Local Gov’t Code Ann. §§ 6.001, 6.002; For incorporation as a type “B” general-law municipality, *See* Tex. Local Gov’t Code Ann. §§ 7.001–7.008; For incorporation as a type “C” general-law municipality, *See* Tex. Local Gov’t Code Ann. §§ 8.001–8.003, 8.005–8.006.

<sup>8</sup> The Texas Constitution provides for the creation of home-rule charters in Art. 11 § 5 (when a city having more than 5,000 inhabitants may, by a majority vote of qualified voters of the city, adopt a charter or amend its charter at an election held for that purpose, subject to such limitations prescribed by the legislature). The “home-rule” amendment of the Texas Constitution is implemented by statute in the Texas Local Government Code, §§ 9.001 – 9.008. (George Blum, Elizabeth Bosek, John Bourdeau, John Dvorkse, Sonja Larsen, & Elizabeth Williams, 52 Tex. Jur. 3d Municipal Corporations, §§ 7, 21.

<sup>9</sup> City of Galveston v. State, 217 S.W.3d 466, 469 (Tex 2007); City of Richardson v. Oncor Electric Delivery Company LLC, 539 S.W.3d 252, 262 (Tex 2018).

<sup>10</sup> Proctor v. Andrews, 972 S.W.2d 729, 733-34 (Tex. 1998).

<sup>11</sup> George Blum., Elizabeth M. Bosek, John Bourdeau, John J. Dvorske, Sonja Larsen, & Elizabeth Williams, 52 Tex. Jur. 3d Municipal Corporations § 9 (2019).

<sup>12</sup> Tex. Local Gov’t Code Ann. § 51.001.

<sup>13</sup> *Id.* at § 51.012.

<sup>14</sup> *Id.* at § 51.032.

<sup>15</sup> *Id.* at § 51.051.

<sup>16</sup> *Id.* at § 51.035.

<sup>17</sup> 5 McQuillin the Law of Municipal Corporations § 17.1 (3d ed. 2018).

<sup>18</sup> Tex. Local Gov’t Code Ann. § 54.001(a).

<sup>19</sup> *Id.* at (b).

<sup>20</sup> *Id.* at (b)(1).

<sup>21</sup> *Id.* at § 54.012(1)-(3); (5).

<sup>22</sup> *Id.* at § 54.013.

<sup>23</sup> *Id.* at § 54.014 (“The municipality must only plead the following allegations: (1) the identification of the real property involved in the violation; (2) the relationship of the defendant to the real property or activity involved in the violation; (3) a citation to the applicable ordinance; (4) a description of the violation; and (5) a statement that this subchapter applies to the ordinance.”)

<sup>24</sup> 2 Tex. Gov’t Code Ann. § 23.101.

<sup>25</sup> *Id.* at § 23.102.

<sup>26</sup> Tex. Loc. Gov’t Code Ann. § 54.015(a)(1)-(6).

<sup>27</sup> *Id.* at (b).

<sup>28</sup> *Id.* at § 54.019(a).

<sup>29</sup> Tex. Loc. Gov’t Code Ann. § 54.016(b).

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<sup>30</sup> *Id.* at (a).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at (a)(1)-(2).

<sup>33</sup> *Id.* at § 54.017(a)(1)-(2).

<sup>34</sup> *City of Brookside Village v. Comeau*, 633 S.W. 2d 790, 796 (Tex 1982) cert. denied 459 U.S. 1087 (the Texas Supreme Court stated an ordinance of a city which conflicts or is inconsistent with state legislation is impermissible); Tex. Local Gov’t Code Ann. § 51.012.

<sup>35</sup> Ryan Henry, *Drafting Ordinances to Withstand Constitutional Challenges*, available at: [https://www.tml.org/legal\\_pdf/DraftingOrd-ConstChall.pdf](https://www.tml.org/legal_pdf/DraftingOrd-ConstChall.pdf)

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 2.

<sup>39</sup> *Gorieb v. Fox*, 274 U.S. 603, 608 (1927)(citing *Zahn v. Board of Public Works*, 274 U.S. 325 (1927)).

<sup>40</sup> 6A McQuillin the Law of Municipal Corporations § 24:11 (3d ed. 2018).

<sup>41</sup> 6A McQuillin the Law of Municipal Corporations § 24:13 (3d ed. 2018); *Lombardo v. City of Dallas*, 73 S.W. 2d 475 (1934) (“Generally speaking, municipal corporations have the right, under the police power, to safeguard the health, comfort, and general welfare of their citizens by such reasonable regulations as are necessary for that purpose ... and only public necessity can justify it’s exercise.”)

<sup>42</sup> 6A McQuillian the Law of Municipal Corporations, §24:13 (3d ed. 2018).

<sup>43</sup> *Patterson v. City of Dallas*, 355 S.W.2d 838, 841 (Tex. Civ. App.—Dallas 1962 rehearing denied) (referencing *Popham v. Patterson*, 51 S.W.2d 539, 542).

<sup>44</sup> Ryan Henry, *Drafting Ordinances to Withstand Constitutional Challenges*, available at: [https://www.tml.org/legal\\_pdf/DraftingOrd-ConstChall.pdf](https://www.tml.org/legal_pdf/DraftingOrd-ConstChall.pdf)

<sup>45</sup> *Hunt v. City of San Antonio*, 462 S.W.2d 536, 538 (Tex. 1971).

<sup>46</sup> *FM Properties Operating Co.*, 93 F.3d at 175 (5th Cir. 1996) (quoting *Shelton v. City of College Station*, 780 F.2d 475, 479 (5th Cir.) (en banc) cert. denied, 477 U.S. 905 (1986) and 479 U.S. 822 (1986).

<sup>47</sup> *City of Brookside v. Comeau*, 633 S.W.2d 790, 792-796 (Tex. 1982) (Judicial review of a municipality's regulatory action is necessarily circumscribed as appropriate to the line of demarcation between legislative and judicial functions”); *See also*, *Hunt v. City of San Antonio*, 462 S.W.2d 536, 539 (Tex. 1971).

<sup>48</sup> *Gregg v. State*, 376 S.W. 2d 763 (1964) (The appellant’s conviction for massaging someone of the opposite sex, which was prohibited under Houston’s massage establishment ordinance was upheld, the evidence presented was sufficient to affirm the conviction); *See also*, *City of Houston v. Shober*, 362 S.W.2d 886 (1962); *Connell v. State*, 371 S.W.2d 45 (a similar conviction prohibiting massage performed on a patron by someone of the opposite was sustained, the underlying ordinance was constitutional and did not deny equal rights, due process, or equal protection).

<sup>49</sup> *Patterson v. City of Dallas*, 355 S.W.2d 838, 841 (Tex.App. – Dallas 1962) rehearing denied.

<sup>50</sup> *Id.*

<sup>51</sup> 616 F.2d 849 (5th Cir. 1980).

<sup>52</sup> *Id.* at 854.

<sup>53</sup> The district court concluded Harris County’s regulation was constitutional except a provision which prohibited transsexual massages, but because the regulations contained a severability clause, the court permanently enjoined enforcement of this particular provision. (*Harper v. Lindsay*, 454 F.Supp 597, 600 (S.D. Tex 1978)).

<sup>54</sup> Tex. Penal Code Ann. § 6.02(a).

<sup>55</sup> *Id.* at (b).

<sup>56</sup> *Id.* at (f); *Id.* at § 12.23; *See also*, *Kaczmarek v. State*, 986 S.W.2d 287 (Tex. App.—Waco 1999, no pet.) (Ordinances criminalizing operation of sexually oriented business without permit were not unconstitutionally vague for not expressly requiring culpable mental state, given that ordinances also did not dispense with culpable mental state and thus fell within provision of Penal Code requiring culpable mental state for offenses defined by other laws unless definition plainly dispenses with mental element).

<sup>57</sup> 5 McQuillin the Law of Municipal Corporations § 17.2 (3d ed. 2018)

<sup>58</sup> Norman J. Singer & Shambie Singer, *Sutherland Statutes & Statutory Construction*, § 44:8 (7th ed. 2018); Elizabeth M. Bosek & John J. Dvorske, 18 Tex. Jur. 3d Criminal Law: Core Aspects § 19 (2019).

<sup>59</sup> Tex. Local Gov’t Code Ann § 215.075

<sup>60</sup> *Driggs v. Denison*, 420 S.W.2d 446, 449 (Tex. Civ. App.—Dallas 1967).

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<sup>61</sup> *Id.* (citing *City of Austin v. Austin City Cemetery Association*, 28 S.W. 528 (1894); *Lombardo v. City of Dallas*, 47 S.W.2d 495 (Tex. Civ. App.—Dallas 1932); 12B Tex. Jur. 3d Constitutional Law § 166 (2019) (“The right of every person to pursue any lawful business, occupation, or profession is not an absolute right but is subject to the paramount right for a city to impose the reasonable restrictions and regulations the protection of the public may require.”))

<sup>62</sup> Houston, Tex., Code of Ordinances ch. 28, art. XII, Sect. 28-362.

<sup>63</sup> The Polaris Project, *Houston, Texas Case Study: Amending City’s Massage Ordinance*, Mar. 2016, last accessed 03/07/2019,000 available at: <https://humantraffickinghouston.org/wp-content/uploads/2016/04/Houston-Case-Study-by-Polaris.pdf>

<sup>64</sup> Federation of State Massage Therapy Boards, *Human Trafficking Task Force Report* (2017) available at: <https://www.fsmtb.org/media/1606/httf-report-final-web.pdf>; Polaris Project, *Human Trafficking in Illicit Massage Businesses*, (2017) available at:

[https://polarisproject.org/sites/default/files/Full\\_Report\\_Human\\_Trafficking\\_in\\_Illicit\\_Massage\\_Businesses.pdf](https://polarisproject.org/sites/default/files/Full_Report_Human_Trafficking_in_Illicit_Massage_Businesses.pdf)

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Tex. Occ. Code Ann. § 455.033.

<sup>69</sup> Tex. Occ. Code Ann. § 455.059 (1)-(2).

<sup>70</sup> Tex. Code Crim. Pro. Ann. § 2.12(1)-(5).

<sup>71</sup> However, the Municipality, without a grant of power from the Local Government Code, does not possess the inherent authority to issue licenses, or require the procurement of a license(s) *See, e.g.*, *Southwestern Telegraph & Telephone Co. v. City of Dallas*, 174 S.W. 636 (Tex. Civ. App. Dallas 1915) writ refused, (May 3, 1916) and writ dismissed, 248 U.S. 590, 39 S. Ct. 7, 63 L. Ed. 435 (1918).

<sup>72</sup> Tex. Loc. Gov’t Code Ann. § 215.003(a)-(c).

<sup>73</sup> Kenneth B. Sills, 10 Tex Jur 3d Business & Occupation Licenses § 9 (2019) (citing, *Southwest Telegraph & Telephone Co. v. City of Dallas*, 174 S.W. 636 (Tex. Civ. App.—Dallas 1915, writ refused (May 1916) and writ dismissed, 248 U.S. 590 (1918)); *Brown v. City of Galveston*, 75 S.W. 488 (1903); *City of Houston v. Harris County Outdoor Advertising Association*, 879 S.W.2d 322, 326 (Tex. App.—Houston [14th Dist.]1994), writ denied, Feb. 16, 1995) (citing *City of Fort Worth v. Gulf Refining Co.*, 83 S.W.2d 610, 618 (Tex. 1935).

<sup>74</sup> *Johnson v. City of Austin*, 674 S.W.2d 894 (Tex. App.—Austin, 1984).

<sup>75</sup> *Uttler v. State*, 571 S.W.2d 934, 937 (Tex. Crim. App. [Panel No.2 Op.] 1972).

<sup>76</sup> *City of Houston v. Harris County Outdoor Advertising Association*, 879 S.W.2d 322, 326 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (citing *City of Fort Worth v. Gulf Refining Co.*, 83 S.W.2d 610, 618 (Tex. 1935).

<sup>77</sup> *Id.* (citing *Hurt v. Cooper*, 110 S.W.2d 896, 899 (Tex. 1937); *City of Fort Worth v. Gulf Refining Co.*, 83 S.W.2d 610, 617 (Tex. 1935).

<sup>78</sup> *City of Fort Worth v. Gulf Refining Co.*, S.W.2d 610, 617 (Tex. 1935).

<sup>79</sup> *Reagan National Advertising of Austin Inc. v. City of Austin*, 498 S.W.3d 236, 245 (Tex. App.—Austin 2016, cert. denied 138 S.Ct. 707 (Jan. 2018)).

<sup>80</sup> *Id.* (citing *Hurt*, 110 S.W.2d at 899; *City of Fort Worth*, 83 S.W.2d at 617).

<sup>81</sup> Tex. Const., art. VIII § 1(f).

<sup>82</sup> *E.g.*, San Antonio, Tex., Code of Ordinances, § 17-19 (“The chief of police shall issue a massage permit within thirty days of receipt ...”)

<sup>83</sup> *E.g., Id.* (“The grounds for denial listed include, “unless he finds ... (1) the correct permit fee has not be tendered to the city ... (2) the operation, as proposed by the applicant, if permitted, would not comply with applicable laws [e.g., city’s building, zoning, and health regulations, ... (3) the applicant ... the manager or other person principally in charge of the operation of the business, have been convicted of a felony or misdemeanor involving moral turpitude unless such conviction occurred at least five (5) years prior to the date of the application (4) applicant knowingly made any false, misleading or fraudulent statement ... (5) the applicant has had a massage permit or license revoked within 5 years of application, (6) applicant is not over the age of eighteen.”)

<sup>84</sup> Tex. Occ. Code Ann. § 455.204(b); 16 Tex. Admin. Code § 117.82 (d) (2017) (Tex. Dep’t of Licensing & Regulation, *Massage Establishment—General Requirements*).

<sup>85</sup> Tex. Occ. Code Ann. § 455.202(a); 16 Tex. Admin. Code § 117.82(a) (2017) (Tex. Dep’t of Licensing & Regulation, *Massage Establishment—General Requirements*).

<sup>86</sup> Tex. Occ. Code Ann. § 455.204(a)-(b).

<sup>87</sup> Tex. Occ. Code Ann. § 455.204(c).

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<sup>88</sup> *E.g.*, San Antonio, Tex., Code of Ordinances, § 17-20, “The massage business permittee shall display his permit in and open and conspicuous place on the premises of the massage business”; Dallas, Tex., Code of Ordinances, Sect. 25A-3, “ The license required by this chapter shall be posted and kept in some conspicuous place in the massage establishment.”

<sup>89</sup> San Antonio, Tex., Code of Ordinances, ch. 17, art. III, § 17-45 (2018).

<sup>90</sup> 578 F.2d 1002 (5th Cir., 1978).

<sup>91</sup> San Antonio’s currently enacted ordinance, cited above, contains largely the same language as what was present when it was challenged in *Pollard*. At the time the ordinance was challenged in *Pollard*, the ordinance included this additional language within Ch. 17, Art. III, § 17-45, “Nothing contained herein shall be construed . . . not (sic) to preclude authorized inspection thereof, whenever such inspection is deemed necessary by the police or health departments. (*Pollard*, 578 F. 2d at 1014).

<sup>92</sup> *Pollard*, 578 F.2d at 1014 (citing *Camara v. Municipal Court*, 387 U.S. 523, 528-29).

<sup>93</sup> *Id.* (quoting *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 313 (1978)).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> 631 F.2d 71 (5th Cir. 1980)

<sup>97</sup> *Oster v. City of New Orleans*, 631 F.2d 71, 71 (5th Cir. 1980).

<sup>98</sup> *Id.* at 72. The provisions challenged included a provision authorizing warrantless routine inspections (relevant to this current section, a hours of operation provision, a provision which required the establishment to record the names and addresses of patrons, along with the names of massage technicians, a provision which prohibited the issuance of an establishment permit, or a license to a massage technician, if there was pending charges against them for crimes involving lewd acts or moral turpitude, and finally, a provision which exempted medical/health establishments, barber/beauty schools, and athletic trainers, from the regulatory scheme.

<sup>99</sup> *Oster*, 631 F.2d at 73.

<sup>100</sup> *Id.* at 72.

<sup>101</sup> *Id.* at 73 (citing, *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967)).

<sup>102</sup> *Id.* at 73.

<sup>103</sup> Houston, Tex., Code of Ordinances, ch. 28, art. XII, § 28-370.

<sup>104</sup> *Id.*

<sup>105</sup> Tex. Loc. Gov’t Code Ann. § 215.034.

<sup>106</sup> 616 F.2d 849 (5th Cir. 1980).

<sup>107</sup> *Harper v. Lindsay*, 616 F.2d 849, 852 (5th Cir. 1980).

<sup>108</sup> *Harper v. Lindsay*, 616 F.2d 849, 852 (5th Cir. 1980).

<sup>109</sup> *Harper v. Lindsay*, 616 F.2d 849, 852 (5th Cir. 1980).

<sup>110</sup> *See supra* footnote X

<sup>111</sup> *Harper v. Lindsay*, 616 F.2d 849, 852 (5th Cir., 1980).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 858.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 858-859.

<sup>117</sup> San Antonio, Tex., Code of Ordinances, ch. 17, §17-24(a).

<sup>118</sup> *Id.* (emphasis added).

<sup>119</sup> *Id.*

<sup>120</sup> San Antonio, Tex., Code of Ordinances, ch. 17, art. 1, § 17-2.

<sup>121</sup> Houston, Tex., Code of Ordinances, ch. 28, art. XII, § 28-361.

<sup>122</sup> 16 Tex. Admin. Code § 117.93(a) (2017) (Tex. Dep’t of Licensing & Regulation, Advertising).

<sup>123</sup> *Id.* at (b).

<sup>124</sup> Houston, Code of Ordinances, ch. 28, art. XII, § 28-362.

<sup>125</sup> Tex. Occ. Code Ann. §§ 455.205, 455.

<sup>126</sup> *See infra* notes 392-430 for a full discussion on Consumer Protection & the Deceptive Trade Practices Act.

<sup>127</sup> *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 762-63.

<sup>130</sup> Tex. Occ. Code Ann. § 455.202(a); 16 Tex. Admin. Code § 117.82(a) (2017) (Tex. Dep’t of Licensing & Regulation, Massage Establishments—General Requirements).

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- <sup>131</sup> 16 Tex. Admin. Code § 117.82(h)(1)-(2) (2017) (Tex. Dep’t of Licensing & Regulation, Massage Establishments—General Requirements); § 117.90(f) (2017) (Tex. Dep’t of Licensing & Regulation, General Ethical Requirements).
- <sup>132</sup> 16 Tex. Admin. Code § 117.82(a)(1)-(3) (2017) (Tex. Dep’t of Licensing & Regulation, Massage Establishments--General Requirements).
- <sup>133</sup> *Id.* at (h)(4).
- <sup>134</sup> *Id.* at (h)(5).
- <sup>135</sup> Houston, Tex., Code of Ordinances, ch. 28, art. XII, § 28-365.
- <sup>136</sup> 578 F.2d 1002 (5th Cir., 1978)
- <sup>137</sup> *Id.* at 1013.
- <sup>138</sup> *Id.*
- <sup>139</sup> *Id.*
- <sup>140</sup> *Id.*
- <sup>141</sup> *Id.* (comparing to *United Health Clubs of America, Inc. v. Strom*, 423 F.Supp. 761, 765 (D.S.C.1976).
- <sup>142</sup> *Id.*
- <sup>143</sup> *Id.*
- <sup>144</sup> *Id.*
- <sup>145</sup> *Id.*
- <sup>146</sup> *Id.*
- <sup>147</sup> See *infra* notes 158-207 for full discussion on land use and building code regulations.
- <sup>148</sup> 16 Tex. Admin. Code § 117.82(c) (2017) (Tex. Dep’t of Licensing & Regulation, Massage Establishments—General Requirements).
- <sup>149</sup> See *e.g.*, Houston, Operation in Connection with Living or Sleeping Quarters Prohibited, “A massage establishment must maintain separation from rooms used wholly or in part for residential or sleeping purposes by a solid wall or by a wall with a solid door which shall remain locked during business hours.” Houston, Tex., Code of Ordinances, ch.28, art. XII, § 28-364 (2018).
- <sup>150</sup> Dallas, Tex., Code of Ordinances, ch. 25A, § 25A-13.
- <sup>151</sup> *Id.*
- <sup>152</sup> *Id.* at § 17.45(b).
- <sup>153</sup> *Id.* at (a).
- <sup>154</sup> *Id.* at § 17.46.
- <sup>155</sup> *Id.* at § 17.48.
- <sup>156</sup> *Id.* at § 17-45(a).
- <sup>157</sup> 8 McQuillin the Law of Municipal Corporations § 25.1 (3d ed. 2018).
- <sup>158</sup> David B. Brooks, 23 Tex. Prac., Municipal Law & Practice § 21.01 (2d ed. 2018).
- <sup>159</sup> Tex. Loc. Gov’t Code Ann. § 211.001.
- <sup>160</sup> *Id.* at § 211.003(a)(1)-(5).
- <sup>161</sup> Laura Hunter Dietz, Beth Bates Holliday, Mary Babb Morris, & Elizabeth Williams, 77 Tx. Jur. 3d Zoning § 21 (2019).
- <sup>162</sup> Tex. Loc. Gov’t Code Ann. § 213.002(b).
- <sup>163</sup> *Id.* at § 211.005(a).
- <sup>164</sup> *FM Properties Operating Co v. City of Austin*, 93 F.3d 167, 175 (5th Cir. 1996).
- <sup>165</sup> *Lombardo v. City of Dallas*, 73 S.W.2d 475, 478 (Tex. 1934).
- <sup>166</sup> See, *e.g.*, *City of Bellaire v. Lamkin*, 317 S.W.2d 43 (Tex. 1958)(citing *Village of Euclid* 272 U.S. at 395); *Minton v. City of Fort Worth Planning Commission*, 786 S.W.2d 563 (Tex. App.—Fort Worth 1990)(citing *Village of Euclid* 272 U.S. at 395).
- <sup>167</sup> *Lombardo*, 73 S.W.2d at 479-480.
- <sup>168</sup> *City of Lubbock v. Stubbs*, 278 S.W.2d 519, 523 (Tex. Civ. App.—Amarillo 1954, writ ref’d n.r.e.).
- <sup>169</sup> 1 Texas Municipal Zoning Law § 9.001 (2018).
- <sup>170</sup> Tex. Loc. Gov’t Code Ann. § 54.001; See *supra* notes 17-33 for a full discussion of a Municipality’s General Enforcement Authority
- <sup>171</sup> Tex. Loc. Gov’t Code Ann. § 211.012(b).
- <sup>172</sup> *Id.* at § 54.001(b)(1); Sect. 211.012(b).
- <sup>173</sup> Tex. Loc. Gov’t Code Ann. § 211.012(b).
- <sup>174</sup> 1 Texas Municipal Zoning Law § 9.001 (2018).

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<sup>175</sup> 1 Texas Municipal Zoning Law § 9.001 (2018) (Noting, that Tex. Penal Code Ann. § 7.02 states, “which provides that a person who aids, encourages, or directs the commission of an offense may be “criminally responsible.”)

<sup>176</sup> *See, e.g., City of Carthage v. Allums*, 554 S.W.2d 753 (Tex. Civ. App. Dallas 1977, no writ) (The city inspector filed criminal charges against the Allums, who claimed that his existing slaughterhouse was a valid, preexisting nonconforming use; However, the court allowed Allums to test the validity of the ordinance by injunction without first appealing to the board of adjustment, thereby exhausting administrative remedies, because the criminal prosecution threatened irreparable injury to Allums’ business); *See also*, Texas Local Government Code, Sect. 211.010(c) (An appeal to the board stays all proceedings in action which is appealed unless there is certification, in writing, that a stay would, “cause imminent peril to life or property); *City of Dallas v. North by West Entertainment, Ltd.*, 24 S.W.3d 917 (Tex. App.—Dallas 2000) appeal dism’d 2000 Tex. App. LEXIS 7237 (temporary injunction against enforcement was automatically suspended when a home rule city filed notice of appeal); *Compare*, *Hang On III Inc. v. Gregg County*, 893 S.W.2d 724 (Tex. App.—Texarkana 1995, writ dism’d by agr.) (The Court refused to enjoin enforcement of sexually oriented business regulations against a restaurant featuring entertainment by nude women, stating that equity cannot enjoin enforcement of a penal ordinance unless it is unconstitutional, and enforcement would cause irreparable harm to a vested property interest).

<sup>177</sup> 1 Texas Municipal Zoning Law § 9.003 (2018).

<sup>178</sup> 1 Texas Municipal Zoning Law § 9.002 (2018); Tex. Loc. Gov’t Code Ann. § 54.012 (subdivisions (3), (4), and (5) authorize municipalities to bring a civil action to enforce zoning, land subdivision, or construction of buildings, and implement civil penalties).

<sup>179</sup> *Hollingsworth v. City of Dallas*, 931 S.W.2d 699, 703 (Tex. App.—Dallas 1996, writ denied)(citing *Swinney v. City of San Antonio*, 483 S.W.2d 556, 559 (Tex.App.—San Antonio 1971, no writ)(The Court held that because Chapter 211 applied, the municipality did not have to show “substantial danger of injury or adverse health impact” because § 54.016 of the Local Government Code does not expressly apply to ordinances regulating the use of land, which is at issue in this cause).

<sup>180</sup> 1 Texas Municipal Zoning Law § 9.006 (2018).

<sup>181</sup> *See generally*, Summary of Zoning Districts (Fort Worth Planning and Development), last visited 03/07/2019) available at: <http://fortworthtexas.gov/planninganddevelopment/pdf/zoning-district-summary.pdf>

<sup>182</sup> Fort Worth, Tex. Code of Ordinances, § 4.900(b)(1).

<sup>183</sup> *Id.* at § 4.101.

<sup>184</sup> *Id.* at § 9.101. (Massage therapy is defined as, “any medical or therapeutic practice unrelated to a sexually oriented business operation operated by or employing licensed psychologist, physicians, physical therapists, registered nurses, chiropractors, licensed practitioners or athletic trainers engaged in the practice of healing arts and the treatment of disease, ailments and disorders of the body.”)

<sup>185</sup> *Id.*

<sup>186</sup> W. Mike Baggett & Brian Thompson Morris, 2 Tex. Prac. Guide Real Estate Litig. § 8:187 (2018); Laura Hunter Dietz, Beth Bates Holliday, Mary Babb Morris, & Elizabeth Williams, 77 Tex. Jur. 3d Zoning § 224 (2019).

<sup>187</sup> 8.101(a) Violations and Fine – Maximum Fine

<sup>188</sup> Fort Worth, Tex., Code of Municipal Ordinances, § 8.102.

<sup>189</sup> Tex. Occ. Code Ann. § 455.202 (“(b) A massage establishment may not (3) allow a nude or partially nude employee to provide massage therapy or other massage services to a customer; (5) allow any individual, including a student, license holder, or employee, to practice massage therapy in the nude or in clothing designed to arouse or gratify the sexual desire of any individual.”); 16 Tex. Admin Code § 117.82(g) (2017) (Tex. Dep’t of Licensing & Regulation, Massage Establishment—General Requirements) (5) (“A massage establishment may not: (3) allow a nude or partially nude employee to provide massage therapy or other massage services to a customer; (5) allow any individual, including a student, license holder, or employee, to practice massage therapy in the nude or in clothing designed to arouse or gratify the sexual desire of any individual.”)

<sup>190</sup> The Polaris Project, *Human Trafficking in Illicit Massage Businesses*, pg. 47 (2018) available at: [https://polarisproject.org/sites/default/files/Full\\_Report\\_Human\\_Trafficking\\_in\\_Illicit\\_Massage\\_Businesses.pdf](https://polarisproject.org/sites/default/files/Full_Report_Human_Trafficking_in_Illicit_Massage_Businesses.pdf)

<sup>191</sup> *Id.*

<sup>192</sup> W. Mike Baggett & Brian Thompson Morris, 2 Tex. Prac. Guide: Real Estate Litig. § 8:230 (2018).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Tex. Loc. Gov’t Code. Ann. § 214.216 (c)(1)-(2).

<sup>196</sup> 2012 Int’l Building Code, Ch. 1 § 114.1 (Unlawful Acts) (Int’l Code Council, 2014).

<sup>197</sup> 2012 Int’l Building Code, Ch. 1 § 114.4 (Violation Penalties) (Int’l Code Council, 2014).



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<sup>198</sup> Houston Amendments to the Int'l Building Code, § 114.1 (2015) available at:

<https://edocs.publicworks.houstontx.gov/all-documents/4536-2012-international-building-code-ibc-houston-amendments.html>

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> 2012 Int'l Building Code, Ch. 1 § 111.4 (2014) (Certificate of Occupancy—Certificate Issued) (Int'l Code Council, 2014).

<sup>202</sup> 2012 International Building Code, Ch. 1 § 111.4 (2014) (Certificate of Occupancy—Revocation) (Int'l Code Council, 2014).

<sup>203</sup> Francis D. K. Ching & Steven R. Winkel, BUILDING CODES ILLUSTRATED: A GUIDE TO UNDERSTANDING THE 2012 INTERNATIONAL BUILDING CODE, 19 (4th ed. 2006).

<sup>204</sup> *Id.* at 22-23.

<sup>205</sup> 2012 International Building Code, Ch. 1 § 111.1 (2014) (Certificate of Occupancy—Use and Occupancy).

<sup>206</sup> Houston Amendments to the Int'l Building Code, § 111.5 (2015) available at:

<https://edocs.publicworks.houstontx.gov/all-documents/4536-2012-international-building-code-ibc-houston-amendments.html>

<sup>207</sup> 16 Tex. Admin Code § 117.82(c) (2018) (Tex. Dep't Licensing & Regulation, Massage Establishment—General Requirements); *See infra* notes 266-270 for a discussion of the relevant state regulations.

<sup>208</sup> Chapter 51 of the Texas Occupation Code gives TDLR its responsibilities; TDLR was given responsibility over Massage therapy after the passing [84]Senate Bill 202 that transferred responsibility from Department of State Health Services

<sup>209</sup> Tex. Occ. Code Ann. § 455.001(8); 16 Tex. Admin. Code § 117.002(17) (2017) (Tex. Dep't of Licensing & Regulation, Definitions).

<sup>210</sup> *Id.*

<sup>211</sup> Tex. Occ. Code Ann. § 455.003; 16 Tex. Admin. Code § 117.002(17) (2017) (Tex. Dep't of Licensing & Regulation, Definitions).

<sup>212</sup> Tex. Occ. Code Ann. § 455.001(7); 16 Tex. Admin. Code § 117.002(16) (2017) (Tex. Dep't of Licensing & Regulation, Definitions).

<sup>213</sup> Texas Department of Licensing and Regulation, “Texas Department of Licensing and Regulation Massage Therapy Frequently Asked Questions.” [Hereinafter “TDLR Massage Therapy FAQs”], Retrieved from <https://www.tdlr.texas.gov/mas/masfaq.htm#licensing>

<sup>214</sup> *Id.*

<sup>215</sup> Tex. Occ. Code Ann. §§ 455.153, 455.156; 16 Tex. Admin. Code §§ 117.20 (2017) (Tex. Dep't of Licensing & Regulation, Massage Therapist License—General Requirements & Application), 117.21 (2017) (Tex. Dep't of Licensing & Regulation, Reciprocity).

<sup>216</sup> Texas Department of Licensing and Regulation, “Out of State Applicants.” Retrieved from <https://www.tdlr.texas.gov/mas/masstate.htm>

<sup>217</sup> *Id.*

<sup>218</sup> Tex. Occ. Code Ann. § 455.155(b); 16 Tex. Admin. Code § 117.84(a)(2) (2017) (Tex. Dep't of Licensing & Regulation, Massage Establishment Exemptions).

<sup>219</sup> Tex. Occ. Code Ann. § 455.155(c)(2)(a)-(b); 16 Tex. Admin. Code § 117.84(a)(2) (2017) (Tex. Dep't of Licensing & Regulation, Massage Establishment Exemptions).

<sup>220</sup> TDLR Massage Therapy FAQs, *supra* note 213.

<sup>221</sup> Tex. Occ. Code Ann. § 455.156(b)(Specifically, Section 455.56(b) states “An applicant for a license under this section must be an individual and **(1) present evidence satisfactory to the department that the person has satisfactorily completed massage therapy studies in a 500-hour minimum, supervised course of instruction provided by a massage therapy instructor at a massage school, a licensed massage school, a state-approved educational institution, or any combination of instructors or schools, in which at least:** (A) 200 hours are taught by a licensed massage therapy instructor and dedicated to the study of massage therapy techniques and theory and the practice of manipulation of soft tissue, with at least 125 hours dedicated to the study of Swedish massage therapy techniques; (B) 50 hours are dedicated to the study of anatomy; (C) 25 hours are dedicated to the study of physiology; (D) 50 hours are dedicated to the study of kinesiology; (E) 40 hours are dedicated to the study of pathology; (F) 20 hours are dedicated to the study of hydrotherapy; (G) 45 hours are dedicated to the study of massage therapy laws and rules, business practices, and professional ethics standards; (H) 20 hours are dedicated to the study of health, hygiene, first aid, universal precautions, and cardiopulmonary resuscitation (CPR); and (I) 50 hours are spent in an internship program; **(2) pass the required examinations;** and **(3) be at least 18 years of age.**”); 16 Tex. Admin. Code § 117.20(8) (2017) (Tex. Dep't of Licensing & Regulation, Massage Therapist License—General Requirements & Application).

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<sup>222</sup> Texas Department of Licensing and Regulation, “Massage Therapy Examination Requirements.” Retrieved from <https://www.tdlr.texas.gov/mas/masexam.htm>.

<sup>223</sup> Tex. Occ. Code Ann. § 455.1525; 16 Tex. Admin. Code § 177.24(c) (2017) (Massage Therapist License Term; Renewals).

<sup>224</sup> Texas Department of Licensing and Regulation, “Massage Therapy Establishment License Application.” Retrieved from <https://www.tdlr.texas.gov/mas/forms/MAS005.pdf>

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> Tex. Occ. Code Ann. § 455.1525; 16 Tex. Admin. Code § 177.80(c)(3) (2017) (Tex. Dep’t of Licensing & Regulation, Massage Establishment Application Procedure & Licensure).

<sup>228</sup> Tex. Occ. Code Ann. § 455.206; 16 Tex. Admin. Code § 117.85(a) (2017) (Tex. Dep’t of Licensing & Regulation, Massage Establishment Change of Ownership or Change of Location).

<sup>229</sup> 16 Tex. Admin. Code § 117.85(b) (2017) (Tex. Dep’t of Licensing & Regulation, Massage Establishment Change of Ownership or Change of Location).

<sup>230</sup> 16 Texas Admin. Code § 117.85(c) (2018) (Tex. Dep’t of Licensing & Regulation, Massage Establishment Change of Ownership or Change of Location).

<sup>231</sup> Tex. Occ. Code Ann. § 455.151(a); 16 Tex. Admin. Code Ann. § 177.82(b) (2018) (Tex. Dep’t of Licensing & Regulation, Massage Establishment—General Requirements).

<sup>232</sup> 16 Texas Admin Code, § 177.82(b) (2017) (Tex. Dep’t of Licensing & Regulation, Massage Establishment Change of Ownership or Change of Location).

<sup>233</sup> Tex. Occ. Code Ann. § 455.004(1)-(3).

<sup>234</sup> *Id.* at § 455.155(a)(1)-(2).

<sup>235</sup> Tex. Occ. Code Ann. § 455.155(c)(2)(a)-(b); 16 Texas Admin. Code § 117.84(2) (2017) (Tex. Dep’t of Licensing & Regulation, Massage Establishment Exemptions).

<sup>236</sup> Tex. Occ. Code Ann. § 455.155(c)(3) (The statute specifically states, “at the place of business, an acupuncturist, athletic trainer, chiropractor, cosmetologist, midwife, nurse, occupational therapist, perfusionist, physical therapist, physician, physician assistant, podiatrist, respiratory care practitioner, or surgical assistant licensed or certified in this state employs or contracts with a licensed massage therapist to provide massage therapy as part of the person’s practice.”); 16 Texas Admin Code § 117.84(a)(3) (2017) (Tex. Dep’t of Licensing & Regulation, Massage Establishment Exemptions).

<sup>237</sup> Tex. Occ. Code Ann. § 455.155(d)(1)-(2) (Chapter 455 specifically states, “A sexually oriented business may not obtain a license from the department or operate as a massage establishment.”); *See also*, 16 Texas Admin Code § 117.80 (2017) (Tex. Dep’t of Licensing & Regulation, Massage Establishment Application Procedures and Licensure).

<sup>238</sup> Tex. Loc. Gov’t Code Ann. § 243.002.

<sup>239</sup> *Ma v. State*, No. 14-16-00028-CR and No. 14-16-00029-CR, 2016 WL 7018200, (Tex. App.—Houston [14th Dist.] March 29, 2017).

<sup>240</sup> *Id.* at \*1.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at \*3.

<sup>243</sup> *Id.*

<sup>244</sup> However, the Court of Appeals did modify the judgment to correct clerical errors; both judgments incorrectly cite the appellant had plead guilty and consequently recited terms if a plea bargain; the court modified the judgment to reflect the appellant plead not guilty and was not sentenced pursuant to a plea bargain (*Ma*, at \*5).

<sup>245</sup> *Id.* at \*3 (citing Tex. Loc. Gov’t Code Ann. § 243.002).

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at \*4.

<sup>248</sup> *Id.*

<sup>249</sup> Tex. Occ. Code Ann. § 455.160(a); 16 Texas Admin Code §§ 117.24(a) (2017) (Texas Dep’t of Licensing & Regulation, Massage Therapist License Term; Renewals), 117.81(a) (2017) (Tex. Dep’t of Licensing & Regulation, Massage Establishment Renewal Requirements).

<sup>250</sup> Texas Department of Licensing and Regulation, “Massage Therapist License Renewal Application Instructions.” Retrieved from: <https://www.tdlr.texas.gov/mas/forms/MAS002.pdf>.

<sup>251</sup> Tex. Occ. Code Ann. § 455.153; 16 Tex. Admin. Code § 117.30 (2017) (Tex. Dep’t of Licensing & Regulation, Massage Therapist Continuing Education—Hours); 16 Tex. Admin. Code § 117.33 (2017) (Tex. Dep’t of Licensing & Regulation, Massage Therapist Continuing Education—Records and Audits).

<sup>252</sup> Tex. Occ. Code Ann. § 455.153; 16 Tex. Admin. Code § 117.81 (2017) (Tex. Dep’t of Licensing & Regulation, Massage Establishment Renewal Requirements).

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<sup>253</sup> 16 Tex. Admin. Code § 117.82(f)(4) (2017) (Tex. Dep’t of Licensing & Regulation, Massage Establishment—General Requirements).

<sup>254</sup> Tex. Occ. Code Ann. § 455.202(a); 16 Tex. Admin Code § 117.82(a) (2017) (Tex. Dep’t of Licensing & Regulation, Massage Establishments—General Requirements).

<sup>255</sup> Tex. Occ. Code Ann. § 455.202(b)(1); 16 Tex. Admin Code § 117.82(a) (2017) (Tex. Dep’t of Licensing & Regulation, Massage Establishments—General Requirements).

<sup>256</sup> Tex. Occ. Code Ann. § 455.204; 16 Tex. Admin Code § 117.82(d) (2017) (Tex. Dep’t of Licensing & Regulation, Massage Establishments—General Requirements).

<sup>257</sup> 16 Tex. Admin. Code § 117.90(q) (2017) (Tex. Dep’t of Licensing & Regulation, General Ethical Requirements).

<sup>258</sup> 16 Tex. Admin. Code § 117.83 (2017) (Tex. Dep’t of Licensing & Regulation, Sanitation Requirements for Massage Establishments).

<sup>259</sup> Tex. Occ. Code Ann. § 455.202(5); 16 Tex. Admin. Code § 117.82(g)(3) (2017) (Tex. Dep’t of Licensing & Regulation, Massage Establishment—General Requirements).

<sup>260</sup> *Id.*, *See, e.g.*, Dale Lezon, *Nude Woman Arrested in Undercover Houston Massage Parlor Sting*, HOUSTON CHRONICLE, Dec. 5, 2013, available at: <https://www.chron.com/neighborhood/spring/crime-courts/article/Nude-woman-arrested-in-undercover-Houston-massage-5038002.php#photo-5555482> (Houston Deputies during a compliance inspection went to an IMB where the business failed to obtain a state massage establishment license or a Class II permit for a sexually oriented business; Two employees were charged with failing to obtain a sexually oriented business permit and one employee was charged with being nude in the business.)

<sup>261</sup> 16 Texas Admin Code § 117.82(i)(1)(A)-(B) (2017) (Tex. Dep’t of Licensing & Regulation, Massage Establishment—General Requirements).

<sup>262</sup> 16 Tex. Admin. Code §§ 117.82(h) (2017) (Tex. Dep’t of Licensing & Regulation, Massage Establishment—General Requirements); 117.90(f) (2017) (Tex. Dep’t of Licensing & Regulation, General Ethical Requirements).

<sup>263</sup> *Id.* at § 117.82(a)(1)-(3).

<sup>264</sup> *Id.*

<sup>265</sup> The Polaris Project, *Human Trafficking in Illicit Massage Businesses*, (lasted visited, February 27, 2018), pg. 27, available at:

[https://polarisproject.org/sites/default/files/Full\\_Report\\_Human\\_Trafficking\\_in\\_Illicit\\_Massage\\_Businesses.pdf](https://polarisproject.org/sites/default/files/Full_Report_Human_Trafficking_in_Illicit_Massage_Businesses.pdf)

<sup>266</sup> *Id.*

<sup>267</sup> 16 Texas Admin. Code § 117.82(c) (2017) (Tex. Dep’t of Licensing & Regulation, Massage Establishments—General Requirements).

<sup>268</sup> See supra footnote X

<sup>269</sup> George E. Dix & John M. Schmolesky, 40 Texas Practice Series: Criminal Practice and Procedure Sect. 9:82 (3d ed. 2017); *See, e.g.*, *Amir v. State*, 45 S.W.3d 88, 89-91 (Tex. Crim. App. 2001) (The search warrant at issue authorized officers to search, “U.S. Apparel, which is located at 5627 Star Lane, Suite A, Houston, Harris County, Texas.” In the warrant U.S. Apparel was not explicitly identified as a business, but the description of the items to be searched included “computer equipment to be used in the operation of U.S. Apparel” which suggested it was in fact a business.”

<sup>270</sup> However, there may be some instances when a search warrant authorizing a search of a business premise only may be construed to include residential areas within a business premise when such areas are sufficiently related to or integrated with the business portions, as suggested by *Amir*; Several factors are relevant in this consideration, such as whether there is evidence that the residential area is used as a living place by the person having control over the business, whether there is a degree of connection (some access to the residence area to the business area), whether there is minimal separation between residential areas and business areas (where walls have been removed or if no separating door can be shut), and evidence the occupant commingles business and residential uses on the premises; Additionally, if the residence area has an independent point of access can indicate the residential area may not be searched) *Amir* 45 S.W.3d at 99-101.

<sup>271</sup> Tex. Occ. Code Ann. § 455.205(c); 16 Texas Admin. Code § 117.93(a) (2017) (Tex. Dep’t of Licensing & Regulation, Advertising).

<sup>272</sup> 16 Tex. Admin. Code § 117.93(b) (2017) (Tex. Dep’t of Licensing & Regulation, Advertising).

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at (c).

<sup>275</sup> *Id.* at § 117.92(a) (2017) (Tex. Dep’t of Licensing & Regulation, Sexual Misconduct).

<sup>276</sup> *Id.* at (a)(1)-(7).

<sup>277</sup> *Id.* at § 117.82(g)(5) (2017) (Tex. Dep’t of Licensing & Regulation, Massage Establishment—General Requirements).

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<sup>278</sup> Tex. Occ. Code Ann. § 455.202(4); 16 Tex. Admin. Code § 117.92(b) (2017) (Tex. Dep’t of Licensing & Regulation, Sexual Misconduct).

<sup>279</sup> Tex. Occ. Code Ann. § 455.059; 16 Tex. Admin. Code § 117.82(f) (2017) (Tex. Dep’t of Licensing & Regulation, Massage Establishments—General Requirements).

<sup>280</sup> *Id.*

<sup>281</sup> 16 Tex. Admin. Code § 117.82(f)(4) (2017) (Tex. Dep’t of Licensing & Regulation, Massage Establishments—General Requirements).

<sup>282</sup> Tex. Occ. Code Ann. § 455.251(a); 16 Tex. Admin. Code § 117.111(b)(1)-(6) (2017) (Tex. Dep’t of Licensing & Regulation, Administrative Penalties and Sanctions).

<sup>283</sup> Tex. Occ. Code Ann. § 455.251(b); 16 Tex. Admin. Code § 117.111(c)(1)-(2) (2017) (Tex. Dep’t of Licensing & Regulation, Massage Establishments—General Requirements).

<sup>284</sup> *Id.* at (d)(1)-(2).

<sup>285</sup> Tex. Occ. Code Ann. § 455.351(a)(1).

<sup>286</sup> *Id.* at (a)(2).

<sup>287</sup> *Id.* at (b).

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at (g).

<sup>290</sup> *Id.* at (f).

<sup>291</sup> *Id.* at (h)(1).

<sup>292</sup> *Id.* at (h)(2).

<sup>293</sup> *Id.* at (h)(3).

<sup>294</sup> *Id.* at § 455.005(a).

<sup>295</sup> *Id.* at (b)(1)-(3).

<sup>296</sup> *Id.* at (c).

<sup>297</sup> Tex. Penal Code Ann. § 43.02(a)-(b).

<sup>298</sup> *Id.* at (c).

<sup>299</sup> *Id.* at (c)(1).

<sup>300</sup> *Id.* at (c)(2).

<sup>301</sup> *Id.* at (d).

<sup>302</sup> Tex. Penal Code Ann. § 43.03 (a)(1)-(2).

<sup>303</sup> *Id.* at (b).

<sup>304</sup> *Id.* at (b)(1).

<sup>305</sup> Tex. Penal Code Ann. § 43.04(a).

<sup>306</sup> *Id.* at (b).

<sup>307</sup> Tex. Penal Code Ann. § 43.05(a)(1).

<sup>308</sup> *Id.* at (b).

<sup>309</sup> *Id.* at (c).

<sup>310</sup> Tex. Penal Code Ann. § 20A.02(a)(1)-(4).

<sup>311</sup> *Id.* at (b).

<sup>312</sup> *Id.* at (b)(2).

<sup>313</sup> *Id.* at (c).

<sup>314</sup> Tex. Penal Code Ann. § 20A.03(a).

<sup>315</sup> *Id.* at (e).

<sup>316</sup> Tex. Penal Code Ann. § 20.02(a).

<sup>317</sup> *Id.* at (c).

<sup>318</sup> *Id.* at (c)(2)(A).

<sup>319</sup> Tex. Penal Code Ann. § 20.05(a)(1)-(2).

<sup>320</sup> *Id.* at (b).

<sup>321</sup> *Id.* at (b)(1)(a).

<sup>322</sup> *Id.* at (b)(2)(A)-(B).

<sup>323</sup> *Id.* at (d).

<sup>324</sup> Tex. Penal Code Ann. § 20.06(a).

<sup>325</sup> *Id.* at (e).

<sup>326</sup> *Id.* at (g)(1)-(2).

<sup>327</sup> Tex. Penal Code Ann. § 21.18(b)(2)-(3).

<sup>328</sup> *Id.* at (c).

<sup>329</sup> *Id.* at (e).

<sup>330</sup> *Id.*

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<sup>331</sup> *Id.* at (d).  
<sup>332</sup> Tex. Penal Code Ann. § 34.02(a)(1)-(4).  
<sup>333</sup> *Id.* at (e)(1).  
<sup>334</sup> *Id.* at (e)(2).  
<sup>335</sup> *Id.* at (e)(3).  
<sup>336</sup> *Id.* at (e)(4).  
<sup>337</sup> *Id.* at (a-1).  
<sup>338</sup> *Id.* at (f).  
<sup>339</sup> Tex. Penal Code Ann. § 71.02(a)(3), (10), (12), (13), (17), (18)  
<sup>340</sup> *Id.* at (b).  
<sup>341</sup> *Id.*  
<sup>342</sup> *Id.* at (b)(2).  
<sup>343</sup> Tex. Occ. Code Ann. § 455.352 (a)(2)  
<sup>344</sup> *Id.* at (d).  
<sup>345</sup> Tex. Occ. Code Ann. § 455.352(e).  
<sup>346</sup> *Id.* at §§ 455.151(a), 455.352(a)(1).  
<sup>347</sup> *Id.* at (d).  
<sup>348</sup> *Id.* at (e).  
<sup>349</sup> Tex. Occ. Code Ann. § 455.352(a)(1); Tex. Occ. Code Ann. § 455.151(b)).  
<sup>350</sup> Tex. Occ. Code Ann. § 455.352(d).  
<sup>351</sup> *Id.* at (e).  
<sup>352</sup> Tex. Occ. Code Ann. § 455.352(a)(1); Tex. Occ. Code Ann. § 455.151(c).  
<sup>353</sup> Tex. Occ. Code Ann. § 455.352(d).  
<sup>354</sup> *Id.* at (e).  
<sup>355</sup> Tex. Occ. Code Ann. § 455.352(a)(1); Tex. Occ. Code Ann. § 455.151(a).  
<sup>356</sup> Tex. Occ. Code Ann. § 455.352(b).  
<sup>357</sup> *Id.*  
<sup>358</sup> *Id.*  
<sup>359</sup> Tex. Occ. Code Ann. § 455.352(a)(1); Tex. Occ. Code Ann. § 455.205(d).  
<sup>360</sup> Tex. Occ. Code Ann. § 455.352(d).  
<sup>361</sup> *Id.* at (e).  
<sup>362</sup> Tex. Occ. Code Ann. § 455.352(a)(1); Tex. Occ. Code Ann. § 455.205(d).  
<sup>363</sup> Tex. Occ. Code Ann. § 455.352(b).  
<sup>364</sup> *Id.*  
<sup>365</sup> *Id.*  
<sup>366</sup> Tex. Occ. Code Ann. § 455.352(b); Tex. Occ. Code Ann. § 455.155(d).  
<sup>367</sup> Tex. Occ. Code Ann. § 455.352(b).  
<sup>368</sup> *Id.*  
<sup>369</sup> *Id.*  
<sup>370</sup> Tex. Occ. Code Ann. § 455.352(b); Tex. Occ. Code Ann. § 455.202(a).  
<sup>371</sup> Tex. Occ. Code Ann. § 455.352(b).  
<sup>372</sup> *Id.*  
<sup>373</sup> *Id.*  
<sup>374</sup> Tex. Occ. Code Ann. § 455.352(a)(1); Tex. Occ. Code Ann. § 455.202(b)(1)-(5).  
<sup>375</sup> Tex. Occ. Code Ann. § 455.352(d).  
<sup>376</sup> *Id.* at (e).  
<sup>377</sup> Tex. Occ. Code Ann. § 455.352(a-1); Tex. Occ. Code Ann. § 455.205(a).  
<sup>378</sup> *Id.*  
<sup>379</sup> Tex. Occ. Code Ann. § 455.352(a)(1), Tex. Occ. Code Ann. § 455.204(b).  
<sup>380</sup> Tex. Occ. Code Ann. § 455.352(d).  
<sup>381</sup> *Id.* at (e).  
<sup>382</sup> Tex. Occ. Code Ann. § 455.352(b), Tex. Occ. Code Ann. § 455.204(b).  
<sup>383</sup> Tex. Occ. Code Ann. § 455.352(b).  
<sup>384</sup> Tex. Occ. Code Ann. §§ 455.204(c), 455.352(a)(1).  
<sup>385</sup> Tex. Occ. Code Ann. § 455.352(d).  
<sup>386</sup> *Id.* at (e).  
<sup>387</sup> Tex. Occ. Code Ann. §§ 455.204(c), 455.352(b).  
<sup>388</sup> Tex. Occ. Code Ann. § 455.352(b).

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<sup>389</sup> Tex. Occ. Code Ann. §§ 455.205(c), 455.352(d).

<sup>390</sup> Tex. Occ. Code Ann. § 455.352(d).

<sup>391</sup> *Id.* at (e).

<sup>392</sup> Richard Aldermann, The Texas Deceptive Trade Practices Act 2005: Still Alive and Well, *Journal of Texas Consumer Law*; John Hill, *Introduction—Consumer Protection Symposium*, 8 St. Mary's L.J. 609 (1977)

<sup>393</sup> The violations (33) of the “laundry-list” are enumerated in the Texas Business and Commerce Code, Sect. 17.46.

<sup>394</sup> Tex. Bus. & Com. Code Ann. § 17.50 (a)(1)-(4).

<sup>395</sup> *Id.* at (a)(1)(A)-(B).

<sup>396</sup> *Id.* at § 17.46(b)(33)(A)-(B).

<sup>397</sup> Interview with the Texas Attorney General Office—Consumer Protection Division on June 27, 2018, interview on file with author.

<sup>398</sup> See *infra* note 435-442 for a discussion of what constitutes a common nuisance under Tex. Civ. Prac. & Rem. Code Ann. § 125.0015.

<sup>399</sup> Stephen G. Cochran, 27 Texas Practice Series, Consumer Rights & Remedies § 6.2 (3d. Ed., 2017).

<sup>400</sup> Tex. Penal Code Ann. § 21.18(b).

<sup>401</sup> Jim Davis & Lauren M. Fincher, 2016 TXCLE Advanced Consumer & Com. L., The Role of the Attorney General in Consumer Protection 7.IV – Elements of a Governmental Claim (2016).

<sup>402</sup> *Bullock v. Escobedo*, 583 S.W.2d 888, 894 (Tex. Civ. App.—Austin 1979, writ ref'd)(quoting *Charles Scribner's Sons v. Mars*, 262 S.W. 722, 727 (Tex. 1924).

<sup>403</sup> *Id.*

<sup>404</sup> Tex. Bus. & Com. Code Ann. § 17.47.

<sup>405</sup> Under the DTPA, the private litigant can recover economic damages, damages for mental anguish, additional damages, and reasonable attorney's fees.

<sup>406</sup> Jim Davis & Lauren M. Fincher, 2016 TXCLE Advanced Consumer & Com. L., The Role of the Attorney General in Consumer Protection 7.V – Remedies (2016).

<sup>407</sup> Tex. Bus. & Com. Code Ann. § 17.50(d) “Each consumer who prevails **shall be awarded** court costs and reasonable and necessary attorneys' fees.”

<sup>408</sup> *Id.*; Jim Davis & Lauren M. Fincher, 2016 TXCLE Advanced Consumer & Com. L., The Role of the Attorney General in Consumer Protection 7.V – Remedies (2016) (citing Tex. Bus. & Com. Code §17.50(b)(2).

<sup>409</sup> Tex. Bus. & Com. Code Ann. § 17.47(c)(1) “in addition to the request for a temporary restraining order, or permanent injunction, in a proceeding brought under subsection (a) of this section, the consumer protection division may request, and the trier of fact may award, a civil penalty to paid to the state in an amount of (1) not more than \$20,000 per violation.”

<sup>410</sup> Stephen G. Cochran, 27 Texas Practice Series, Consumer Rights and Remedies § 6.2 (3d. ed., 2017).

<sup>411</sup> Tex. Bus. & Com. Code Ann. § 17.60(1)-(2) (“Whenever the consumer protection division has reason to believe that a person is engaging in, has engaged in, or is about to engage in any act or practice declared to be unlawful by this subchapter, or when it reasonably believes it to be in the public interest to conduct an investigation to ascertain whether any person is engaging in, has engaged in, or is about to engage in any such act or practice, an authorized member of the division may: (1) require the person to file on the prescribed forms a statement or report in writing, under oath or otherwise, as to all the facts and circumstances concerning the alleged violation and such other data and information as the consumer protection division deems necessary; (2) examine under oath any person in connection with this alleged violation”).

<sup>412</sup> Tex. Bus. & Com. Code Ann. § 17.60(3)-(4).

<sup>413</sup> *Id.* at § 17.61.

<sup>414</sup> Stephen G. Cochran, 27 Texas Practice Series § 6.2 (3d. ed., 2017) (Other such agencies which are granted Consumer protection powers, akin to TDLR includes the Texas Department of Transportation and the Motor Vehicle Board, the Texas Real Estate Commission, the Department of Housing and Community Affairs, the Public Utility Commission, and the Railroad Commission).

<sup>415</sup> *Id.*

<sup>416</sup> *Id.*, See, Tex. Occ. Code Ann. § 455.0511 (“(a) The executive director shall administer and enforce this chapter; (b) The department [TDLR] shall: (1) investigate a person who may be engaging in or offering to engage in a practice that violates this chapter”; Tex. Occ. Code Ann. § 455.059 (investigations and inspections); 6 Tex. Admin. Code §117.110(a) (Tex. Dep’t of Licensing & Regulation, Complaints) (2017) (“Any person may file a complaint with the department alleging that a massage therapist, massage school, massage therapy instructor, massage establishment, continuing education provider, or another person or business has violated the Act or this chapter”); 16 Tex. Admin Code § 117.82(f)(1) (Tex. Dep’t of Licensing and Regulation, Massage Establishment General Requirements).

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<sup>417</sup> Stephen G. Cochran, 27 Texas Practice Series § 6.2 (3d. ed., 2017)

<sup>418</sup> Tex. Bus. & Com. Code Ann. § 17.48(a).

<sup>419</sup> *Id.* at (b).

<sup>420</sup> *Id.* at § 17.47(a).

<sup>421</sup> *See* Tex. Bus. & Com. Code Ann. § 17.48.

<sup>422</sup> *Id.* at § 17.48(b).

<sup>423</sup> *Id.*

<sup>424</sup> *Id.* at § 17.505(a).

<sup>425</sup> *Id.* at § 17.47(a) (However, the seven day notice requirement is not required for the **Consumer Protection Division** if the CPD believes there is good cause the defendant would evade service of process or destroy any relevant records, or, there is such an emergency which exists which would result in immediate and irreparable injury loss, or damage would occur as a result in obtaining a temporary restraining order. A defendant can also waive their right to notice by appearing at trial with the announcement of ready (Kirk v. State, 651 S.W.2d 840 (Tex. App. El Paso, 1983)).

<sup>426</sup> Tex. Bus. & Com. Code Ann. § 17.47(a).

<sup>427</sup> In the DTPA, notario fraud is defined as, using the translation into a foreign language of a title or other word, including “attorney,” “immigration consultant,” “immigration expert,” “lawyer,” “licensed,” “notary,” and “notary public,” in any written or electronic material, including an advertisement, a business card, a letterhead, stationery, a website, or an online video, in reference to a person who is not an attorney in order to imply that the person is authorized to practice law in the United States” (Tex. Bus. & Com. Code Ann. § 17.46(28)). The DTPA stipulates if a county or district attorney is seeking relief for this laundry list violation, “a district or county attorney is not required to obtain the permission of the consumer protection division to prosecute an action under this subchapter [§ 17.46(28)],” as long as the county or district attorney provides a full report to the consumer protection division once a final decision has been reached in the matter. (Tex. Bus. & Com. Code Ann. § 17.48(b), (d)). Section 17.48 also provides that any county or district attorney seeking a civil penalty for notario fraud, three fourths of any civil penalty awarded must be paid to the county where the court is located. (*Id.* at (c)).

<sup>428</sup> Tex. Bus. & Com. Code Ann. § 17.46 (27) (“the term “false, misleading, or deceptive acts or practices” includes, but is not limited to, the following acts: taking advantage of a disaster declared by the governor under Chapter 418, Government Code, by: (A) selling or leasing fuel, food, medicine, or another necessity at an exorbitant or excessive price; or (B) demanding an exorbitant or excessive price in connection with the sale or lease of fuel, food, medicine, or another necessity.”)

<sup>429</sup> Interview with the Texas Attorney General Office - Consumer Protection Division on June 27, 2018, interview on file with author.

<sup>430</sup> *Id.*

<sup>431</sup> *Town of Dish v. Atmos Energy Corporation*, 519 S.W.3d 605, 609 (Tex. 2017); *Barnes v. Mathis*, 353 S.W.3d 760, 763 (Tex. 2011); *Holubec v. Brandenberger*, 111 S.W.3d 32, 37 (Tex. 2003); *Bolton v. Fisher*, 528 S.W.3d 770, 777-78 (Tex. App.—Texarkana 2017 (review denied, (June 8, 2018))); *1717 Bissonnet, LLC v. Loughhead*, 500 S.W.3d 488, 498 (Tex. App.—Houston [14th Dist.] 2016).

<sup>432</sup> *Crosstex North Texas Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 588 (Tex. 2016); *Nichols v. McKinney*, 553 S.W.3d 523, 530 (Tex. App.—Waco 2018).

<sup>433</sup> Celena Vinson & Julie Countiss, *The Power of Civil Enforcement*, 43 Am. J. of Crim. Law 105, 105-112 (2015).

<sup>434</sup> *Id.* at 110-111.

<sup>435</sup> Tex. Civ. Prac. & Rem. Code Ann. § 125.0015(a)(2), (6), (7), (10), (11), (18) & (20).

<sup>436</sup> *See supra* notes 341-344.

<sup>437</sup> *See supra* notes 299-303.

<sup>438</sup> *See supra* notes 304-306.

<sup>439</sup> *See supra* notes 307, 308.

<sup>440</sup> *See supra* notes 309-311.

<sup>441</sup> *See supra* notes 312-315.

<sup>442</sup> Tex. Civ. Prac. & Rem. Code Ann. § 125.0015(a).

<sup>443</sup> *Id.*

<sup>444</sup> *Id.* (This is also consistent with the general rule of venue in the Tex. Civ. Prac. & Rem. Code Ann. § 15.002(a)(1)-(4), available at:

<https://law.justia.com/codes/texas/2005/cp/002.00.000015.00.html> ).

<sup>445</sup> Tex. R. of Civ. P. 682 (TRCP 682 specifically states, “No writ of injunction shall be granted unless the applicant therefor shall present his petition to the judge verified by his affidavit and containing a plain and intelligible statement of the grounds for such relief.”)

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<sup>446</sup> Tex. Civ. Prac. & Rem. Code Ann. § 125.002(a).  
<sup>447</sup> *Id.* at (b).  
<sup>448</sup> *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 211 (Tex. 2002).  
<sup>449</sup> *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978).  
<sup>450</sup> *Downer v. Aquamarine Operators Inc*, 701 S.W.2d 238, 241-42 (Tex. 1985).  
<sup>451</sup> *Haddock v. Quinn*, 287 S.W.3d 158, 170 note 2, (Tex. App.—Fort Worth 2009, pet. den’d).  
<sup>452</sup> *Butnaru*, 84 S.W.3d at 211.  
<sup>453</sup> 654 S.W.2d 807 (Tex. App.—Houston [14th District] 1983, rehearing denied July 15, 1983).  
<sup>454</sup> *Id.*  
<sup>455</sup> *Id.*  
<sup>456</sup> *Parrish v. Hunt*, 331 S.W.2d 304, 305 (1960).  
<sup>457</sup> *Deblo Inc.*, 654 S.W.2d at 810.  
<sup>458</sup> *Id.* at 811.  
<sup>459</sup> *Id.*  
<sup>460</sup> *Id.*  
<sup>461</sup> 596 S.W.2d 220 (Tex. App.—Houston [14th District] 1980).  
<sup>462</sup> *Id.* at 220.  
<sup>463</sup> *Id.*  
<sup>464</sup> *Id.*  
<sup>465</sup> *Id.*  
<sup>466</sup> *Id.*  
<sup>467</sup> *Id.* at 221-222.  
<sup>468</sup> *Id.*  
<sup>469</sup> 605 S.W. 2d 679 (Tex. App.—Houston [1st District] 1980).  
<sup>470</sup> *Benton*, 605 S.W. 2d at 681.  
<sup>471</sup> *Id.*  
<sup>472</sup> *Id.*  
<sup>473</sup> *Id.*  
<sup>474</sup> *Id.*  
<sup>475</sup> *Id.* at 682.  
<sup>476</sup> *Id.*  
<sup>477</sup> *Id.*  
<sup>478</sup> *Id.*  
<sup>479</sup> *Id.*  
<sup>480</sup> Tex. Civ. Prac. & Rem. Code Ann. § 125.004  
<sup>481</sup> Tex. Civ. Prac. & Rem. Code Ann. § 125.004(b).  
<sup>482</sup> Tex. Civ. Prac. & Rem. Code Ann. § 125.004(b).  
<sup>483</sup> Tex. Civ. Prac. & Rem. Code Ann. § 125.004(b).  
<sup>484</sup> Tex. Occ. Code Ann. XXX, see *supra* note XX at XX for a full discussion on the licensing requirement.  
<sup>485</sup> Tex. Civ. Prac. & Rem. Code Ann. § 125.004(a-1).  
<sup>486</sup> Tex. Civ. Prac. & Rem. Code Ann. § 125.004(a-3) (Subsection (a-3) identifies that “for the purposes of Subsections (a-1) and (a-2) notice is only considered to be provided to the defendant seven days after the postmark date of notice provided under Tex. Civ. Prac. & Rem. Code Ann. § 125.0017.”)  
<sup>487</sup> Tex. Civ. Prac. & Rem. Code Ann. § 125.004  
<sup>488</sup> *Morgan v. Humble*, 598 S.W.2d 364, 365 (Tex. Civ. App. Houston [14th Dist] 1980).  
<sup>489</sup> *Id.*  
<sup>490</sup> Tex. Civ. Prac. & Rem. Code Ann. § 125.004(a-2)(1)-(2)  
<sup>491</sup> Tex. Civ. Prac. & Rem. Code Ann. § 125.0017.  
<sup>492</sup> Tex. H.B. 731, 85th Leg., R.S. (2019), Text available at:  
<https://capitol.texas.gov/tlodocs/86R/billtext/pdf/HB00731L.pdf#navpanes=0>  
<sup>493</sup> TCPRC Chapter 125.004 (a)(3)(c).  
<sup>494</sup> TRE 803(20) Reputation Concerning Boundaries or General History reads, “A reputation in a community— arising before the controversy—concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation”; *But see.*, *Morgan v. Humble*, 598 S.W.2d 364 (The granting of a temporary injunction was an abuse of discretion when testimony was allowed, over the objection of the appellee’s counsel, when the testifying police officer said that the club in question was “a house of prostitution” but had no knowledge of the general reputation in the community. The trial court specifically allowed the officer to testify at the hearing for the purpose of the club’s reputation in the community.



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Ultimately the 14th Court of Appeals held that it was an abuse of discretion for the trial court to allow the police officer to testify and was reversible error. The Fourteenth Court of Appeals also held that there was insufficient evidence to support the court’s finding that the club was a public nuisance, because the officer, whose testimony was improperly admitted, and was the only witness for the prosecution—no other evidence was introduced which tended to show the club was being used for the illegal purpose of prostitution.

<sup>495</sup> Tex. R. Evid. 901(a).

<sup>496</sup> Tex. R. Civ. P. 193.7 (“A party’s production of a document in response to written discovery authenticates the document for use against that party in any pretrial proceeding or at trial ...”)

<sup>497</sup> *Id.*

<sup>498</sup> *Id.*

<sup>499</sup> *Id.* (Citing, *United States v. Goichman*, 547 F.2d 778, 784 (3d. Cir. 1976)).

<sup>500</sup> *Id.*

<sup>501</sup> *Id.*

<sup>502</sup> Karl E. Hays, *State Bar of Texas: Essentials of E-Discovery*, (2014) TXBB-EDISCOVERY 16.2; *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 555 (U.S. Dist. Ct. MD, 2007) (Citing, Gregory P. Joseph, *Internet and Email Evidence*, 13 *Prac. Litigator* (Mar. 2002) at 22, *reprinted in*, 5 Stephen A. Saltzburg et al., *Federal Rules of Evidence Manual* at § 901.02[12] (9th ed. 2006)) ( Other factors which may be considered in ruling whether to admit internet postings include, “the length of time the data was posted on the site; whether others report in having seen it; whether it remains on the website for the court to verify; whether the data is the type ordinarily posted on that website or websites of similar entities ...”)

<sup>503</sup> Karl E. Hays, *State Bar of Texas: Essentials of E-Discovery*, (2014) TXBB-EDISCOVERY 16.2 (The list of self-authentication rules which may apply to online postings are derived from here).

<sup>504</sup> Tex. R. Evid. 901(b)(1)

<sup>505</sup> *Id.* at (3).

<sup>506</sup> *Id.* at (4).

<sup>507</sup> *Id.* at (9).

<sup>508</sup> Tex. Civ. Prac. & Rem. Code Ann. § 125.004(d).

<sup>509</sup> *Id.*

<sup>510</sup> *Id.*

<sup>511</sup> *Id.*

<sup>512</sup> Tex. Civ. Prac. & Rem. Code Ann. § 125.0015(a)(18).

<sup>513</sup> Tex. Occ. Code Ann. § 455.352(a)(1); Tex. Occ. Code Ann. § 455.202(b)(1)-(5).

<sup>514</sup> Tex. Occ. Code Ann. § 455.204; 16 Tex. Admin Code § 117.82(d) (2017) (Tex. Dep’t of Licensing & Regulation, *Massage Establishments—General Requirements*).

<sup>515</sup> Tex. Occ. Code Ann. § 455.206; 16 Tex. Admin. Code § 117.85 (2017) (Tex. Dep’t of Licensing & Regulation, *Massage Establishment Change of Ownership or Change of Location*).

<sup>516</sup> Tex. Occ. Code Ann. § 455.202(5); 16 Tex. Admin. Code § 117.82(g)(3) (2017) (Tex. Dep’t of Licensing & Regulation, *Massage Establishment—General Requirements*).

<sup>517</sup> 16 Tex. Admin Code § 117.92 (2017) (Tex. Dep’t of Licensing & Regulation, *Sexual Misconduct*).

<sup>518</sup> Tex. R. of Evid. 901(b)(7) (“The following are examples only—not a complete list—of evidence that satisfies the requirement [of authenticating or identifying an item of evidence] ... (7) Evidence that: (A) a document was recorded or filed in a public office as authorized by law; or (B) a purported public record or statement is from the office where items of this kind are kept.”)

<sup>519</sup> Tex. Civ. Prac. & Rem. Code Ann. § 125.004(e)(1)-(2).

<sup>520</sup> Dorsaneo, *Texas Litigation Guide*, Sect. 50.01

<sup>521</sup> *Garland v. Shepherd*, 445 S.W.2d 602, 604 (Tex. Civ. App.—Dallas 1969, no writ).

<sup>522</sup> It should be noted that there is a general statutory provision within the Texas Civil Practice and Remedies Code (Chapter 65) which provides a writ of injunction may be granted in the following situations: (1) the applicant is entitled to the relief demanded and all or part of the relief requires the restraint of some act prejudicial to the applicant; (2) a party performs or is about to perform or is procuring or allowing the performance of an act relating to the subject of pending litigation, in violation of the rights of the applicant, and the act would tend to render the judgment in that litigation ineffectual; (3) the applicant is entitled to a writ of injunction under the principles of equity and the statutes of this state relating to injunctions; (4) a cloud would be placed on the title of real property being sold under an execution against a party having no interest in the real property subject to execution at the time of sale, irrespective of any remedy at law; or (5) irreparable injury to real or personal property is threatened, irrespective of any remedy at law. *Texas Civil Practice and Remedy Code*. 65.011 (1)-(5).

<sup>523</sup> *Nabilco v. State*, 2013 WL 119680 (Tex. Civ. App.—Houston [14th District] 2013), vacated on other grounds (citing, *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 210 (Tex. 2002)).

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- <sup>524</sup> TCPRC 65.001, TRCP 693.
- <sup>525</sup> Dorseano, Texas Litigation Guide; *Benton v. City of Houston*, 605 S.W.2d 679, 683 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).
- <sup>526</sup> Dorseano, Texas Litigation Guide
- <sup>527</sup> *HILB, Rogal & Hamilton Co. v. Wurzman*, 861 S.W.2d 30
- <sup>528</sup> *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002), .
- <sup>529</sup> *City of Garland v. Texas Power and Light Co.*, 342 S.W.2d 816, 820 (Tex. Civ. App.—Dallas 1961, no writ).
- <sup>530</sup> *Rattikin Title Co. v. Grievance Commission*, 272 S.W.2d 948, 955 (Tex. Civ. App.—Fort Worth, no writ).
- <sup>531</sup> Tex. R. of Civ. Pro. 39.
- <sup>532</sup> Tex. Civ. Prac. & Rem. Code Ann. § 125.045(a)(1)-(2).
- <sup>533</sup> Tex. Civ. Prac. & Rem. Code Ann. § 125.045(a-1)(1)-(4).
- <sup>534</sup> Dorseano, Texas Litigation Guide Sect. 50.06
- <sup>535</sup> *Id.*
- <sup>536</sup> Tex. Civ. Prac. & Rem. Code Ann. § 125.045(b)(1)-(7).
- <sup>537</sup> Tex. Civ. Prac. & Rem. Code § 125.0015 et seq.
- <sup>538</sup> *See e.g.*, *Otten v. Town of China Grove*, 660 S.W.2d 565, 569 (Tex. App.—San Antonio 1983, writ dismissed); *Morgan v. Humble*, 598 S.W.2d 364 (Tex. Civ. App.—Houston [14th Dist.] 1980).
- <sup>539</sup> The Department of State Health Services provides current massage licensee information online. *See* <https://vo.ras.dshs.state.tx.us/datamart/selSearchTypeTXRAS.do?from=loginPage>.
- <sup>540</sup> Tex. Civ. Prac. & Rem. § 125.0015 (18).
- <sup>541</sup> *see*
- <sup>542</sup> Alternatively, pro bono counsel can be deputized by an act or vote of the city council or by mayoral decree. Check the applicable local charter and/or ordinances.
- <sup>543</sup> *See Rankin v. FPL Energy, LLC*, 266 S.W.3d 506, 508 (Tex. App.—Eastland 2008, no pet.); *Maranatha Temple, Inc. v. Enter. Products Co.*, 893 S.W.2d 92, 95 (Tex. App.—Houston [1st Dist.] 1994, pet. denied).
- <sup>544</sup> Alternatively, the pro bono counsel can enter into a representation agreement with the County, assuming their firms have no conflicts of interest.
- <sup>545</sup> *See* Tex. Loc. Gov't Code Ann. § 151.001(a) (requiring a county officer who needs “the services of deputies, assistants, or clerks” to apply to the commissioners court); *See also* Tex. LOC. GOV'T CODE ANN. § 151.002 (requiring a commissioners court to adopt an order authorizing an officer to appoint a specified number of employees); *See also*, *Guynes v. Galveston City*, 861 S.W.2d 861, 863 (Tex. 1993) (“...the courts of this state have for the last century upheld the power of a commissioners court to hire counsel to assist it or other officials in carrying out their responsibilities so long as the statutory duties of other county officials are not thereby usurped”).



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