

CALIFORNIA
BOARD OF BARBERING AND COSMETOLOGY



OCTOBER 16, 2014
Enforcement Committee Meeting
Board of Barbering and Cosmetology
2420 Del Paso Road
Sequoia Room, 1st Floor
Sacramento, CA 95834



Richard Hedges, Public Member,
President

Dr. Kari Williams, Industry Member,
Vice President

Andrew Drabkin, Public Member

Joseph Federico, Industry Member

Kristy Underwood
Executive Officer

Edmund G. Brown Jr., Governor
State of California

Department of Consumer Affairs
Board of Barbering and Cosmetology

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California State Board of Barbering and Cosmetology

Enforcement Committee Meeting Agenda

Thursday, October 16, 2014

10:00 A.M.

Until completion of business

Board of Barbering and Cosmetology

2420 Del Paso Road

Sequoia Room, 1st Floor

Sacramento, CA 95834

ALL TIMES ARE APPROXIMATE AND SUBJECT TO CHANGE

1. Welcome and Introductions
2. Election of Committee Chairperson
3. Approval of Enforcement Committee Meeting Minutes
 - June 3, 2013
4. Discussion on the Practice of Teeth Whitening
5. Discussion on Section 7351, of Article 6, Chapter 10, Division 3, of the California Business and Professions Code on the Provision and Maintenance of Adequate Facilities Pertaining to Establishment Owners Storing Washers and Dryers in the Establishment Restroom.
6. Proposed Revisions to Section 974 of the California Code of Regulations Regarding Revisions to the Fine Schedule.
7. Discussion on Section 7319 (e), of Article 2, Chapter 10, Division 3, of the California Business and Professions Code Pertaining to Demonstrating Products (i.e. Eyelash Extensions, Makeup) and When a License is Required.
8. Public Comment

Note: the Board may not discuss or take action on any matter raised during this public comment section, except to decide whether to place the matter on the agenda of a future meeting. [Government Code Sections 11125, 11125.7(a)]

A quorum of the Board will be present. Meetings of the Board of Barbering and Cosmetology are open to the public except when specifically noticed otherwise in accordance with the Open Meeting Act. The audience will be given appropriate opportunities to comment on any issue before the Board, but the Chair may apportion available time among those who wish to speak.

The meeting is accessible to the physically disabled. A person who needs disability-related accommodation or modification in order to participate in the meeting shall make a request no later than five (5) working days before the meeting to the Board by contacting Tami Guess at (916) 575-7144 or sending a written request to that person at the address noted above.

No Attachment



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**CALIFORNIA STATE BOARD OF
BARBERING AND COSMETOLOGY
ENFORCEMENT COMMITTEE MEETING**

MINUTES OF JUNE 3, 2013

**California Board of Barbering
and Cosmetology
2420 Del Paso Road
1st Floor Sequoia Room, Room 109
Sacramento, CA 95834**

COMMITTEE MEMBERS PRESENT

Joseph Federico
Richard Hedges

STAFF MEMBERS PRESENT

Kristy Underwood, Executive Officer
Gary Duke, Legal Counsel
Tandra Guess, Board Policy Analyst

1. Agenda Item #1, WELCOME AND INTRODUCTIONS

Mr. Federico, Board President, called the meeting to order at 10:00 a.m.

2. Agenda Item #2, ELECTION OF A COMMITTEE CHAIRPERSON

Upon motion by Mr. Federico, seconded by Mr. Hedges, Mr. Hedges was elected by a 2-0 vote as Chair of the Enforcement Committee.

3. Agenda Item #3, APPROVAL of ENFORCEMENT COMMITTEE MEETING MINUTES

Upon motion by Mr. Federico, seconded by Mr. Hedges, the minutes from the January 11, 2013, Enforcement Committee meeting were approved by a 2-0 vote.

4. Agenda Item #4, DISCUSSION AND RECOMMENDATIONS ON WAYS THE BOARD CAN PREVENT UNLICENSED ACTIVITY

Focus of this discussion is mobile licensees. Ms. Underwood discussed what the Board has found in its research.

The Board has received numerous complaints about mobile licensees, specifically individuals who are putting signs on their cars saying that they will come to homes to provide services. Industry magazines, including Nail Pro Magazine, promote this practice. Ms. Underwood stated enforcement is

going to be difficult because the Board cannot go into people's homes. The Board needs to notify licensees that this form of mobile services is illegal and is actually unlicensed activity because services would not be performed in a licensed establishment.

The Board will contact magazines to publicize that this is not acceptable and will also utilize social networking as a means to notify individuals. The possibility of adding something to renewal notices will be researched. Ms. Underwood wanted to make sure that the committee is aware that this practice of providing services in people's homes, or outside of a licensed establishment, is going on and it is growing throughout California. Ms. Underwood stated every complaint she has personally seen is from other licensees as opposed to clients being injured. Mr. Hedges' concern is how mobile service providers disinfect their tools.

Board approved mobile units, such as motorhomes, turned into salons are inspected and licensed and clients get their services in the mobile unit and not in the home.

Mr. Hedges noted the Board needed to make the public aware that there could be dangers for them personally.

Mr. Federico questioned whether this would include the so-called makeover parties. Ms. Underwood stated it depended on what the purpose of the parties is. Usually the purpose of a makeover party is to sell products and therefore, makeover parties do not fall under the Board's authority.

Ms. Underwood stated there is an avenue for performing services for clients in rest homes or for clients who cannot leave their home. The appointment must be made through the salon that the provider works in and must be on the provider's appointment book and then the provider can go to the residence.

Ms. Guess stated that she felt the majority of the people who are performing this type of mobile service are unaware that it is considered unlicensed activity. She believes it is important to educate the operators first that this is considered by the Board to be unlicensed activity. Notice to these operators can be made by magazine publication, website posting, bulletins, and social networks. Inserts could be added to license renewal notices. Mr. Hedges suggested press releases.

Freelance certification is being researched. More information will be presented on this subject at the July Board meeting.

Public Comment

Mimi Vazquez, Skyline College, inquired as to where freelance certification comes from. Ms. Underwood stated that the freelance certification is available in another state (Oregon) and they are researching the feasibility freelance certification for the State of California.

Mr. Federico likes the idea of tying mobile service providers to a salon. There needs to be a sponsoring salon. Those providers not sponsored by a salon would be considered as providing unlicensed services. Ms. Underwood thought the Board should start strong with education to consumers and education to licensees letting them know that they could be looking at fines if they are found offering services outside of a licensed establishment.

5. Agenda Item #5, DISCUSSION OF THE OPTION OF OFFERING REMEDIAL EDUCATION IN LIEU OF A CITATION AND/OR FINE

Ms. Underwood stated that the option of offering remedial education in lieu of a citation and/or a fine was before the Board within the past few years and it was mentioned in the Sunset Review Hearing.

This option would allow a person, if they receive a citation, to take a remedial education class to have that citation removed from their record and not be fined. Ms. Underwood does not recommend the Board implement this because she does not believe the Board has the staffing or the resources in general to implement such an option. There is remedial education for foot spa operators who are suspended for violations. Many states found that the cost of such a program was excessive. Mr. Hedges suggested that the Board not go down this road until it has a firm commitment from the Department, the Legislature, and the Governor that the Board would be allowed to set up a separate bureaucracy to handle implementation and enforcement of remedial education. Ms. Underwood feels the current, escalating fine schedule is a good deterrent.

Public Comment

Jean Ogren suggested the Board consider implementing continuing education requirements before licensees can get their licenses renewed.

6. Agenda Item #6, DISCUSSION OF LASH/BROW TINTING

Ms. Underwood summarized this item. Currently, there is no Food and Drug Administration (FDA) approved product that can be used to tint lashes and brows. States who allow lash and brow tinting are actually in violation of federal rules. The FDA regulates product coming into the country. The FDA will not cite the licensee. The FDA cites the manufacturer of the product. Ms. Underwood doesn't believe providers/salons are aware of the violation. Lash and brow tinting is currently part of the curriculum taught in schools. Ms. Underwood stated the Board needs to get the word out to the licensees. Regulations need to be changed and lash and brow tinting training needs to be removed from the curriculum. Ms. Underwood believes the Board has to take a stand. This is not an acceptable practice. Mr. Hedges suggested research into what is in the products that would harm the eye. Mr. Hedges believes the lack of action on the part of the Board puts the Board and State in jeopardy. Manufacturers are going to have to come up with a new product that is not harmful to the eye.

Public Comment

Jean Ogren mentioned that this issue is a matter of educating the Board's licensees. Ms. Underwood agreed. Ms. Underwood stated the Board will start with education and will not start immediately start citing for violations, since this was something the Board thought was acceptable.

Upon motion by Mr. Hedges, seconded by Mr. Federico, the suggestion that the committee recommend to the full Board that the Board move forward with education, possibly more strictly regulating the process of lash and brow tinting, and updating the current curriculum to reflect the FDA's warning was approved by a 2-0 vote.

Public Comment

Jean Ogren asked if a quorum was necessary for this committee meeting. Ms. Underwood stated it was not necessary.

7. Agenda Item #7, PUBLIC COMMENT

Note: The Board may not discuss or take action on any matter raised during this public comment section, except to decide whether to place the matter on the agenda of a future meeting. [Government Code Sections 11125, 11125 (a)].

The public present did not wish to address the Committee.

8. Agenda Item #8, ADJOURNMENT

With no further business, the meeting was adjourned.



MEMORANDUM

DATE	September 11, 2014
TO	Members, Enforcement Committee Board of Barbering and Cosmetology
FROM	Tami Guess, Board Policy Analyst Board of Barbering and Cosmetology
SUBJECT	Teeth Whitening

Purpose of Discussion

A trend has developed within the barbering and beauty industry of providing teeth whitening services at Board licensed establishments.

Definitions

Teeth whitening: Processes that will make teeth appear whiter.

Practice of Dentistry: the diagnosis or treatment, by surgery or other method, of diseases and lesions and the correction of malpositions of the human teeth, alveolar process, gums, jaws, or associated structures; and such diagnosis or treatment may include all necessary related procedures as well as the use of drugs, anesthetic agents, and physical evaluation.

Background

The appearance of teeth whitening services and practices in non-dental settings has led to various State Dental Board decisions, attorney general opinions and legislation in some States. Some jurisdictions have taken recent action to limit teeth bleaching services to dental settings. These include: Florida, Iowa, Massachusetts, Nevada, New Jersey, Tennessee and the District of Columbia. On February 3, 2011 an administrative action was taken by the Federal Trade Commission (FTC) against the North Carolina Board of Dental Examiners for limiting teeth whitening services to licensed dental professionals. According to the FTC, North Carolina's restrictions amounted to a restraint of trade and unreasonably harmed competition. This ruling was challenged and the courts upheld the FTC's administrative determination. Currently, the United States Supreme Court is reviewing the Court of Appeals decision. The Board should be aware that there are currently several legal challenges involving teeth whitening services and the restricted practice of dentistry.

On May 14, 2014, Board staff obtained a legal opinion regarding the practice of teeth whitening in Board licensed establishments. The opinion stated that the act of teeth whitening was not within the scope of practice for a cosmetologist, esthetician, manicurist and/or student of cosmetology/esthetics/manicuring. The act is considered a practice of dentistry. It is a violation of the dental act for a cosmetologist/esthetician/manicurist or student of cosmetology/esthetics/manicuring to engage in teeth whitening services.

Practice of Dentistry¹

- Evaluating, assessing or diagnosing the discoloration of teeth.
- The application of a tooth whitening gel to another person or employee.
- Providing personalized instruction to a consumer and instructing a person based on an assessment.
- Supervising the use and application of a tooth bleach, or lightening fluids, pastes, gels, solutions, or other agents to a person's teeth.

Not Practice of Dentistry

- The practice of selling over-the-counter teeth whitening products so long as the seller is not evaluating a consumer and making specific recommendations to the consumer based on that evaluation.

Conclusion

It is a violation of the dental act for a cosmetologist or student of cosmetology to engage in teeth whitening services. (**B & P Code** sections 1625 (b) (d), 1626, 1701.1, 1752.4 and section 1752 (a)(3); **Dental Board regulation**, Title 16, California Code of Regulations section 1086, subdivision (d)(12) and (13)) If Board inspectors see this activity taking place within an establishment and/or school, it should be reported to the dental board for resolution.

Inspectors may cite the licensee for the practice of medicine (B & P Code, section 7320). However, as a practical matter this would be difficult for the Board to prove and the Board should also consider the recent legal victories with regard to restricting the practice of dentistry as it relates to teeth whitening services.

Staff Recommendation

The Board's inspection staff should note the practice of teeth whitening services, if found being performed by a Board licensee or student on the inspection report at the time of inspection. The Board's Enforcement/Cite and Fine unit should forward the names and locations of the establishments to the Dental Board for resolution and follow up. The Board should not cite the practice of medicine (B & P Code 7320) for teeth whitening services, until the legality of restricting such practice has been resolved within the Courts. The Board's legal staff should continue to monitor the legal challenges involving teeth whitening services and the restricted practice of dentistry.

¹ *Martinez v. Mullen* (2014) WL 1315658 (D. Conn.), March 28, 2014, p.5



MEMORANDUM

DATE	September 16, 2014
TO	Members, Enforcement Committee
FROM	Tami Guess, Board Policy Analyst Board of Barbering and Cosmetology
SUBJECT	Storing Washers and Dryers in Board Licensed Establishments

Section 7351, of Article 7351, Chapter 10, Division 3 of the California Business and Professions Code on the provision and maintenance of adequate facilities pertaining to establishment owners reads as follows:

“Every establishment shall provide at least one public toilet room located on or near the premises for its patrons. Any toilet room installed on or after July 1, 1992, shall be not less than 18 square feet in area. The entrance to the room shall be effectively screened so that no toilet compartment is visible from any workroom. The room shall be kept in a clean condition and in good repair, well lighted and ventilated to the outside air, and effectively screened against insects and free from rodents. The floor shall be of concrete, tile laid in cement, vitrified brick, or other nonabsorbent material. All sewer drains shall be connected to an approved disposal system, and shall be properly trapped. **No restroom shall be used for storage.**”

The question has come up that this section does not provide enough authority to cite an establishment for a washer/dryer being stored in a restroom.

The Merriam-Webster on-line dictionary at <http://www.merriam-webster.com/dictionary/storage> defines “storage” as:

Storage:

- space where you put things when they are not being used
- the state of being kept in a place when not being used : the state of being stored somewhere
- the act of putting something that is not being used in a place where it is available, where it can be kept safely, etc. : the act of storing something

The Committee may want to consider defining exactly what can and cannot be stored in a restroom.



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MEMORANDUM

DATE	August 23, 2014
TO	Enforcement Committee
FROM	Kevin Flanagan, Regulations Analyst
SUBJECT	Revisions to Fine Schedule (974 CCR)

Staff has identified the following changes that need to be made to the Board's fine schedule as a result of our new health and safety regulations. They mostly reflect new sections, but there are also a couple instances in which existing subsections have changed.

980(c)	Incorrect storage of soiled electrical tools
980.1(g), 980.2(f)	Failure to list chair as "Not in Service" in log; no sign displayed on chair
980.3 (e)	Improper storage of basins or tubs
980.4	Incorrect disinfection of foot basin or tub after use of disposable liner
980.4(a)(2)	Incorrect/Missing log
980.4(a)(4)	Failure to maintain supply of five (5) disposable liners per foot tub basin
981(b)	Improper storage of new supplies and disposable tools ¹
981(c)	Carrying instruments or supplies in or on garments ²

¹ & ² — the prohibition against carrying tools and supplies on or in garments is currently numbered as Section 981(b) and will need to be changed. Subsection 981(b) in the new H&S regulations refers to improper storage of new supplies and disposable tools.



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MEMORANDUM

DATE	September 23, 2014
TO	Members, Enforcement Committee Board of Barbering and Cosmetology
FROM	Tami Guess, Board Policy Analyst Board of Barbering and Cosmetology
SUBJECT	Product Demonstrations

The Board has received notification of several establishments and manufacturers claiming exemption under Section 7319 (e), of Article 2, Chapter 10, Division 3, of the California Business and Professions Code pertaining to product demonstrating. In part, here are a few of the scenarios the Board Enforcement Unit is currently contending with:

Eyelash Extension Application

The Board has received reports of non-licensees providing lash extension services in non-licensed establishments. Providers are taking a manufacturer's "how to" course and then applying the entire application of lashes and having the client pay for the cost of the lashes. Clients are not just paying for the lashes, as the cost for such is relatively low (\$ 20.00 – \$ 30.00) and a lash extension "demonstration" currently runs around \$ 150.00. It should be noted that the average price at a "non-demonstrating" salon is also around \$ 150.00. Again, the argument that keeps being presented is that the provider is merely "demonstrating" how to apply the lashes, in which the point of sale is for the purchase of the lashes themselves, not the application service.

A lash extension training academy currently advertises the following on their website:

"Semi-permanent Eyelash Extensions does not require Licensing, and training can be completed in one class (7-8 hours)."

"NOTE: You will be told by some parties that you need to be a licensed esthetician or cosmetologist, however, that's only if you set up your business as a "service sale", in California this holds true as well, BUT you can set up your business as a "retail sale," and sell the lashes, not your time. In most cases, this is the same set up in other states. As of now the only states that require you to be licensed no matter what is Illinois and

Texas. We provide you with the information, documentation, tips and business support for you whether you are licensed or not. Our Academy does not support any illegal activity, nor can we give you legal advice. Please call us directly with any questions.”

At Home Hair Coloring Services

The Board has seen a similar line of reasoning, as presented, in the excerpt below, from a Hair color manufacturer.

“-- is a company that manufactures and sells at-home hair color and hair care products. -- also offers its “Color to You” product, where a customer may purchase a consultation, full-service color and blow out in the customer’s home and performed by a -- “Colorista” who is licensed with the BBC. The consultation serves as a recommendation of the appropriate -- Hair color of the appropriate -- hair color for the customer; the full-service color and blow out by the -- Colorista demonstrates to the customer how to apply -- hair color to his/her hair at home and to see how the hair color looks on dry hair. The purpose of the “Color to You” product is to both demonstrate and recommend -- at-home hair color products. As the purpose of -- “Color to You” product is to recommend and demonstrate -- at-home hair color products, -- is exempt pursuant to section 7319 (e).”

In this scenario, licensed cosmetologists are going to clients homes (non-licensed establishments) to provide a full hair coloring service, which also includes a blow out style.

Make up

The Board continues to see unlicensed makeup studios opening for business. Within these studios unlicensed makeup artists are performing make up application. The makeup artist is charging a flat, service rate, for his/her service and stating they are merely demonstrating the make-up product.

Current Law

Section 7316 of the California Business and Professions Code defines the scope of cosmetology and skin care:

- (b) The practice of **cosmetology** is all or any combination of the following practices:
- (1) Arranging, dressing, curling, waving, machineless permanent waving, permanent waving, cleansing, cutting, shampooing, relaxing, singeing, **bleaching, tinting, coloring**, straightening, **dyeing**, applying hair tonics to, beautifying, or otherwise treating by any means, the hair of any person.
 - (2) Massaging, cleaning, or stimulating the scalp, face, neck, arms, or upper part of the human body, by means of the hands, devices, apparatus or appliances, with or without the use of cosmetic preparations, antiseptics, tonics, lotions, or creams.
 - (3) **Beautifying the face, neck, arms, or upper part of the human body, by use of cosmetic preparations, antiseptics, tonics, lotions, or creams.**
 - (4) Removing superfluous hair from the body of any person by the use of depilatories or by the use of tweezers, chemicals, or preparations or by the use of devices or

appliances of any kind or description, except by the use of light waves, commonly known as rays.

(5) Cutting, trimming, polishing, tinting, coloring, cleansing, or manicuring the nails of any person.

(6) Massaging, cleansing, treating, or beautifying the hands or feet of any person.

(c) Within the practice of cosmetology there exist the specialty branches of skin care and nail care.

(1) **Skin care** is any one or more of the following practices:

(A) Giving facials, applying makeup, giving skin care, removing superfluous hair from the body of any person by the use of depilatories, tweezers or waxing, **or applying eyelashes to any person.**

(B) **Beautifying the face, neck, arms, or upper part of the human body, by use of cosmetic preparations, antiseptics, tonics, lotions, or creams.**

(C) Massaging, cleaning, or stimulating the face, neck, arms, or upper part of the human body, by means of the hands, devices, apparatus, or appliances, with the use of cosmetic preparations, antiseptics, tonics, lotions, or creams.

Section 7317 of the California Business and Professions Code defines the where services must be performed:

Except as provided in this article, it is unlawful for any person, firm, or corporation to engage in barbering, cosmetology, or electrolysis for compensation without a valid, unexpired license issued by the board, or in an establishment or mobile unit other than one licensed by the board, or conduct or operate an establishment, or any other place of business in which barbering, cosmetology, or electrolysis is practiced unless licensed under this chapter. Persons licensed under this chapter shall limit their practice and services rendered to the public to only those areas for which they are licensed. Any violation of this section is subject to an administrative fine and may be subject to a misdemeanor.

Section 7319 (e) of the California Business and Professions Code defines the “demonstrating” exemption:

(e) Persons engaged in the administration of hair, skin, or nail products for the exclusive purpose of recommending, demonstrating, or selling those products.

Definition

According to Merriam-Webster’s on-line dictionary the definition of Demonstrating is: to show or prove the value or efficiency of to a prospective buyer <*demonstrate* a new product>

Intent

The intent of section 7319 (e) is to provide a means for retailers to show the value of a product so that a person may purchase the item and perform the service on themselves, at a later date, in the privacy of their own homes.

Factors of Demonstrating

- Pricing would be only for the product being demonstrated. There would not be a 'consultation/service' fee. It would not be the same pricing structure as a full service.
- The product demonstration would be with the intent that a person could perform the service on their own, at home, without a licensee/product instructor present.
- The demonstrator would not be encouraging the repeat of the service but rather the purchase of the product.

Recommendation

Board staff does realize that unlicensed activity is being performed. Product demonstration is not taking place, but rather, a full service is being performed. The Enforcement Committee should discuss this issue and if warranted advise the staff on a course of action.