

BEFORE THE BOARD OF BARBERS AND COSMETOLOGISTS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 24.121.301 definitions,)
24.121.1509 implements and)
equipment, 24.121.2101 continuing)
education, and 24.121.2301)
unprofessional conduct)

TO: All Concerned Persons

1. On April 15, 2010, the Board of Barbers and Cosmetologists (board) published MAR notice no. 24-121-8 regarding the public hearing on the proposed amendment of the above-stated rules, at page 837 of the 2010 Montana Administrative Register, issue no. 7.

2. On May 10, 2010, a public hearing was held on the proposed amendment of the above-stated rules in Helena. Several comments were received by the May 18, 2010, deadline.

3. The board has thoroughly considered the comments received. A summary of the comments received and the board's responses are as follows:

Comments 1 through 10 reference proposed amendments to ARM 24.121.1509(11):

COMMENT 1: Two commenters stated that because teeth whitening products are approved by the U.S. Food and Drug Administration (FDA) through the Food, Drug, and Cosmetic Act (FD&C) to be sold as over-the-counter (OTC) retail cosmetic products, and are available for purchase at various retail locations and from television shopping channels, they should be available for purchase from salons. The commenters suggested the board amend the rule to prohibit only those teeth whitening products that are not prepackaged, self-administered, and not FDA/FD&C approved for OTC sale and use.

RESPONSE 1: The board notes that this rule amendment does not prohibit the sale of teeth whitening products in salons and shops. The board further explains that when a licensee assists a customer with the teeth whitening process, the product is then no longer considered self-administered.

COMMENT 2: One commenter stated that it would be a restriction of trade to forbid salons from selling teeth whitening products.

RESPONSE 2: The board disagrees and notes that this rule amendment does not prohibit the sale of teeth whitening products in salons and shops.

COMMENT 3: Two commenters stated that they have had their teeth whitened at a Montana salon, administered the product themselves, and were very satisfied with the results.

RESPONSE 3: The board points out that one commenter referred to salon personnel performing teeth whitening services. The board further notes that this amendment would not allow an individual to obtain teeth whitening services in a salon, as the board considers provision of these services outside the scope of practice of licensees under the board's jurisdiction.

COMMENT 4: One commenter noted that a department hearing examiner issued a proposed finding of fact in a recent teeth whitening case that a salon license allowed the salon owner to sell OTC cosmetic products and that such products may be applied to the customer.

RESPONSE 4: The board agrees that such findings of fact were made in that case.

COMMENT 5: Two commenters noted that the BleachBright teeth whitening product is a self-administered, OTC cosmetic retail product that is not restricted in its sale to dentists or medical doctors. The commenters asserted that BleachBright does not differ appreciably from the chemistry of many other currently available OTC whitening products.

RESPONSE 5: The board notes that it takes no issue when the teeth whitening product is self-administered by a nonlicensee, but if the product is provided as a service in a salon, it is no longer considered self-administered.

COMMENT 6: One commenter admitted selling BleachBright in the commenter's salon since January 2009, and asserted that it has been a great product and has not caused any client harm. The commenter stated that cosmetologists are always looking for products that enhance their clients' beauty and that this product has been a good source of revenue for the salon.

RESPONSE 6: The board responds that when any licensee uses a product, it must be within the scope of practice for that licensee, and cautions that not every beauty enhancement product will fall within the scope of practice for this board's licensees. The board further notes that the sale of teeth whitening products may continue to be a good revenue source, since the rule amendment does not restrict these products from being sold in salons.

COMMENT 7: A commenter admitted offering clients the use of a blue LED light in the commenter's salon and stated that the light is classified by the FDA as a class 1 medical device, which is the same as a toothbrush. The commenter asserted that the board interprets the definition of the practice of dentistry at 37-4-101, MCA, to include services or procedures that alter the color or physical condition of teeth, which would mean that a mother would need a license to brush her children's teeth.

RESPONSE 7: The board declines to interpret the Board of Dentistry's rules or laws, as they are outside this board's jurisdiction.

COMMENT 8: One commenter asserted that teeth whitening products can be used both correctly and incorrectly by consumers, but that the procedure poses no more risk than many other OTC products available. The commenter stated that it is not in the public's best interest to limit trained cosmetologists from providing teeth whitening services to the public and noted that cosmetologists currently perform many procedures with various chemicals that may be harmful without the proper training, including dying or bleaching hair or eyebrows or microdermabrasion.

RESPONSE 8: The board agrees that teeth whitening products can arguably be used both correctly and incorrectly by consumers. The board responds that cosmetologists are not trained to perform teeth whitening services, as there is no curriculum in school or tests on these services, and the board does not regulate teeth whitening services or products. The board points out that dying and bleaching hair and microdermabrasion are services within the scope of practice for Montana licensed cosmetologists, and that cosmetologists receive proper instruction, training, and testing on these services, and such services are regulated by the board.

COMMENT 9: One commenter opined that the board's enabling statute mentions esthetics, beauty culture, and beautification of the hair and body, and that teeth whitening falls under that category.

RESPONSE 9: The board disagrees that teeth whitening is within any of the board's enabling statutes through the definitions of esthetics, beauty culture, or beautification of the hair and body.

COMMENT 10: One commenter supported the rule change as a way to limit patient risks by prohibiting nondentists from providing tooth bleaching in nondental settings. The commenter asserted that nondental personnel lack the knowledge, resources, education, and license necessary to provide dental exams.

RESPONSE 10: The board appreciates all comments made during the rulemaking process.

COMMENT 11: One commenter opposed the change to ARM 24.121.2101(6), and stated that it is impossible to open and make available all approved continuing education (CE) to all instructor licensees because of proprietary information and trade laws.

RESPONSE 11: The board agrees with the commenter and is amending this rule to address the concerns regarding franchise agreements.

COMMENT 12: One commenter agreed with amending ARM 24.121.2101(8), so that instructor licensees, not schools, would be required to maintain CE records.

RESPONSE 12: The board appreciates all comments made during the rulemaking process.

COMMENT 13: One commenter opposed adding (12) to ARM 24.121.2101, which would prohibit licensees from repeating CE courses for credit within three years. The commenter stated that both the cosmetology industry and CE courses change constantly, and provided the example that Redken RAK and Symposium delivers new education every two years. The commenter asserted that the board should not prevent instructors from delivering new or improved information to students in any three-year period.

RESPONSE 13: The board notes that following the amendment, instructors will still be able to repeat a course, but the board will not assign CE credit for courses repeated within three years.

4. The board has amended ARM 24.121.301, 24.121.1509, and 24.121.2301 exactly as proposed.

5. The board has amended ARM 24.121.2101 with the following changes, stricken matter interlined, new matter underlined:

24.121.2101 CONTINUING EDUCATION - INSTRUCTORS/INACTIVE INSTRUCTORS (1) through (5) remain as proposed.

(6) All approved education must be open and available to all instructor licensees, unless it violates a franchise agreement.

(7) through (20) remain as proposed.

BOARD OF BARBERS AND
COSMETOLOGISTS
WENDELL PETERSEN, CHAIRPERSON

/s/ DARCEE L. MOE
Darcee L. Moe
Alternate Rule Reviewer

/s/ KEITH KELLY
Keith Kelly, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State October 4, 2010