

**Oregon Health Licensing Agency
Board of Cosmetology
Minutes of March 6, 2006**

MEMBERS PRESENT

Mike Snook, Chairperson
Deely Klarr
Linda Bergmann
Debora Masten
Judith Petersen

MEMBERS EXCUSED

Patricia Hall

STAFF PRESENT

Susan Wilson, Director
Larry Peck, Regulatory Operations Manager
Samantha Patnode, Board Liaison

GUESTS

Donna Blake, Dynatronics
Brenda Foster, Air Brush Tanning Salon Owner
Susan Graham, Beaumonde Academy of Cosmetology

CALL TO ORDER

Chairperson Michael Snook called the meeting of the Board of Cosmetology to order at 9:03 a.m. on March 6, 2006, at 9:03 a.m. the Oregon Health Licensing Agency in the Rhoades Conference Room, 700 Summer Street NE, Suite 320, Salem, Oregon.

APPROVAL OF AGENDA

MOTION

Ms. Klarr made a motion and Ms. Bergmann seconded to approve the agenda. The motion passed with Mr. Snook, Ms. Masten, Ms. Bergmann, Ms. Klarr and Ms. Petersen voting aye.

APPROVAL OF MINUTES

MOTION

Ms. Masten made a motion and Ms. Bergmann seconded to approve the minutes of January 9, 2006. The motion passed with Mr. Snook, Ms. Masten, Ms. Bergmann, Ms. Klarr and Ms. Petersen voting aye.

REPORTS

Revenues & Expenditures

Mr. Riggs reported the Board of Cosmetology revenue and spending history used to determine necessary funding levels. Mr. Riggs reported the Board of Cosmetology historically has not been paying their "fair share" of expenses due to the agency policy of charging all boards a minimum of 2%. For the current biennium, Cosmetology has been assessed 78.4% whereas their actual percentage of OHLA workload is 86.7%.

Ms Wilson added that after the 2003 Legislative changes establishing single fields of practice; revenue estimates were based on an estimated percentage of licensees renewing two or more licenses. The estimates used were conservative and adjustments will be made based on actual renewals. The disparity in the amount charged for practitioner fees for cosmetology to fund agency services and low projections for fields of practice are factors affecting current funding levels.

As part of the 2007-09 budget development, Ms. Wilson reported OHLA is in the formative stages of establishing a uniform fee structure for OHLA regulated professions. The proposed fee structure will

reduce the number of separate administrative rules and special rulemaking required. There are currently 65 different licensing fees and the proposed change could reduce that number to six. The plan is to revise the fee ratio and the fee amount according to the overall number of licenses issued. The OHLA is also proposing a policy package to increase the number of enforcement officers and support staff in the regulatory operations division. The numbers of licensees and facility licenses have increased dramatically since 2001 and the agency is unable to keep pace with current staffing levels.

E-Government "Secure Pay" infrastructure is now in place and is scheduled to go "live" in May. Ms. Wilson reported another technology policy package is expected to establish critical funding permanently for technology projects. The OHLA will report the strategy for the budget and policy packages at later date. The OHLA Budget Request is provided to Governor Kulongoski August 1, 2006 for approval.

Ms. Klarr stated that there is a general lack of understanding in the industry regarding how fees are determined and what the fees cover. She suggested that OHLA write an article in the Northwest Stylist explaining the fee structure and that the agency is seeking to add four additional investigators to conduct inspections. Mr. Peck report that as of January 2006 there were 34 routes, and only six of those 34 are within the 12 month inspection period. He stated that 263 investigations and over 11,000 inspections were conducted last year. Mr. Bergmann inquired about inspector qualifications. Mr. Peck explained the qualifications for Investigator 1 and Investigator 3 positions which are: Proficient written and verbal communication for reporting, investigatory and evidence-gathering, with some law enforcement experience and an understanding of administrative law and it's application in the 15 professions OHLA oversees.

The Board discussed ways to minimize the fiscal impact of raising fees on individuals just graduating from school who will pay application, examination and license fees. Members suggested allowing applicants to defer payment of the license fee until a later time for those fields of practice they are not going to actively pursue. Other options are under review.

Enforcement

Mr. Tryon reported the percentage of complaints received from January 1 through December 31, 2005 for the Board of Cosmetology:

January 1, – December 31, 2005
Total Number of Licenses – 79,395
Total Number of Complaints –166
Overall Percent of OHLA Complaints – 63%

January 1, - January 31, 2006
Total Number of Licenses – 79,130
Total Number of Complaints – 14
Overall Percent of OHLA Complaints – 50%

Mr. Tryon presented a breakdown of complaints received, and the ratio of complaints per licensee base per month from January through December of 2005.

Mr. Tryon reviewed a comparison for 2002 through 2005, noting that in 2004 there were 202 complaints, and in 2005 there were 166 complaints, noting a difference of 35 complaints received between those years. He clarified questions from the Board. In reference to the report, Mr. Snook stated that complaints are down and there is a smaller percentage of cost in that area. Ms. Wilson stated that it is based on licensee volume and actual inspections.

Mr. Tryon drew the Board's attention to a summary of enforcement actions noting there were 45 complaint files that were closed since the last board meeting.

Mr. Snook asked if the Massage Therapy Board and the Oregon Health Licensing Agency have been working together. Mr. Peck stated that OHLA continues to promote a good working relationship with the Massage Therapy Board. He stated OHLA enforcement officer's have assisted the Massage Therapy Board on inspections.

Licensing

Ms. Murphy provided the Board with statistics on the total number of active, inactive, and expired status counts. She provided a graph of fiscal licensing statistics that shows the increases and decreases from 1998 until 2005 and the numbers of certificates issued and renewed, and applications based on reciprocity. Mr. Snook asked if individual licensees can be counted and put on the graph. Ms. Murphy stated she will add that statistic to the graph. She presented a four year comparison report from 2004 through 2005 and through January 2005 and 2006.

Practitioner Certificates – Original Issued:

5 - Increase of Original Certificates Issued – 3% increase
66– Decrease of Licensees (original issued licenses) – 35% decrease

Reciprocity

51 – Increase of Reciprocity Issued – 113% increase
13 – Increase of Licensees – 29% increase

Practitioner Certification Renewed

376– Increase of Certificates Renewed – 34% increase
315 – Decrease of Licensees – 28% decrease

Practitioner Certificate – Late Renewals

89– Increase of Late Renewals – 39% increase
22 – Decrease in Individual Renewals – 10% decrease

Certificate of Identification

8 – Increase of Certificates Issued – 100% increase

Facility Licensure:

21 – Increase Late Renewals – 54% increase

Independent Contractor Licensure:

6 – Increase of Late Renewals – 7% increase

Ms. Murphy explained the next two reports indicates the monthly activity within the year.

Examinations

Ms. Murphy reported on the full year and monthly comparison report from 2004 through January 2006, that the number indicates examinations conducted and the pass/fail percentages for the following examination categories -- Oregon Laws & Rules, Hair Design, Barber, Facial Technology, Nail Technology, and Certificate of Identification.

Ms. Murphy reported on the status of the contract for use of the national examination from NIC in the State of Oregon. She stated during negotiations questions were submitted to clarify NIC services and that the agency is now in the final stages of downloading the test questions into the current OHLA Q-Test system. She provided additional information regarding testing vendors, such as Laser Grade, which is a company that will offer the Oregon test at other locations in the state. Applicants will be able to take the examination off-site at an approved service location, but candidates will not be able to receive same day licensure due to a time lapse in processing the test results. Laser Grade projects a seven to ten day delay. Ms. Murphy added that OHLA will have no control over the fee Laser Grade Testing Centers charges for each test.

Mr. Snook asked if the national examination was going to include more anatomy questions than Oregon's examination. Ms. Cindy Davidson responded that she had reviewed the entire NIC item bank in 2005 and remembered only two or three questions on anatomy. She referenced an earlier survey that NIC had submitted to schools regarding subject matter ranking of importance and that NIC conducts periodic evaluations for review of the test blueprint.

Outreach and Communications

Mr. Bohot reported that an article in the Nails Magazine entitled "To Serve and Inspect" focused on the qualifications of becoming an inspector.

Mr. Bohot provided an overview of *OHLA Agency Overview & Service* brochure. He provided a draft of the board member orientation handbook and script for a video and announced both will be reviewed by the OHLA Customer Connection Committee.

Mr. Bohot shared an e-mail received from Ms. Tristan Jones, voicing concern on the fee structure changes resulting from fields of practice certification. He recapped his response to Ms. Jones, explaining the sizable outreach to practitioners that had been conducted and the basis for the change. He noted the lingering discontent with the revised fee structure in that the agency is still hearing from individuals on this issue. Ms. Wilson offered examples of services provided to practitioners, such as translation of brochures into Vietnamese, electronic renewal services and same day licensure.

E-Government – License Renewal Store

Ms. Wilson reiterated the e-commerce functions that will be launched in May once OHLA is comfortable and the system is verified, it will be promoted on the web site and other media.

Outreach & Communications

Mr. Bohot reported on televised and media print interest stories, noting that Fox Channel 12 did a segment on salon safety and NBC Channel 8 did a segment on laser hair removal, and that an article was featured in the Statesman Journal on Debora Masten's Salem Laser and Skin Rejuvenation Center. He reported that airbrush tanning is still in the media spotlight, and that individuals are calling KXL radio station. He explained that callers are still unclear about the difference between regulating individuals who are doing the spray tanning and the unregulated self serve tanning booths. The board discussed airbrush tanning regulations. Members requested a position statement be drafted and posted on the Web site. Board members reviewed a video tape of the segments.

Mr. Snook asked for clarification on the Board/Agency's position regarding who can / cannot provide "laser" hair removal services. Mr. Bohot responded that licensed estheticians may do laser hair removal. Mr. Peck clarified that before the 2005 law change, all facial technicians had to be licensed to use lasers for hair removal, which remains in effect if they use lasers on any part of the body for hair

removal. Mr. Snook asked whether a person working under the supervision of a physician was required to be licensed as an esthetician. Mr. Peck answered no; however, the physician must be on the premises while services are being performed. It was pointed out that the esthetician scope of practice does not stipulate physician supervision for laser hair removal. Mr. Snook asked what type of certification an esthetician would be required to hold beyond their practitioner certification. Ms. Masten stated that laser hair removal should be done under the direct supervision of a physician if the practitioner is using a class of device that is not allowed for the esthetician scope of practice. She noted that there are safety concerns with using machines that are unregulated.

Mr. Markee addressed concerns regarding the definition of esthetician and scope of practice and how specific "services" will be enforced. He also pointed out that the term "laser" is not referenced in the administrative rules. Ms. Wilson explained it is a type of "temporary hair removal" which is in the statutory definition of esthetics. She stated the devices addressed in rule are divided into three categories: Type 3 Category are typically surgical devices with restricted use by physicians; Type 2 Category may be limited to licensed professionals and requires training, and Type 1 Category is typically devices that may be sold over the counter, such as electric toothbrushes, etc. She explained that the Federal Food and Drug Administration (FDA) establishes the class type and restrictions and FDA guidelines are being followed. She acknowledged that consumer demand is exceeding industry education and training.

Ms. Snook stated that an esthetician working under the supervision of a physician may use a Class 2 device provided they have been trained on the specific device and have proof of training from the manufacturer or approved source. Ms. Wilson explained the FDA process for classification and registration of devices and the intended use statement that may set restrictions on use. She stated if a practitioner is using a restricted device they may be fined. She clarified that use of medical devices in the cosmetology field has been discussed with the Board of Medical Examiners for more than two years, with no interest from the BME to regulate use of these devices as it applies to cosmetic practices.

Committee Updates

Product Safety / Public Protection:

Ms. Klarr stated she had no report at this time.

Enforcement:

Mr. Snook stated he had no report at this time.

Scholarship / Education:

Ms. Petersen stated she had no report at this time.

Industry Liaison:

Members stated there were no reports at this time.

Item Writing:

Ms. Murphy stated the first meeting will be April 17, 2006.

Legislation / Rules:

Ms. Allbritton responded to an earlier question regarding whether the statutes/rules limit an applicant's ability to pay licensing fees incrementally during the qualification process. She explained that the agency has implemented uniform standards and rules for all the programs under its administration to streamline processes. She explained the three distinct steps in the process – application, examination and licensing, and noted that the law and rules provide flexibility so that an individual is not required to

do all steps simultaneously. An applicant could pay the application and examination(s) fees, and determine the field of practice (license) to activate while deferring other license fees to a later date to defray some of the initial licensing costs. Ms. Klarr asked OHLA to advise the schools of this deferred payment option for students who are just completing school.

Ms. Allbritton recapped the following:

- September 19, 2005 – The Board of Cosmetology Rules Advisory Committee met to review administrative rules and consider amendments following Passage of HB 2103 and HB 2105.
- October 2005 – Recommendations were approved by the Board and Notice of Proposed Rulemaking Hearing was filed with the Secretary of State's office.
- November 21, 2005 – This public hearing was postponed following a petition received from the American Massage Therapy Association – Oregon Chapter to extend the comment period.
- November 10, 2005 – An Amended Notice of Rulemaking Hearing was filed.
- December 7, 2005 – Rules Advisory Committee Meeting
- January 23, 2006 – Revised Public Rule Date
- January 9, 2006 – The Board met and reviewed agency recommendations for supplementary rule amendments and testimony to be presented at the January 23, 2006 public rule hearing.
- January 23, 2006 – Public Rule Hearing – Recommendation- Sanction permanent adoption of administrative rules as presented by the agency.

Ms. Allbritton provided an overview of the report from Mr. Bert Krages, Administrative Rules Hearing Officer, received following the January 23, 2006 public rule hearing. She commented on his recommendation to remove the term “manual and mechanical devices” from the proposed rules and cited his reasons. She pointed out that the terminology is used nationally within the cosmetology industry and that clarification is needed for practitioners who use those devices, advising the Board members to retain the wording. She reported that Mr. Krages recommended removing the non-government safety certifications, and that the agency concurred with his reason for not specifying certain independent companies. Mr. Krages did not support a public comment calling for deleting client record requirements.

Ms. Allbritton recapped the Hearing Officer's and legal counsel's recommendations for changes to the proposed rules:

Definition of “Manipulating” changed slightly at the recommendation of the Rules Advisory Committee and this will be permanently adopted:

“Manipulating” means, as referred to in ORS 690.005(7) articulation or massage, pressure, friction, stroking, tapping or kneading by manual or mechanical means, with or without lubricants such as salts, powders, liquids or creams, for the purpose of providing skin care.

OAR 8917-010-0065 Requirements & Standards

Subsection (2) text has been revised to link with criteria contained in OAR 817-010-0005 definitions for (34) low level disinfectants and (39) high level disinfectants

Subsections (9) through (13) and NOTE detail. Provisions were rewritten to add clarity to mitigate confusion and ambiguity in the types of devices and equipment that may be used in cosmetology and the type of documentation licensees are required to maintain and be subject to inspection by the agency. Recommendations were received from licensees, Mr. David Suzuki and OHLA staff and consulting with legal counsel. The rules are consistent with FDA standards and other resource materials.

(9)(a) All manual or mechanical devices and equipment used in the practice of cosmetology must meet all product registration requirements imposed by any federal, state, county, or local authority.

(9)(b) All manual or mechanical devices or equipment used in the practice of cosmetology must be used in accordance with the product safety requirements imposed by any federal, state, county, or local authority.

(10) The holder of a facility license or independent contractor registration must verify, maintain, or be able to access documentation related to any device classified by the U.S. Food and Drug Administration (FDA) as a "Class I" or "Class II" manual or mechanical device that is used in the practice of cosmetology, including the practice of barbering, esthetics, hair design, and nail technology, as defined in ORS 690.005. Required documentation includes:

(a) Verification of establishment registration of manufacturer on FDA Registration Database;

(b) Verification of "FDA device registration" for Class I devices on FDA Device Listing Database (Form 2891, required under 21 CFR Part 807.20 and, if applicable FDA Form 2892);

(c) FDA 510K number for Class II devices, including the Intended Use Statement put forth by the FDA; and

(d) Certification or acknowledgement from the manufacturer or from a trainer approved by the manufacturer that each practitioner who uses any Class II device has been trained in the safe and effective use of the Class II device by the manufacturer or by a trainer approved by the manufacturer.

(11) Practitioners may not use any manual or mechanical device or equipment unless the use is consistent with client health and safety. In determining whether the use of any manual or mechanical device or equipment is consistent with client health and safety, the agency will consider the information provided in the documentation required by section (10) of this rule.

(12) In the provision of cosmetology services, practitioners may use Class II devices only for the use or uses intended by the manufacturer.

(13) Practitioners may use a Class III medical device only when providing services under the supervision of a physician.

(14) Practitioners must permit any representative of the agency to inspect any manual or mechanical device or equipment used in the practice of cosmetology or the documentation required by section (10) of this rule, upon demand.

NOTE: Class I devices are typically exempt from a 510(k) submission to the FDA because of their low risk and non-invasive nature, but are still registered with the FDA using Form 2891 and 2892. A Class II device has more potential for risk if the device is not designed properly, does not meet strict standards, or is not used properly. Class II devices may require additional controls such as special labeling, mandatory performance standards and post market review. Practitioners may use only those Class II devices intended by the manufacturer for use in providing cosmetology services. Only practitioners who have been trained in the safe and effective use of the device or equipment may use the device or equipment. Verification of establishment registration is necessary; FDA standards and regulations may be accessed at www.fda.gov/cdrhdevadvice.

The documentation requirements described in section (10) of this rule apply to specialized items used in the practice of cosmetology, and may not apply to those items used in the delivery of basic services, which have been defined as an "article", equipment", or "materials and supplies" in OAR Chapter 817, division 005, such as scissors, combs, orangewood sticks, shampoo bowls, styling chairs or nail files.

Safety and Infection Control Rules: Practice Standards

817-015-0050

Skin Care Services

(4) An esthetician must obtain training in the safe and effective use of each chemical, product or device that the esthetician uses to provide services in the practice of esthetics, and must provide documentation of that training in response to a request from the agency.

817-015-0065

Client Records

(2) Legible hand-written or electronic records are acceptable. Basic client information includes the client's name, address, telephone number, type of service and date of service.

(3) A practitioner may obtain medical advice if necessary to safeguard the client or the practitioner.

(6) A practitioner may not provide services to a client who refuses to provide the personal information, required by (2) of this rule – unless the client signs a waiver form documenting the client's refusal to provide the required information. The signed waiver form must be retained on file in the required subsection (5) of this rule for client records.

817-035-0110

Posting Requirements

(4) Holders of a facility license or an independent contractor registration must maintain the most recent inspection certificate on the facility premises or at the designated work station and allow access to the record upon request by the agency's enforcement officer or representative.

817-040-0003

Fees

Changing Facial Technology to Esthetics

Changing Examination fees to \$25.00

817-090-0045

Schedule of Penalties for Certification/License/Registration/Permit Violations

(3) Failing to maintain the most recent inspection certificate on the facility premises or at the work station of an independent contractor, or to make the document available upon request is a violation of OAR 817-035-0110 (5) and shall incur the following penalties:

817-090-0105

(9) Failing to maintain required documentation of an FDA Class I or Class II manual or mechanical device or equipment, or to provide required documentation upon request is a violation of OAR 817-010-0065 (10) or (13) and shall incur the following penalties:

Ms. Allbritton referenced the attached Hearing Officer's report, which identified the individuals who provided written/oral testimony and summarized comments received regarding proposed rules. In response to a question from the audience, Ms. Wilson stated the OHLA will schedule a training session for schools and others who wish to attend to clarify use of Class 1 and Class 2 devices. She stated the training will be announced in the Northwest Stylist and posted on the OHLA - Cosmetology Web site.

MOTION

Ms. Klarr made a motion and Ms. Bergmann seconded to approve the permanent administrative rules. The motion passed with Mr. Snook, Ms. Masten, Ms. Bergmann, Ms. Klarr and Ms. Petersen voting aye.

Ms. Masten raised concern that some lasers are Class 3 devices and that individuals are performing laser services in spas and salons, without supervision of a physician, that are outside of the esthetic scope of practice. Ms. Wilson asked how equipment is purchased when it is restricted to the medical profession. Ms. Masten cautioned that it is easy to obtain the machines since manufacturers are motivated to sell their product. Mr. Peck referred to the *Facial Forward* material and stated that Mr. Bohot had contacted Mike Sherman, Chief Enforcement Officer of the Board of Medical Examinations, asking for clarification on the term "supervision" used in laser treatments. Mr. Sherman had responded that the physician would not be required to be on-site, but should be available to consult when a well trained practitioner is providing low-risk procedures on low-risk customers. Mr. Peck stated that the BME policy statement on lasers defined what is considered "surgery", without specifically stating a position on laser hair removal.

Ms. Snook asked what enforcement action would be taken if an individual was found to be using a Class 3 laser in a salon without a physician on-site or even associated with the facility. Mr. Peck answered that the case would be referred to the BME. Ms. Wilson stated that in the absence of addressing a Class 3 medical device in the rules, a practitioner could use a Class 3 device and not be prosecuted. The Board discussed amending OAR 817-010-0065 to add clarity for use of Class 3 devices. The following

provision was added ... *"Practitioners may use a Class 3 medical device only when providing services under the supervision of a physician."*

MOTION

Ms. Masten made a motion and Ms. Klarr seconded to amend the rule and add Class 3 device that reads, "Practitioners may use a Class 3 medical device only when providing services under the supervision of a physician." The motion passed with Mr. Snook, Ms. Masten, Ms. Bergmann, Ms. Klarr and Ms. Petersen voting aye.

Outreach and Communication

Mr. Wilson reported on an e-mail Mr. Peck received from Representative Donna Nelson, regarding a constituent's complaint against an OHLA enforcement officer. The enforcement officer allegedly cited a person for not using an acceptable medical history form and then coerced them into purchasing from him a medical history form for \$100. Mr. Peck stated the complaint was investigated and that the constituent had been cited \$100 for failing to have and use a client history card. Mr. Peck reported that he contacted Rep. Nelson and had sent copies of the regulations which stipulated acquiring basic information that can be retained in any format, and that if the person objects to providing the information they can sign a waiver agreement. Mr. Peck had replied to Rep. Nelson that OHLA would be happy to meet with the practitioner without threat of intimidation or further penalties to review the requirements and ensure they were in compliance. He reported that he had a response from Rep. Nelson.

JLCIMT Report

Ms. Wilson discussed the Joint Legislative Committee on Information Management Technology Systems. She stated that the plan was approved and OHLA has moved forward with E-commerce Services and will return to the E-Board if additional funding is necessary.

The next Board meeting has been rescheduled from May 15, 2006 to May 8, 2006 due to board members not being able to attend. It will be held at Phagan's Beauty School in Portland.

Board Interest File

Mr. Snook stated that one of the items of interest is the Las Vegas Convention on Esthetics, Cosmetics & Spa from June 3rd through June 5th.

The board meeting adjourned at 1:22 p.m.

Susan K. Wilson, Director