



TEXAS DEPARTMENT OF LICENSING AND REGULATION

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OPINION

November 8, 2005

FILE # ML-44504-05

I.D. # 44504

The Honorable Greg Abbott
Texas Attorney General
Office of the Attorney General
P. O. Box 12548
Austin, TX 78711-2548

RQ-0415-GA

Re: Request for Attorney General Opinion on sterilization requirements for certain cosmetology and barbering services

Dear General Abbott:

As executive director of the Texas Department of Licensing and Regulation (Department), I respectfully request an opinion concerning provisions of Senate Bill 411, as adopted by the 79th Legislature, Regular Session, and House Bill 1304, as adopted by the 79th Legislature, Regular Session. The purpose of this opinion request is to determine how to resolve apparent conflicts between the two bills relating to sterilization requirements for certain cosmetology and barbering services.

Senate Bill 411 results from the Sunset Advisory Commission review of the Texas Cosmetology Commission and the Texas State Board of Barber Examiners. The bill abolishes those agencies and transfers their functions to the Department. In addition, Senate Bill 411 makes certain substantive changes in the statutory requirements for cosmetologists and barbers. One such change is the addition of a new Section 1603.352, Occupations Code, which pertains both to barbers and cosmetologists and provides as follows:

SANITATION REQUIREMENTS FOR CERTAIN SERVICES.

- (a) A person who holds a license, certificate, or permit issued under this chapter, Chapter 1601, or Chapter 1602 and who performs a barbering service described by Section 1601.002(1)(E) or (F) or a cosmetology service described by Section 1602.002(10) or (11):
 - (1) shall, before performing the service, disinfect and sterilize *with an autoclave* each nondisposable instrument used to perform the service; and
 - (2) may use a disposable supply or instrument only if that supply or instrument is purchased at the location where the service is

performed or provided by the person on whom the service is performed.

- (b) The owner or manager of a barber shop, barber school, beauty shop, specialty shop, or beauty culture school is responsible for providing *an autoclave* for use in the shop or school as required by Subsection (a). *An autoclave* used as required by Subsection (a) must be:
 - (1) registered and listed with the federal Food and Drug Administration; and
 - (2) used in accordance with the manufacturer's instructions.

(Emphasis added.)

This new section takes effect January 1, 2006.

House Bill 1304, which also takes effect January 1, 2006, adds a similar provision to Chapter 1602, Occupations Code, relating to cosmetologists. The bill adds Section 1602.408, Occupations Code, as follows:

SANITATION REQUIREMENTS FOR CERTAIN SERVICES.

- (a) A person who holds a license, certificate, or permit issued under this chapter and who performs a cosmetology service described by Section 1602.002(10) or (11):
 - (1) shall, before performing the service, disinfect and sterilize *with an autoclave or a dry heat, ultraviolet, or other commission-approved sterilizer* each nondisposable instrument used to perform the service; and
 - (2) may use a disposable supply or instrument only if that supply or instrument is purchased at the location where the service is performed or provided by the person on whom the service is performed.
- (b) The owner or manager of a beauty shop, specialty shop, or beauty culture school is responsible for providing *an autoclave or a dry heat, ultraviolet, or other commission-approved sterilizer* for use in the shop or school as required by Subsection (a). *An autoclave or a dry heat, ultraviolet, or other commission-approved sterilizer* used as required by Subsection (a) must be:
 - (1) registered and listed with the federal Food and Drug Administration; and

- (2) used in accordance with the manufacturer's instructions.

(Emphasis added.)

House Bill 1304 also adds subsections (e) and (f) to Section 1601.506, Occupations Code Occupations Code, pertaining to barbers, as follows:

- (e) A person who holds a license, certificate, or permit issued under this chapter and who performs a barbering service described by Section 1601.002(1)(E) or (F):
 - (1) shall, before performing the service, disinfect and sterilize *with an autoclave or a dry heat, ultraviolet, or other board-approved sterilizer* each nondisposable instrument used to perform the service; and
 - (2) may use a disposable supply or instrument only if that supply or instrument is purchased at the location where the service is performed or provided by the person on whom the service is performed.
- (f) The owner or manager of a barbershop, specialty shop, or barber school is responsible for providing *an autoclave or a dry heat, ultraviolet, or other board-approved sterilizer* for use in the shop or school as required by Subsection (e). *An autoclave or a dry heat, ultraviolet, or other board-approved sterilizer* used as required by Subsection (e) must be:
 - (1) registered and listed with the federal Food and Drug Administration; and
 - (2) used in accordance with the manufacturer's instructions.

(Emphasis added.)

There appears to be a conflict between the emphasized language of Senate Bill 411 and the emphasized language of House Bill 1304. The Senate Bill 411 language requires the use of an autoclave for sterilization of nondisposable instruments. However, House Bill 1304 allows sterilization of nondisposable instruments by certain other methods instead of an autoclave. An autoclave is "an apparatus (as for sterilizing) using superheated steam under pressure." Webster's 9th New Collegiate Dictionary. Furthermore, Senate Bill 411 repeals Section 1601.506, Occupations Code, effective September 1, 2005. That is the section to which House Bill 1304 adds the sterilization provisions relating to barbering services.

The Department requires assistance in determining how to harmonize the two bills or, if the bills are in conflict, which provisions should prevail. One factor to consider is that the

Senate Bill 411 sterilization provision is a more general provision that appears in Chapter 1603, Occupations Code, which applies both to barbers and cosmetologists. However, the House Bill 1304 sterilization provisions are added to Chapter 1601, Occupations Code, which applies specifically to barbers, and Chapter 1602, Occupations Code, which applies specifically to cosmetologists. Another factor to consider is that, according to legislative records, Senate Bill 411 has a later date of enactment than House Bill 1304. The last legislative vote on Senate Bill 411 occurred on May 28, 2005, while the last legislative vote on House Bill 1304 occurred on May 18, 2005. Neither bill includes a provision that would clearly indicate which bill should prevail in the event of a conflict.

The following are some general rules of statutory construction that appear to us to be relevant. Section 311.025(a), Government Code states, "Except as provided by Section 311.031(d), if statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails." Subsection (b) states, "Except as provided by Section 311.031(d), if amendments to the same statute are enacted at the same session of the legislature, one amendment without reference to another, the amendments shall be harmonized, if possible, so that effect may be given to each. If the amendments are irreconcilable, the latest in date of enactment prevails." Section 311.026(a), Government Code states, "If a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both." Subsection (b) states, "If the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail."

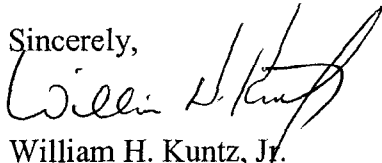
In light of the above information, I ask the following questions:

- (1) Effective January 1, 2006, does the law require a person who performs a cosmetology service described by Section 1602.002(10) or (11), Occupations Code to use only an autoclave to sterilize nondisposable instruments, or does the law allow the person to use the alternative sterilization methods listed in House Bill 1304 instead of an autoclave?
- (2) Effective January 1, 2006, does the law require the owner or manager of a beauty shop, specialty shop, or beauty culture school to be responsible for providing an autoclave for use in the shop or school, or does the law allow the owner or manager to provide the alternative sterilization methods listed in House Bill 1304 instead of an autoclave?
- (3) Effective January 1, 2006, does the law require a person who performs a barbering service described by Section 1601.002(1)(E) or (F), Occupations Code to use only an autoclave to sterilize nondisposable instruments, or does the law allow the person to use the alternative sterilization methods listed in House Bill 1304 instead of an autoclave?

- (4) Effective January 1, 2006, does the law require the owner or manager of a barbershop, specialty shop, or barber school to be responsible for providing an autoclave for use in the shop or school, or does the law allow the owner or manager to provide the alternative sterilization methods listed in House Bill 1304 instead of an autoclave?

Thank you for your consideration. Please let me know if I can be of assistance.

Sincerely,



William H. Kuntz, Jr.
Executive Director

cc: Honorable John Whitmire
Texas Senate

Honorable Martha Wong
Texas House of Representatives

Honorable Peggy Hamric
Texas House of Representatives

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