

VOLUME NO. 34

Opinion No. 58

BARBERS - Barbering, what constitutes; BARBERS - Barbering, sex of clientele not determinative; BARBERS - Barbering, singeing, shampooing and dyeing male person's hair; COSMETOLOGY - Sex of clientele not determinative; COSMETOLOGY - Hair cutting, incident to service. Section 66-402, 66-802 and 66-818, R.C.M. 1947.

HELD: 1. A cosmetologist may cut hair as incident to the practice of cosmetology so long as the hair cutting is not the primary service rendered.

2. Only licensed barbers may singe, shampoo, apply tonic to, or dye the hair of a male person.
3. The sex of the client does not determine whether the service is barbering or cosmetology except as provided in section 66-402, R.C.M. 1947.

December 11, 1972

Mr. Ed Carney, Director
Department of Professional
and Occupational Licensing
LaLonde Building
Helena, Montana 59601

Dear Mr. Carney:

This is in response to your letter concerning the practice of barbering, in which you ask the following questions:

1. Is a barber license required by a cosmetologist to cut a man's hair and to do hair styling for a male person?
2. Is a barber license required by a cosmetologist to singe, shampoo, apply hair tonic or dye a male person's hair?

An examination of the pertinent statutory provisions relating to the practice of "barbering" and "cosmetology" indicates the nature of the two professions. Section 66-402, Revised Codes of Montana, 1947, provides:

"Any one or any combination of the following practices when done upon the human body for tonsorial purposes, and not for the treatment of disease or physical or mental ailments and when done for payment, either directly or indirectly, constitutes the practice of barbering:

"Shaving or trimming the beard.

"Cutting the hair.

"Giving facial or scalp massage, or treatment with oils, creams, lotions or other preparations, either by hand or mechanical appliances.

"Singeing or shampooing the hair or applying hair tonic; or dyeing the hair of male persons.

"Applying cosmetic preparations, antiseptics, powders, oils, lotions to scalp, face or neck."

Section 66-802, R.C.M. 1947, provides in part:

“The practice of teaching of cosmetology is defined to be and includes any or all work generally and usually included in the term ‘hairdressing’ and ‘beauty culture’ and performed in so-called hairdressing and beauty shops, or by itinerant metologists, which work is done for the embellishment, cleanliness and beautification of the hair, scalp, face, arms or hands . . .”

The only practice which the legislature has limited by the sex of the clientele is that of “singeing or shampooing the hair or applying hair tonic; or dyeing the hair of male persons” which constitutes barbering. This section is a specific statute which provides that the rendering of certain services on male persons is limited to licensed barbers and, therefore, controls over the general statutes of the chapter dealing with cosmetology. See: **Montana Association of Tobacco and Candy Distributors v. State Bd. of Equal.**, Mont. , 476 P.2d 775 (1970).

In regard to all other practices delineated in the aforementioned sections, the legislature made no limitation on the basis of sex. The question then resolves itself not into the question of the sex of the clientele but into the fact of cutting hair itself.

It is a well-accepted fact that hair must be cut in the ordinary course of the practice of cosmetology. This fact is reinforced by the exemption of barbers from the provisions of the chapter on cosmetology when barbers are in the “performance of the usual and ordinary duties of their vocation.” See: section 66-818, R.C.M. 1947. It should also be noted that by adoption of the sections regulating barbering and cosmetology the legislature intended that both professions should exist without dual licensing. As the Supreme Court of Michigan stated in **Jeffs v. Board of Examiners of Barbers**, 30 N.W.2d 445, 447 (1948):

“It will be noted that the cosmetologist who merely cuts or trims the hair of her lady customer as an incident to her work is not performing the work customarily done by a barber . . .

* * *

“‘On the other hand, when hair cutting, as practiced on the individual or on customers in general, becomes the important or main feature of the process, and not the incident thereto, then the requirements of section 2(b) *** (Stat. Ann. 1946 Cum. Supp. §18.132) apply, and such operator must obtain a license in accordance with the aforementioned provision.’

“We consider that the legislature intended that a licensed cosmetologist should be permitted to do all that cosmetologists customarily do in their regular and ordinary work but did not

intend that a licensed cosmetologist should assume to do the work customarily and ordinarily done by a licensed barber.”
(Emphasis supplied)

Again, in **Bone v. State Board of Cosmetology**, 80 Cal. Rptr. 164, 167-8 (1969), the California Court of Appeals stated:

“The acts of the California Legislature reflect its determination that the vocations of barbering and cosmetology shall remain separate and distinct. Cosmetologists are trained in and entitled to practice in a wider field of activity than barbers, but some cutting of hair is an appropriate and permissible activity in the practice of cosmetology . . .

* * *

“. . . But whether the standards of competence are primary or secondary, it is beyond question that the statutory scheme provides for such standards, and we cannot say this is unreasonable. It is thus not unreasonable for the Legislature to say that, although cosmetologists may cut hair in the course of their broader practice of cosmetology, **an establishment which is engaged primarily in the business of haircutting shall be those who are trained and registered as barbers.**” (Emphasis supplied)

I concur with the views expressed in these two cases.

THEREFORE, IT IS MY OPINION that:

1. A cosmetologist may perform haircutting as an incident to the practice of cosmetology; however, when haircutting becomes the main feature of service, the person performing the service must be a licensed barber.
2. Singeing or shampooing, applying tonic to, or dyeing a male person’s hair constitutes barbering.
3. Except as specifically provided in section 66-402, R.C.M. 1947, whether a person is practicing cosmetology or barbering is not determined by the sex of the clientele.

Very truly yours,

ROBERT L. WOODAHL
Attorney General