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Opinion No. 12-91

Exemption from the Cosmetology Act for Medical Professionals

QUESTIONS

1. Is a person who does not have an aesthetics license but is providing aesthetics services in a medical spa or similar facility supervised by a licensed physician exempt from the Cosmetology Act pursuant to Tenn. Code Ann. § 62-4-109?

2. Would the same person be exempt from the Cosmetology Act if he or she did have an aesthetics license?

OPINIONS

1. Yes, if (1) the aesthetics service also falls within a medical practice, (2) the person is licensed for that particular medical practice, and (3) the person is providing that service solely in his or her capacity as a medical professional. Persons who do not satisfy all three criteria are not exempt medical professionals and are subject to the Cosmetology Act.

2. Yes, if all three criteria are present.

ANALYSIS

1. Pursuant to the Tennessee Cosmetology Act of 1986 (the “Cosmetology Act” or “Act”), the Tennessee Board of Cosmetology (the “Board”) governs the practice of aesthetics, and persons practicing aesthetics are required to have a license issued by the Board. Tenn. Code Ann. §§ 62-4-103, -108, & -110. The practice of aesthetics includes

- (A) Massaging, cleansing, stimulating, manipulating, exercising, beautifying or similar work with hands or mechanical or electrical apparatus or by the use of cosmetic preparations, antiseptics, tonics, lotions or creams;

- (B) Placing or applying artificial eyelashes; or

- (C) Giving facials, applying makeup, giving skin care or removing superfluous hair by tweezing, depilatories or waxing.

Tenn. Code Ann. § 62-4-102(a)(1). Certain persons and activities are exempted from the Act and thus do not need to obtain a license from the Board. For example, the practice of aesthetics “does not include any treatment or attempt to treat any abnormality or disease-related condition of the skin, skin disease process or aging process of the skin.” Tenn. Code Ann. § 62-4-102(b) (2009). Also exempt are:

- (1) Persons and establishments engaged exclusively in massage, as defined by § 63-18-102;
- (2) Duly registered barbers and technicians operating in duly registered barber shops only;
- (3) Physicians and surgeons or trained nurses, trained nurses assistants, aides or similar personnel, acting solely in their professional capacities;
- (4) Any person rendering cosmetology services in the person's own home without charge to the recipient;
- (5) Any person who demonstrates or applies, or both, cosmetics without charge in a retail establishment; and
- (6) Any person who engages in hair wrapping

Tenn. Code Ann. 62-4-109(a).

Professional activities in Tennessee that require licensure sometimes overlap with each other. For example, both barbers and cosmetologists cut hair, *compare* Tenn. Code Ann. § 62-3-105(2) *with* Tenn. Code Ann. § 62-4-102(a)(3), and both aestheticians and massage therapists provide massage services. *Compare* Tenn. Code Ann. § 62-4-102(a)(1) *with* Tenn. Code Ann. § 63-18-102(5). The purpose of some of the exceptions in Tenn. Code Ann. § 62-4-109(a) is to ensure that persons who are practicing another profession do not need to obtain a Cosmetology Act license. The Act does not apply to massage therapists licensed under Tenn. Code Ann. § 63-18-101 to -116 (the “Massage Licensure Act”) merely because an activity falls within both it and the Massage Licensure Act. Tenn. Code Ann. § 62-4-102(b)(1). Registered barbers practicing in a barber shop do not need to obtain a cosmetology license for activities that constitute both barbering and the practice of cosmetology. Tenn. Code Ann. § 62-4-102(b)(2). However, if massage therapists or barbers were to perform an activity that falls within the Cosmetology Act but not the Massage Licensure Act or barbering statutes, therapists or barbers would not be exempted from the Act.

The Cosmetology Act includes a similar exemption for licensed or certified medical professionals. Tenn. Code Ann. § 62-4-109(a)(3). Persons practicing medicine or nursing are required to obtain licenses pursuant to Tenn. Code Ann. §§ 63-6-101 to -241 and 63-7-101 to -304. Nurse assistants and aides must complete a training program and obtain a certification

from the Tennessee Department of Health. Tenn. Code Ann. § 68-11-209(e) & Tenn. Comp. R. & Reg. 1200-08-06-.01(8). *See also Estate of French v. Stratford House*, 333 S.W.3d 546, 558 n.11 (Tenn. 2011) (discussing the required training program for nurse assistants and aides). The phrase “or similar personnel” provides the exemption for other licensed or certified nurses, assistants, or aides. Tenn. Code Ann. § 62-4-109(a)(3). For any activity that falls within both a medical practice and the practice of aesthetics, it is not necessary for the licensed nurse, assistant, or aide to obtain an aesthetics license when performing such an activity as part of his or her medical profession. If, however, a nurse, assistant, or aide were to perform an activity that constitutes the practice of aesthetics but does not fall within his or her licensed medical practice, the nurse, assistant, or aide would not be exempt from the Act. Also, the nurse, assistant, or aide would not be exempt from the Act if he or she were to perform an activity that falls within both practices but the performance of the activity was not in his or her “professional capacity” as a medical professional. Tenn. Code Ann. § 62-4-109(a)(3).

Accordingly, a person who does not have an aesthetics license but is providing aesthetics services in a medical spa or similar facility supervised by a licensed physician is exempt from the Act if (1) the aesthetics service also falls within a medical practice, (2) the person is licensed for that particular medical practice, and (3) the person is performing that service in his or her professional medical capacity. Based on the circumstances described in the first question, the third criterion would appear to be satisfied because the service is being provided in a medical spa supervised by a licensed physician. Persons who do not satisfy all three criteria are not exempt as medical professionals and are subject to the Act. Those who violate the Act commit a Class B misdemeanor, and the Board may bring an action in circuit or chancery court to enjoin them. Tenn. Code Ann. § 62-4-129.

2. Assuming the three criteria discussed above are present, possession of an aesthetics license would not make the exempt nurses, assistants, and aides subject to the Act. Even though they may be licensed under the Act, the exemption still applies. Tenn. Code Ann. 62-4-109(a)(3) does not limit the exemption to medical professionals who do not possess an aesthetics license.

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