

# FEATURE ARTICLE



## Barber or Cosmetologist? Only Your Hairdresser Knows For Sure

*Crystal Crawford*

### INTRODUCTION

Since 1927, California has separately licensed barbers<sup>1</sup> and cosmetologists.<sup>2</sup> The validity and necessity of *any* such occupational licensing in the name of consumer protection has often been challenged.<sup>3</sup> The justification for the existence of two separate boards—the Board of Barber Examiners and the Board of Cosmetology—which license substantially similar trades has been questioned for almost as long as the two boards have existed.<sup>4</sup> In spite of the facts that (1) two recent government studies have concluded that the two boards should be consolidated,<sup>5</sup> and (2) eleven states have succeeded in licensing both trades through a single board,<sup>6</sup> attempts to merge the boards have been stymied by those whom the boards were created to regulate in the public interest—the two industries.

Many industry members remain vehemently opposed to the notion of merger, citing “enormous” differences between the occupations.<sup>7</sup> A review of the governing statutes reveals that barbers may not work below the neck,<sup>8</sup> whereas cosmetologists may work on the upper torso, hands, or feet, but may not shave the face or trim the beard.<sup>9</sup> A focus on the occupations’ functions as they relate to haircare, however, reveals few differences.<sup>10</sup> One 22-year veteran of the barbering business commented, “The laws haven’t changed with the times.... In the old days, men did men and women did women.... The law should be brought up to date. After all, hair is hair.”<sup>11</sup>

This article examines the California Boards of Barber Examiners and Cosmetology from their creation, including a review of legislative history, committee findings, and judicial opinions concerning both trades. What rationale justified the original dichotomy? Is that justification still valid? Do concerns for public health, safety, and welfare require the continued existence of both boards, or would the consuming public be better served by one “Board of Haircare”?<sup>12</sup>

### Legislative Purpose

Bills creating the Board of Barber Examiners (BBE) and the Board of Cosmetology (BC) were introduced within two days of each other in the Assembly and Senate respectively.<sup>13</sup> Both bills proceeded through the legislature at the same pace and were signed by the governor on the same day.<sup>14</sup> Since the creation of the boards, changes affecting one board have often been shadowed by changes to the other.<sup>15</sup> Likewise, legislative committee projects generally have not studied one industry without also considering the other.<sup>16</sup>

The similar nature of the two trades and the continued “separate but equal” legislative treatment of the two licensing schemes in and of themselves suggest that a merger of the boards may be appropriate. Further, legislative history reveals that a rational justification for the existence of two separate licensing boards has in fact never been articulated.

*Board of Barber Examiners.* On March 30, 1927, Assemblymember Cloudsley introduced Assembly Bill 1251 (AB 1251). The bill was “[a]n act prescribing the terms upon which licenses or certificates of registration may be issued to practitioners of barbering, creating the state board of barber examiners and declaring its powers and duties, [and] prescribing penalties for violation hereof....”<sup>17</sup> The proposal proceeded quickly through two Assembly and two Senate committees, all of which recommended passage without opposition or debate.<sup>18</sup> Governor C.C. Young received AB 1251 on April 29, 1927 and signed the proposal on May 31, to become effective on July 30, 1927.<sup>19</sup>

A review of AB 1251’s progression as reported in the Journals of the Assembly and Senate does not reveal any justification for the bill’s introduction or passage, or for the regulation of barbering in general.<sup>20</sup> The bill simply created a scheme for registering barbers, including minimum qualifications and a standardized exam.<sup>21</sup> Barbering was defined as shaving or trimming beards or cutting

hair; giving facials or scalp massages and treatments; singeing, shampooing or dyeing hair or applying tonics, applying cosmetic preparations, antiseptics, powders, oils, clays or lotions to scalp, face or neck. Section 15 of the Act set forth grounds upon which the BBE could suspend, revoke, or refuse to issue or renew a barber’s certificate of registration, including such grounds as felony convictions, malpractice or incompetency, false advertising, habitual drunkenness or unprofessional conduct.<sup>22</sup>

Various amendments to the Barber Act followed<sup>23</sup> until 1939, when the legislature repealed the 1927 enactment and, through Senate Bill 202 (SB 202), rechartered the Barber Act as part of the Business and Professions Code.<sup>24</sup> Like AB 1251, the language and history of SB 202 gives no additional guidance as to the legislative purpose underlying the regulation of barbers.

The first glimmer of such legislative intent appeared with the 1939 introduction of AB 1026, which contained amendments to existing Barber Act sections and the addition of several new sections to the Act as rechartered in the Business and Professions Code. Most of the new sections dealt with the identification of sanitary violations as justification for disciplinary action by the BBE. Conditions such as unclean premises, unclean cuspidors, and a barber’s failure to wash the hands immediately prior to serving each patron became grounds for discipline.<sup>25</sup> AB 1026 passed the Assembly Committee on Public Health and Quarantine as well as the Senate Committee on Governmental Efficiency and was approved by the governor on May 9, 1939, effective September 19, 1939.<sup>26</sup> In spite of the fact that no specific intent is articulated in Assembly or Senate Journals, it seems reasonable to infer legislative concern for public health, safety, and welfare from the increased emphasis on sanitary practices.

Finally in 1941, the legislature expressly declared the relationship of the Barber Act to health, safety, and welfare.<sup>27</sup> AB 67, as introduced by Assemblymember Bashore on January 9, 1941, added Arti-



cle 4.5 to the Barber Act and established a minimum price schedule. The bill passed the Assembly Committee on Judicial Codes and the Senate Committee on Business and Professions. In setting forth its findings which purported to justify minimum price scheduling, the legislature stated that "[a]s the barber business affects the health, comfort and well-being of our citizens, and of the public..., in order to promote the public welfare, health and safety, and to prevent the transmission of disease, in view of the personal touch and contacts manifested and exercised in the barber business,...the barber profession is hereby declared to be a business affecting the public health, public interest and public safety."<sup>28</sup> This declaration has furnished the only express statement of reasons for regulating the barbering industry in California.

In 1973, however, the legislature repealed Article 4.5<sup>29</sup> after a state court declared the price-fixing scheme unconstitutional in *Allen v. California Board of Barber Examiners*.<sup>30</sup> While the repeal of Article 4.5 arguably does not change the relationship of barbering to public health, safety, and welfare, we are once again left with no express justification for the regulation of barbering or the creation of the Board of Barber Examiners.

**Board of Cosmetology.** Like the BBE, the California Board of Cosmetology (BC) was created in 1927. Senator Crowley introduced SB 875 on March 28, 1927 as "[a]n act to regulate the occupations and practices of hairdressers and cosmeticians, cosmetologists, and the branches of cosmetology; to create the state board of cosmetology, and to provide for the issuance by said board of certificates of registration and licenses entitling the holders thereof to engage in and to teach such occupations and practices; to insure the better education of hairdressers and cosmeticians; to provide for rules regulating the proper conduct and sanitation of cosmetological establishments, schools of cosmetology, and places where the occupations of hairdressers and cosmeticians are practiced; prescribing penalties for the violation of the provisions of this act."<sup>31</sup>

As did AB 1251, SB 875 passed quickly through two Senate and two Assembly Committees without opposition.<sup>32</sup> SB 875 was signed into law by Governor C.C. Young on May 31, 1927 and became effective on July 30, 1927.<sup>33</sup> Like the BBE bill, any relationship between the BC and protection of public health, safety, and welfare was unstated and seems presumed.

The Cosmetology Act created a scheme for licensing all beauty shops, beauty schools, and any person engaged in acts constituting cosmetology.<sup>34</sup> Cosmetology was defined as the arranging, dressing, curling, waving, cleansing, cutting, singeing, bleaching, tinting, or coloring the hair of a person by hand or with mechanical appliances; massaging the scalp, face, neck, arms, bust or upper torso with or without the use of cosmetic preparations; hair removal by electrolysis or depilatories; and the manicuring of nails.<sup>35</sup> Section 21 of the Act set forth grounds for refusal, revocation or suspension of a license. The grounds cited were similar to those in the Barber Act, and sought to prevent unsanitary conditions, false advertising, fraud, spread of disease, habitual drunkenness, and drug use.<sup>36</sup>

Curiously, neither the Barber Act nor the Cosmetology Act as enacted in 1927 explained the necessity for two separate boards. There is no indication of any significant difference between the professions, except for the broader scope of cosmetological practices; nor is there any explicit indication that the distinction was based on the then-prevalent male and female orientation of the respective professions.

Like the Barber Act, the Cosmetology Act was amended on several occasions,<sup>37</sup> followed by the repeal and rechartering of the Act as part of the Business and Professions Code.<sup>38</sup> The reenactment of the Cosmetology Act in the Business and Professions Code was followed by further substantial amendments and additions to the Act. On January 25, 1939, Senators Phillips and Breed introduced SB 1036 relating to the practice, training and government of cosmetology.<sup>39</sup> After several committee amendments, the bill passed through the legislature and was signed by Governor Olson, to become effective September 19, 1939.<sup>40</sup> The act clarified qualifications for BC board members as well as requirements for cosmetologist and manicurist examinations.<sup>41</sup>

On January 14, 1955, Senator Desmond introduced SB 617, an act adding Section 7326 to the Business and Professions Code and delineating license classifications within the practice of cosmetology.<sup>42</sup> SB 617 passed both the Senate Committee on Business and Professions and the Assembly Committee on Public Health. The act was sent to the governor on May 10, 1955 and signed on May 20, effective September 7, 1955. Business and Professions Code section 7326 expressly states the legislature's finding that the various classifications and

qualifications for cosmetology licensure are "vital and necessary to protect the public health, safety, and welfare of the people."<sup>43</sup>

None of these bills nor their legislative history, however, provide any hint of a justification for the separate cosmetologist/barbering licensing scheme.

**Judicial Decisions Exploring Legislative Intent.** Since the legislative history fails to disclose reasons for the separate BBE and BC, a review of judicial decisions affecting either board is helpful. Although the first two California cases to discuss the BBE and its functions, *Ganley v. Claeys*<sup>44</sup> and *Doyle v. Board of Barber Examiners*,<sup>45</sup> generally addressed the validity of barber regulation for public health reasons,<sup>46</sup> neither court had occasion to comment on the separate BBE/BC licensing scheme.

Finally in 1967, the Third District Court of Appeal addressed the relationship of barbering to cosmetology. In *Mains v. Board of Barber Examiners*,<sup>47</sup> the BBE had suspended the barbershop license of Mains, a licensed cosmetologist practicing cosmetology in his barbershop.<sup>48</sup> The Board claimed that "Mains, who [was] not a licensed barber, 'on the premises of aforesaid barbershop...did cut the hair of a male patron therein.'"<sup>49</sup> Mains brought a proceeding in mandamus to compel the BBE to annul its decision suspending his barbershop certificate. The trial court issued the peremptory writ and the appellate court affirmed, noting that "there is nothing in either the Barbers Act or the Cosmetology Act referring to males or females."<sup>50</sup> The court also recognized that public health reasons form the basis for the regulation of both barbers and cosmetologists, and that both statutory schemes demand the same standards of sanitation. "Neither [act] makes any provision for the segregation of the sexes and no such segregation appears to us to be constitutionally warranted."<sup>51</sup> The *Mains* court held that section 6522(d) of the Barber Act expressly authorized a licensed cosmetologist to operate in a barbershop when the cosmetological practices are limited to haircutting.<sup>52</sup>

Following the *Mains* decision, the legislature amended section 6522(d) to provide that persons licensed to practice cosmetology were exempt from having to obtain a barber's license in order to cut hair, provided that such haircutting "is performed in a licensed cosmetology establishment which does not represent itself to the public as being primarily engaged in the business of haircutting, or which is not primarily engaged in the business of haircutting."<sup>53</sup>



Shortly after this 1967 amendment, the constitutionality of section 6522 was challenged in *Bone v. State Board of Cosmetology*.<sup>54</sup> Plaintiff Bone was a licensed cosmetologist who employed other cosmetologists in two establishments which "specialize[d] in the styling and cutting of men's hair."<sup>55</sup> The *Bone* court characterized the 1967 amendment to section 6522 as a "clear legislative repudiation of the *Mains* interpretation,"<sup>56</sup> and rejected plaintiff's petition for an injunction to prevent disciplinary action by either of the boards. The court noted that California has always maintained separate licensing systems for cosmetology and barbering, even though the statutes recognize some overlap between the professions.<sup>57</sup> Relying on *Williamson v. Lee Optical of Oklahoma*,<sup>58</sup> the court refused to disturb the California legislature's decision "that the vocations of barbering and cosmetology...remain distinct and separate."<sup>59</sup>

## Opinions on Merger: Talk, Talk, Talk

Although the notion of merger between the barber and cosmetology boards has been a "hot" issue in the industry for the last several years, it is not a new idea. Interestingly enough, on January 19, 1939, Assemblymember Doyle introduced AB 966, which would have created a Cosmetology-Barber Board by consolidating the BBE and BC. The proposal was sent to the Assembly Committee on Governmental Efficiency and held there without further action until June 20, 1939.<sup>60</sup>

**Legislative Committee Reports.** In 1955, Senate Resolution 113 created the Senate Interim Committee on Licensing Business and Professions to ascertain, study, and analyze all facts relating to the licensing of businesses and professions in California.<sup>61</sup> In 1956, the Committee presented a Partial Report to the legislature.<sup>62</sup> In general, the Partial Report's introduction noted the difficulty involved in separating the public interest from industry interests in the licensing process. The Report recognized that a desire to improve practices, standards, and prestige in an industry may create barriers to entry.<sup>63</sup> The Report observed that a basic criticism against licensing boards is that they act primarily in the interests of their own group, and not in the public interest. Proposals to the Committee suggested a reorganization of state agencies to better protect the public's interests and improve efficiency.

Although the Partial Report made no recommendations, it reviewed several October 1955 hearings addressing barbering and cosmetology, during which consolidation of the boards was one of the several issues discussed.<sup>64</sup> The Partial Report's analysis of the Barber and Cosmetology Acts disclosed similar legislative objectives administered in the same manner.

During the 1955 hearings, BBE President Harold Luckey was opposed to any plan for consolidation, but refused to specify his reasons; other barber industry members cited wide differences in educational requirements and practices as reasons for opposition.<sup>65</sup> BC President Nancy Knick was also opposed to consolidation. When asked about the differences between barbering and cosmetology, Ms. Knick replied, "Well, in barber work they are mainly working on men whereas in cosmetology we are always working on women. And there is in my opinion a great deal of difference between cutting hair and shaving and between beautifying a woman...." Ms. Knick admitted, however, that any differences between the professions were related to function and not to the sanitation aspects of regulation.<sup>66</sup>

The Senate Committee made its full report to the legislature in 1957.<sup>67</sup> The Committee recognized that "efficiency, economy and general improved government" might be achieved by consolidation of the BBE and BC,<sup>68</sup> but preferred to defer its recommendations until further studies were completed, including further public hearings.<sup>69</sup>

Barber colleges were carefully scrutinized by a 1961 Senate Fact Finding Committee on Public Health & Safety;<sup>70</sup> consolidation of the two licensing boards, however, was not an issue. Then in 1963, a subcommittee of the Assembly Interim Committee on Public Health released a report entitled "Cosmetology in California."<sup>71</sup> The Report focused on cosmetology schools and the relationship of schools to salons.<sup>72</sup> While there is no reference to the merger issue, the gender factor again surfaced as an underlying reason for the separate existence of the two boards. The Report's introduction states that the success of a cosmetology salon depends on "wom[en] who want [their] hair beautified."<sup>73</sup>

**Other Studies.** Other California agencies have also evaluated cosmetology and barbering, with results made available to the legislature. For instance, in 1967, the Commission on California State Government Organization and Economy ("Little Hoover Commission")

reported findings and recommendations following an examination of the Professional and Vocational Standards Department.<sup>74</sup> The Commission recognized that the central issue in determining the propriety of licensing programs is "represent[ation] and protect[ion of] the general public interest."<sup>75</sup> The Commission's Report also stated that there are many examples of "distortion of the licensing function" where the licensing program is used to the "special advantage of the licensed group."<sup>76</sup> In its recommendations regarding individual boards, the Commission specifically concluded that consideration should be given to combining the BBE and BC.<sup>77</sup>

In 1978, the California State Department of Consumer Affairs (DCA) released a Regulatory Review Task Force Report. The independent study was commissioned by the DCA to assess and critique California's licensing process.<sup>78</sup> The seven-volume Report began as a response to the legislature's 1976 decree that DCA bodies seat at least one-third public members.<sup>79</sup> This "philosophical breakthrough" prompted the DCA to review administrative effectiveness as well as the need for each licensing body.<sup>80</sup>

Volume I of the Report reviews available literature to orient the reader to professional and occupational licensing. The independent surveyors succinctly described the paradox of licensing: "[o]n the one hand, [licensing schemes] promote the public health and welfare by requiring minimum standards of competence for those who provide goods and services to the public. At the same time, however, such controls lay the groundwork for that monopolistic inhibition of free competition sought by the occupational groups themselves."<sup>81</sup> The surveyors asserted that public policy requires government to ensure that the social costs of regulation do not outweigh perceived benefits. Hence, government has an ongoing responsibility to continuously assess the performance and impact of those agencies it creates, especially amidst changing social and economic conditions.<sup>82</sup>

Volumes II and III of the Report consist of "board studies" on individual agencies; Volume II includes a review of both the BBE and BC. The Report's review of the two boards recognized the "authentic cultural distinction between the rituals for cutting hair of men and women" that existed in 1927,<sup>83</sup> but concluded that today, "the difference between the sex of the haircutter and the sex of the client is no longer a relevant matter either in the industry or in public



policy....[T]he two boards regulate essentially the same industry."<sup>84</sup> As for the functional differences between the two vocations which are so often cited by the industries in defense of two separate boards, the Task Force stated that for barbers, shaving "accounts for less than one percent of their work," citing a 1974 BBE Report,<sup>85</sup> and that other functions exclusive to one trade "do not account for a substantial portion of most practitioners' work."<sup>86</sup> The study concluded that the need for two boards has "long passed," and that the separate boards "continue because of inertia of outdated tradition, the existence of entrenched bureaucratic interests, and the commercial interests of the separate systems of cosmetological and barber schools."<sup>87</sup>

The Report's review of barbering and cosmetology included an assessment of existing dangers to the consumer posed by the industries, the need for quality assurance, the cost of sanitary inspections, and the complaint-handling and disciplinary systems within the BBE and BC.<sup>88</sup> The Task Force recommended: (1) that the BBE and BC be dissolved and replaced by a single "Board of Haircare"; (2) abolition of certain educational requirements; (3) simplification of entry into the occupations by requiring registration without competency exams; (4) a reduction in costly sanitary inspections; (5) requiring a single test on hygiene for those persons who wish to register as "novices"; and (6) retention of strict certification requirements with examination for operators who shave with a straight razor, use heat to curl or straighten, and perform electrolysis.<sup>89</sup> The Report concluded that adoption of these recommendations would result in substantial savings to California (between \$400,000-\$600,000), because the budget of one board would be much less than the present budgets combined.<sup>90</sup>

In January 1979, the Little Hoover Commission released its evaluation of the DCA Task Force findings.<sup>91</sup> The Commission discussed its previous Professional and Vocational Standards report released in 1967,<sup>92</sup> and concluded that its own study and that of the Task Force were very different in approach and level of detail. While the Commission took a general, conceptual approach, the Task Force attempted to assess the operational effectiveness of eighteen particular DCA boards.<sup>93</sup>

In its 1979 study, the Commission attempted to develop suggestions and recommendations for improving California's licensing programs using the Task Force Report itself, agency

responses to Task Force conclusions,<sup>94</sup> and the Commission's own 1967 study.<sup>95</sup> The Commission, however, did not find the Task Force results unblemished, and as a result, severely limited its use of Task Force findings.<sup>96</sup>

Even though the Commission criticized the Task Force Report for several reasons, including the absence of "standard methodological steps and analytical procedures" and the "pervasive use of highly subjective statements" without premise,<sup>97</sup> the Commission concurred with the Task Force's conclusions that: (1) the separate BBE and BC are unnecessary; (2) the great majority of work performed by the industry does not involve any threat to consumer safety; and (3) entrance to the vocation is highly over-regulated.<sup>98</sup>

The Commission suggested that both boards be subject to legislative review through the "sunset" process,<sup>99</sup> and advised the legislature to consider replacing the BBE and BC with a single "Board of Hair Stylists and Cosmeticians" which would administer two basic types of registrations (hairstyling only and cosmetician practice). The Commission further suggested: (a) requiring basic competency in shop and tool hygiene along with practical knowledge of the laws governing this area; (b) requiring special certification and a practical exam for hazardous operations such as electrolysis or straight-razor shaving; (c) two classes of registration (apprentice and regular) as an additional indicator of competency; (d) decreasing the Board's role in shaping training school curricula; and (e) shifting the sanitary inspection function to local health departments.<sup>100</sup>

*Reform in Other States.* Eleven states—Alaska, Colorado, Connecticut, Delaware, New Hampshire, New Jersey, New York, Oregon, Utah, Washington, and West Virginia—successfully regulate barbers and cosmetologists through a single board.<sup>101</sup> In recent years, several of them have consolidated separate boards while retaining separate licensure for barbers and cosmetologists;<sup>102</sup> others have merged both boards and licensure.<sup>103</sup> James D. Hanson, Executive Secretary to Washington's Cosmetology/Barber/Manicurist Division of Professional Licensing, reports that the merger there has resulted in a 25% decrease in administrative workload, as well as more efficient use of staff time.<sup>104</sup>

Washington's merger provides a lesson to California and other states contemplating merger. The Washington legislature repealed the old statute on June 30, 1984 and the new statute creat-

ing a merged board became effective the next day—without the benefit of any regulations to implement the new act.<sup>105</sup> Hence, any state contemplating merger should provide for a grace period during which the new board can draft and adopt implementing regulations so as to effectuate a smooth transition.

*Legislative and Administrative "Efforts" to Merge.* Curiously, in spite of these studies and reports to and by the legislature, and the success of other states in regulating both trades through a single board, the BBE and BC continue their "separate but equal" regulation of the beauty industry in California. Recent legislative attempts to merge the two boards have failed. For example, Assemblymember Mori introduced AB 1485 on March 29, 1979. AB 1485 would have provided for a "State Board of Barber and Cosmetology Examiners." Once introduced, the bill was referred to the Labor, Employment and Consumer Affairs Committee.<sup>106</sup> Referring expressly to the 1978 Task Force Report recommendation that the BBE and BC be consolidated as well as the governor's 1979 budget proposal for merger, the Committee noted "recent studies have concluded that radical changes in licensing programs are in order."<sup>107</sup> The Committee concluded it would be appropriate to delay any proposed changes to the BBE and BC until a full "sunset" review of licensing could be completed.<sup>108</sup> The Committee also mentioned that AB 1485 made no changes in the law other than the consolidation of the boards. As such, any savings in expenditures would be minimal because the bill contained no provision for a reduction in functions.<sup>109</sup> AB 1485 died on January 30, 1980 in committee without hearing.<sup>110</sup>

For the past five years, the two boards have responded to the increasing political pressure to merge by reluctantly and repeatedly "discussing" the issue. In April 1982, the BBE unanimously agreed to form an ad hoc committee of all BBE and BC board members to consider the merger issue. The BC followed suit in May 1982.<sup>111</sup> The ad hoc committee met on June 11, 1982 and elected a chairperson, stated its purpose, and defined its area of study.<sup>112</sup> Ironically, the BC voted to end its participation on July 18, 1982, after only one joint meeting. One public member of the BC cited lack of industry support as the Board's reason for voting to discontinue the ad hoc committee effort.<sup>113</sup>

Then, in May 1983, the BBE unveiled two alternative plans, C(1) and C(2), designed to eliminate an existing Barber



Act prohibition against barbers and cosmetologists working in the same shops.<sup>114</sup> Under both plans, a cosmetologist could perform "acts of cosmetology" (but not "acts of barbering") in a barbershop without the then-required partition to separate a barbershop from a cosmetology shop. Both proposals required a participating cosmetologist to secure a special certificate from the BBE, and authorized the BBE to discipline that certificate. The only real difference between the two plans lay in Plan C(2)'s requirement that a cosmetologist complete a 100-hour training course on barber laws and regulations in order to obtain a certificate to practice in a barbershop. In both proposals, the BBE claimed the certification procedure would eliminate the need for BBE and BC consolidation.<sup>115</sup>

In September 1983, the BBE endorsed plan C(1) as more workable.<sup>116</sup> On November 6, 1983, the BC voted to oppose Plans C(1) and C(2) even though the BC confirmed its continued interest in consolidation.<sup>117</sup> The cosmetology industry remained opposed to merger on two grounds: (1) a combined board would be too large to function effectively; and (2) combination could result in increased educational requirements for cosmetologists.<sup>118</sup>

The BBE and BC held another special joint session in February 1984 to discuss consolidation. An administrative merger—consolidation of the two boards with retention of separate license classifications for barbers and cosmetologists—was discussed as a possible solution to consumer concerns, enforcement problems, and duplicative regulatory efforts. BBE President Raymond Stults stated that the BBE had not taken a position on the issue, but two other BBE members verbally expressed support. The BC voted unanimously to seek an administrative merger of the two boards.<sup>119</sup>

While this administrative jockeying-for-political-position continued, legislation was introduced to reduce many of the prohibitions against barbers and cosmetologists working together. Senator Montoya, Chair of the Senate Business and Professions Committee, introduced SB 2203 on February 17, 1984.<sup>120</sup> The California Barber College Association originally sponsored the bill, which proposed amendments to the Barber and Cosmetology Acts which would allow both practices to occur on the same premises without structural barriers.<sup>121</sup> The bill also proposed to eliminate duplicative inspections by allowing an inspector of either board to

cite for violations of either Act with the licensee's board following through on the citation.<sup>122</sup> The BC opposed SB 2203 because the bill permitted barbershops to employ cosmetologists without having to obtain a cosmetology establishment license, while beauty shops employing barbers had to obtain a barbershop license as well as a cosmetology establishment license.<sup>123</sup>

In spite of BC's opposition, SB 2203 was signed by the governor on August 19, 1984, to become effective January 1, 1985.<sup>124</sup> After passage, the BC immediately began preparing urgency legislation to clarify the inconsistent treatment created by SB 2203.<sup>125</sup> As a result, Senator Montoya introduced SB 180 on January 15, 1985. The bill, which was signed by the governor on July 12, 1985, deleted the exemption for barbershops created by SB 2203 by providing that a cosmetologist may practice in a barbershop only if the barbershop is licensed by the BC as a cosmetological establishment, and a barber may practice in a cosmetology shop only if the shop is licensed as a barbershop by the BBE.<sup>126</sup> Thus, instead of simplifying the licensing scheme and decreasing the hidden costs of doing business which are inevitably passed on to consumers, SB 2203 and SB 180 have resulted in a costly and wasteful dual licensure situation for individuals and establishments practicing essentially the same trade.<sup>127</sup>

AB 2268, introduced by Assemblymember Elder on March 8, 1985 and signed by the Governor on October 2, 1985,<sup>128</sup> further eroded the functional distinction between the two trades by, *inter alia*, specifying that chemical waving (once the exclusive province of cosmetologists) may now be performed by barbers.<sup>129</sup> Obviously, the increasing statutory equality of functions between the trades argues persuasively for merger.

In recent months, both the BBE and BC have sought industry comment on the merger issue. The BC confirmed its commitment to merger by voting in favor of merger with the BBE at its August 24, 1986 meeting.<sup>130</sup> On October 19, 1986, however, the BC opened the floor for public comment on the issue, and industry members (especially school owners) expressed strong opposition to the idea.<sup>131</sup> Likewise, the BBE held a public hearing on November 24, 1986, to again discuss the notion of merger with BC. Many barbers and owners of barber colleges testified in opposition to the proposal, claiming they would lose control over their craft and that an agency

regulating 265,000 cosmetologists/shops and only 27,000 barbers/shops would inevitably overlook the interests of the barbers. BC Executive Director Harold Jones also testified at the hearing in favor of merger, warning that current legislative sentiment favors merger, and stating that it would be to the agencies' advantage to negotiate an agreeable administrative merger, rather than be forced to accept a possibly-unfavorable legislative mandate.<sup>132</sup>

## Why Not Consolidate?

As exemplified by the 1986 passage of AB 183 (Johnson), which abolished the state Board of Dry Cleaning and Fabric Care,<sup>133</sup> the time has come to reduce administrative regulation of occupations which may be policed largely by consumers and the normal functioning of the marketplace.

Momentarily assuming the validity of continued regulation of barbers and cosmetologists, consolidation of the BBE and BC is a practical and necessary alternative to the outmoded, costly, and confusing tradition of two boards regulating the same industry. Well-drafted merger legislation would likely save California taxpayers one-half million dollars per year,<sup>134</sup> streamline state government operations, reduce consumer confusion about the complaint process, and eliminate licensee confusion about ambiguous and overlapping licensing requirements and enforcement authority. Such legislation should establish a nine-member board composed of five public members and, at most, four industry members. The legislation should add barbering to the list of existing licensing categories under the jurisdiction of the combined board, and eliminate dual licensure problems.<sup>135</sup> A transition period of twelve to eighteen months should be provided so that California may avoid the problems experienced by Washington and New Hampshire.<sup>136</sup> Most importantly, the proposal should expressly define the legislature's intent underlying the regulation of the haircare industry, so that the scope of agency action is confined to that intent.<sup>137</sup>

"Since Delilah sheared Samson's flowing tresses, with rather disastrous consequences to his potency, hair cutting has been infused with sexual symbolism."<sup>138</sup> Notwithstanding industry denials, it is clear that the original separation in the regulation of the haircare industry is steeped in anachronistic and legally-irrelevant sexual stereotype rather than in permissible concern for public health and safety. In the area of haircare, public



health requires—at most—standards to guard against unsanitary conditions and incompetent practitioners who are in a position to cause irreparable harm. Public health does *not* require protection of industry traditions which unreasonably prevent commonsense legislative responses to social change. There is no rational justification for the continuation of “separate but equal” licensing of barbers and cosmetologists in California.



## FOOTNOTES

1. The California Barber Act, Business and Professions Code sections 6500-6651 (derived from 1927 Cal. Stat. 1748). California barbers were originally subject to regulation beginning in 1901. Problems, however, resulted in the repeal of the law in 1903. See II California State Department of Consumer Affairs, *Regulatory Review Task Force Report F-29* (May 31, 1978) (hereinafter “Task Force Report”).

2. The California Cosmetology Act, Business and Professions Code sections 7300-7446 (derived from 1927 Cal. Stat. 17110).

3. See Rose, *Occupational Licensing: A Framework for Analysis*, 1979 ARIZ. ST. L.J. 189, 190 (1979). See also Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6 (1976); Wallace, *Occupational Licensing and Certification: Remedies for Denial*, 14 WM. & MARY L. REV. 46 (1972); Barron, *Business and Professional Licensing—California, A Representative Example*, 18 STAN. L. REV. 640 (1966).

4. See *infra* text accompanying notes 60, 74-98.

5. Commission on California State Government Organization and Economy (“Little Hoover Commission”), *Comments and Recommendations Regarding Professional and Business Licensing* 14 (Jan. 1979) (hereinafter “1979 Little Hoover Commission Report”); *Task Force Report*, *supra* note 1, at F-29.

6. See *infra* text accompanying notes 101-103.

7. For example, as of May 1985, the California Barber College Association, the California State Association of Journeyman Barbers, Hairdressers, Cosmetologists, Masseurs and Guilds, and the California Association of Schools of Cosmetology were all opposed to a merger between the barber and cosmetology boards.

8. Business and Professions Code section 6520.

9. Business and Professions Code section 7321.

10. See *infra* text accompanying notes 22, 35.

11. *San Francisco Examiner*, June 20, 1982, at B1.

12. The scope of this article does not address the fundamental question whether regulation of these industries is justified *at all*. See generally Fellmeth, A Theory of Regulation: A Platform for State Regulatory Reform, *California Regulatory Law Reporter* Vol. 5, No. 2 (Spring 1985) p. 3.

13. Final Calendar of Legislative Business, 47th Sess., Senate Final History, at 263 (1927); Final Calendar of Legislative Business, 47th Sess., Assembly Final History, at 378 (1927).

14. Senate Final History, *supra* note 13, at 263; Assembly Final History, *supra* note 13, at 378.

15. See, e.g., Act of Feb. 3, 1939, 1939 Cal. Stat. 372, *repealing* the Barber Act, and Act of Feb. 3, 1939, 1939 Cal. Stat. 411, *repealing* the Cosmetology Act. Both Acts were rechaptered as additions to the Business and Professions Code. See *infra* text accompanying notes 24, 38.

16. See, e.g., Senate Interim Committee on Licensing Business and Professions, 1956 Partial Report to the Legislature (1956); Assembly Interim Committee on Public Health, Subcommittee on Cosmetology, *Cosmetology in California* (1961-63).

17. Final Calendar of Legislative Business, 47th Sess., Assembly Final History, at 378 (1927).

18. The bill passed the Assembly Committee on Public Health and Quarantine, the Assembly Ways and Means Committee, the Senate Committee on Public Health and Quarantine, and the Senate Finance Committee.

19. Final Calendar of Legislative Business, 47th Sess., Assembly Final History, at 378 (1927).

20. 1927 Journal of the Senate, 47th Sess., at 1748, 1883, 2045, 2052, 2177; 1927 Journal of the Assembly, 47th Sess., at 1337, 1499, 1535, 1604, 1673, 1964, 2471, 2648.

21. Act of May 31, 1927, ch. 853, 1927 Cal. Stat. 1748-56.

22. Act of May 31, 1927, ch. 853, sec. 2, 1927 Cal. Stat. 1749, 1752-53. Arguably, only “malpractice or incompetency” has anything to do with protecting public health, safety, and welfare.

23. Act of May 18, 1929, ch. 302, 1929 Cal. Stat. 606; Act of June 19, 1931, ch. 1116, 1931 Cal. Stat. 2367; Act of June 7, 1935, ch. 297, 1935 Cal. Stat. 1015; Act of July 15, 1935, ch. 526, 1935 Cal. Stat.

1603; Act of June 22, 1937, ch. 484, 1937 Cal. Stat. 1441.

24. Act of Feb. 3, 1939, ch. 35, 53d Sess., 1939 Cal. Stat. 372.

25. Act of May 9, 1939, ch. 118, 1939 Cal. Stat. 1230-32.

26. Final Calendar of Legislative Business, 53d Sess., Assembly Final Calendar, at 313 (1939).

27. Act of May 19, 1941, ch. 317, 1941 Cal. Stat. 1469. Senate Bill 235 was also introduced to add Article 4.5 to the Business and Professions Code. The bill passed both houses but was pocket-vetoed by the governor on July 19, 1941.

28. Act of May 19, 1941, ch. 317, sec. 1, 1941 Cal. Stat. 1469.

29. Act of Aug. 27, 1973, ch. 319, sec. 27, 1973 Cal. Stat. 737.

30. 25 Cal. App. 3d 1014, 102 Cal. Rptr. 368 (1972). The Fourth District Court of Appeal based its decision on *State Board v. Thrift-D-Lux Cleaners*, 40 Cal. 2d 436, 254 P.2d 29 (1953), in which the California Supreme Court ruled that statutory provisions setting minimum prices for dry cleaners were unconstitutional as violating due process and as constituting an unlawful delegation of legislative powers to an administrative agency.

31. Act of May 31, 1927, ch. 845, 1927 Cal. Stat. 1711.

32. 1927 Journal of the Assembly, 47th Sess., at 1974, 1992, 2099, 2220, 2316; 1927 Journal of the Senate, 47th Sess., at 1153, 1384, 1406, 1693, 2078, 2328.

33. Final Calendar of Legislative Business, 47th Sess., Senate Final History, at 263 (1927).

34. Act of May 31, 1927, ch. 845, sec. 3, 47th Sess., 1927 Cal. Stat. 1712.

35. *Id.* at sec. 2, 1927 Cal. Stat. at 1711.

36. *Id.* at sec. 21, 1927 Cal. Stat. at 1722.

37. See Act of Apr. 20, 1933, ch. 123, 50th Sess., 1933 Cal. Stat. 576; Act of June 14, 1933, ch. 931, 50th Sess., 1933 Cal. Stat. 2458.

38. Act of Feb. 3, 1939, ch. 38, 53d Sess., 1939 Cal. Stat. 396-411.

39. Final Calendar of Legislative Business, 53d Sess., Senate Final History, at 320 (1939).

40. Act of May 19, 1939, ch. 168, 53d Sess., 1939 Cal. Stat. 1399 (effective Sept. 19, 1939).

41. *Id.*

42. Act of May 20, 1955, ch. 501, 1955 Reg. Sess., 1955 Cal. Stat. 970.

43. Business and Professions Code section 7326.

44. 2 Cal. 2d 266, 40 P.2d 817 (1935).





## FEATURE ARTICLE

45. 219 Cal. App. 2d 504, 33 Cal. Rptr. 349 (1963).

46. *Id.* at 507-08, 53 Cal. Rptr. at 352 ("[t]he general validity of such a statutory licensing system cannot seriously be questioned. Public health, sometimes described in terms of sanitation, or safeguards against communicable disease, is regarded as the police power objective which justifies licensing of barbers").

47. 249 Cal. App. 2d 459, 57 Cal. Rptr. 573 (1967).

48. The Board suspended Mains' barbershop license under Business and Professions Code section 6522, which set forth certain exemptions to the licensing provisions of the Barber Act. In 1967, under section 6522(d), "persons practicing beauty culture" were exempt from the barber licensure requirement; "however, the provisions of this section do not authorize any of the persons exempted to shave or trim the beard, or cut the hair of any person for cosmetic purposes except that persons included in [section 6522] subdivision (d) may cut the hair." *Id.* BBE interpreted this proviso to mean that "persons practicing beauty culture" (i.e., cosmetologists) could "cut the hair" in cosmetological establishments, but not in barbershops.

49. 249 Cal. App. 2d at 461, 57 Cal. Rptr. at 573 (emphasis original). Mains was not accused of shaving or trimming the beard. *Id.* at 463, 57 Cal. Rptr. at 574.

50. 249 Cal. App. 2d at 464-65, 57 Cal. Rptr. at 576.

51. *Id.* at 466, 57 Cal. Rptr. at 576.

52. *Id.* at 465, 57 Cal. Rptr. at 576.

53. Business and Professions Code section 6522 (1967).

54. 275 Cal. App. 2d 851, 80 Cal. Rptr. 164 (1969).

55. *Id.* 852-53, 80 Cal. Rptr. at 165.

56. *Id.* at 855, 80 Cal. Rptr. at 167.

57. *Id.* at 853-54, 80 Cal. Rptr. at 165-66.

58. 348 U.S. 483 (1955). *Williamson* held that courts must defer to legislative decisions so long as there is any reasonable basis in fact to support the enactment.

59. *Bone*, 275 Cal. App. 2d at 856, 80 Cal. Rptr. at 167-68.

60. Final Calendar of Legislative Business, 53d Sess., Assembly Final History, at 302 (1939).

61. SR 113, 2 Journal of the Senate 4320, 1955 Reg. Sess. (1955) (adopted as amended June 8, 1955).

62. California Senate Interim Committee on Licensing Business and Professions, 1956 *Partial Report to the Legislature*, 1 Appendix to the Journal of the Senate, 1956 Reg. Sess. (1956).

63. *Id.* at 9-11.

64. The barbering hearings addressed: (1) the feasibility of a full-time board; (2) minimum price law; (3) discipline; (4) administrative regulations; (5) misdemeanor provisions of the act; (6) examinations; (7) extension of grandfather privileges; (8) reciprocity; and (9) consolidation of board functions. The cosmetology hearings addressed: (1) regulation of electrolysis; (2) cosmetology schools; (3) discipline; (4) policy rules and directives of the board; (5) curtailment of junior operators licenses; and (6) consolidation of boards.

65. 1956 *Partial Report*, *supra* note 62, at 51-52.

66. *Id.* at 70.

67. California Senate Interim Committee on Licensing Business and Professions, 1957 *Report to the Legislature*, at 13-15, 2 Appendix to the Journal of the Senate, 1957 Reg. Sess. (1957).

68. *Id.* at 35-36, 58-59.

69. *Id.* at 13-15.

70. Senate Fact Finding Committee on Public Health & Safety, *Report on Sandwiches, Hearing Aids, Barber Colleges and Cemeteries*, 2 Appendix to the Journal of the Senate, 1961 Reg. Sess. (1961).

71. Assembly Interim Committee on Public Health, Subcommittee on Cosmetology, *Cosmetology in California*, 1 Appendix to the Journal of the Assembly, 1963 Reg. Sess. (1963).

72. *Id.* at 7.

73. *Id.* at 8. The Report also commented on the large number of bills introduced in recent legislative sessions that related to cosmetology.

74. Commission on California State Government Organization and Economy, *An Examination of the Department of Professional and Vocational Standards* (Sept. 1967).

75. *Id.* at 7.

76. *Id.* at 8. For example, entry may be restricted so that competition is reduced and the profession's status is advanced without public benefit.

77. *Id.* at 24-25.

78. *Task Force Report*, *supra* note 1.

79. See Act of Sept. 22, 1976, ch. 1188, 1976 Cal. Stat. 5338 (1976).

80. *Task Force Report*, *supra* note 1, at Departmental Preface.

81. I *Task Force Report*, *supra* note 1, at A-21.

82. *Id.* at A-5.

83. II *Task Force Report*, *supra* note 1, at F-1.

84. *Id.*

85. California State Board of Barber Examiners, *Report of Findings and Pro-*

*jections from 1974 Barber Board Survey*, at 15.

86. II *Task Force Report*, *supra* note 1, at F-1 (emphasis original).

87. *Id.* at F-2.

88. *Id.* at F-3 through F-25.

89. *Id.* at F-19. These operations were perceived as potentially hazardous by the Task Force.

90. *Id.* at F-27.

91. 1979 *Little Hoover Commission Report*, *supra* note 5, at 1.

92. See *supra* text accompanying notes 74-77.

93. 1979 *Little Hoover Commission Report*, *supra* note 5, at 2.

94. *Id.* at Letter of Transmittal and Summary p. 1.

95. *Id.* at 1.

96. *Id.* at 3. The Commission did not find the 1978 Task Force Report to be "a source of reliable or unbiased evidence."

97. *Id.* at 4.

98. *Id.* at 9.

99. See *California Regulatory Law Reporter* Vol. 1, No. 2 (Summer 1981) p. 2 for explanation of the "sunset" concept.

100. 1979 *Little Hoover Commission Report*, *supra* note 5, at 14-15.

101. California Board of Cosmetology, *A Survey of States That Have Merged Boards for the Purposes of Licensing Both Barbers and Cosmetologists* (October 1986) (hereinafter "BC Survey").

102. For example, Alaska (1980), Colorado (1977), Connecticut (1980), Delaware (1981), New Hampshire (1980), and Washington (1984) have recently accomplished an administrative merger of two boards. The West Virginia Board of Barbers and Beauticians has been regulating both trades since 1934. New York has also licensed both trades, along with many other professions, through its Division of Licensing Services since 1946.

103. New Jersey's State Board of Beauty Culture Control and Oregon's Board of Barbers and Hairdressers issue a single hairdresser license. Utah legislation passed in 1981, which appeared to merge the state's haircare licenses, is still being interpreted to determine whether the boards and licenses have been merged.

104. Letter from James D. Hanson to Crystal Crawford (Mar. 11, 1985).

105. *BC Survey*, *supra* note 101. New Hampshire also experienced organizational difficulties when its barbering and cosmetology laws were repealed on June 30, 1980, and emergency laws were adopted pending formulation of a combined scheme.



106. Assembly Final History, 1979-80 Reg. Sess., at 935 (1980).

107. Assembly Committee on Labor, Employment, and Consumer Affairs, 1980 Report on AB 1485, at 1 (1980).

108. *Id.* at 2. The Committee was referring specifically to the then-pending AB 46 (McCarthy), which called for a comprehensive review of the structure and performance of California's licensing boards. AB 46 died on August 18, 1980.

109. Assembly Committee Report, *supra* note 107, at 1-2.

110. Assembly Final History, 1979-80 Reg. Sess., at 935 (1980).

111. *California Regulatory Law Reporter* Vol. 2, No. 3 (Summer 1982) at 37, 40-41.

112. *Id.*, Vol. 2, No. 4 (Fall 1982) at 36.

113. *Id.* at 40.

114. *Id.*, Vol. 4, No. 1 (Winter 1984) at 34, 39-40.

115. *Id.* at 39. The reasoning underlying this assertion is unclear.

116. *Id.*

117. Letter from BC President Joyce Seymour to BBE President Raymond Stults (Nov. 22, 1983).

118. *California Regulatory Law Reporter* Vol. 4, No. 1 (Winter 1984) p. 40.

119. Minutes from Special Joint BBE and BC Session at 12 (Feb. 13, 1984).

120. Senate Recess History, 1983-84 Reg. Sess., pt. 3, at 821 (1984).

121. Senate Committee on Business and Professions, 1984 Report on SB 2203, at 1 (1984).

122. *Id.*

123. *California Regulatory Law Reporter* Vol. 4, No. 4 (Fall 1984) p. 37.

124. Act of Aug. 29, 1984, 1983-84 Reg. Sess., ch. 816, 1984 Cal. Stat. (1984).

125. *California Regulatory Law Reporter* Vol. 4, No. 4 (Fall 1984) p. 37.

126. SB 180, 1985-86 Reg. Sess. (1985); Senate Weekly History, 1985-86 Reg. Sess., at 140 (Jan. 30, 1986).

127. "Dual licensure" occurs when individuals are required to possess two or more separate licenses for the performance of a single function or service. On September 17, 1985, Governor Deukmejian signed AB 1328 (Johnson), which required the DCA to conduct a study of its agencies to determine the number and type of licensees subject to dual licensure, and develop a plan to eliminate the need for more than one license. The Department reported its findings to the legislature on January 1, 1987, and failed to address the barbering/cosmetology licensing scheme. DCA interpreted AB 1328 to mandate a study of occupations where two or more licenses are re-

quired in order to practice; and DCA views dual licensure as discretionary within the haircare industry. Telephone Interview with Neil Fippin, DCA Chief of Administration (Dec. 5, 1986). Notwithstanding DCA's views, the introduction and passage of AB 1328 is a clear indication that the validity and necessity of outmoded and overlapping licensing requirements remains a topic of legislative concern.

128. Assembly Weekly History, 1985-86 Reg. Sess., at 1089 (Jan. 30, 1986).

129. Business and Professions Code section 6520 (1986).

130. *See California Regulatory Law Reporter* Vol. 6, No. 4 (Fall 1986) p. 34.

131. *See infra* agency report on Board of Cosmetology.

132. *See infra* agency report on Board of Barber Examiners.

133. *See California Regulatory Law Reporter* Vol. 6, No. 4 (Fall 1986) p. 35.

134. *See supra* text accompanying note 90.

135. *See supra* note 127.

136. *See supra* text accompanying note 105 and n.105.

137. On December 5, 1986, Assemblymember Elder introduced AB 86, which would repeal the provisions of law creating the BC and transfer BC's powers and duties to BBE. As introduced, the bill makes no changes to the structure or composition of the BBE, thus allowing for no cosmetologist representation on the Board. Further, AB 86 provides no expression of legislative intent justifying the regulation of the haircare industry. Rather than making meaningful changes or improvements to the present scheme, AB 86 may create more problems than it solves.

138. *New York State Hairdressers & Cosmetologists Association, Inc. v. Cuomo*, 83 Misc.2d 154, 369 N.Y.S.2d 965 (N.Y. Sup. Ct. 1975).