

MEMORANDUM

TO: MARK B. STEINAGEL, DOPL DIRECTOR

FROM: KEVIN M. MCDONOUGH

DATE: FEBRUARY 26, 2016

RE: INFORMAL LEGAL ADVICE

BACKGROUND

The Acupuncture Board Chair, Tiffany Garofalo, requested that “microneedling” be placed on the agenda for its most recent Acupuncture Licensing Board meeting. More specifically, she wished to discuss the definition and scope of the microneedling process. Consistent with the discussions during that Board meeting, you have asked me for informal legal advice as to whether DOPL exceeded its rulemaking authority when it further defined the practice of master esthetics in rule, by expanding that practice to include microneedling.

ISSUE PRESENTED

Did DOPL exceed its rulemaking authority when it further defined “Master-Level Esthetics” to include microneedling?

CASE LAW

It is well recognized and a long-standing principle of administrative law that “an agency’s rules must be consistent with its governing statutes.” *Sanders Brine Shrimp v. Utah State Tax Commission*, 846 P.2d 1304, 1306 (Utah 1993); *accord Rocky Mountain Energy v. Utah State Tax Commission*, 852 P.2d 284, 287 (Utah 1993) (holding that “[r]ules are subordinate to statutes and cannot confer greater rights or disabilities”). *See also Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134, 56 S. Ct. 397, 399, 80 L. Ed. 528 (1936) (administrative bodies have the power to prescribe rules in order to carry into effect the will of the legislature as expressed by statute. In order for a rule to be valid, it must be in harmony with the governing statute.) These basic tenets of law have recently been reaffirmed by the Utah Supreme Court in the case of *Dorsey v. Department of Workforce Services*, 330 P.3d 91, 94 (Utah 2014).

GOVERNING STATUTE¹

The Utah Legislature's enactment of the "Barber, Cosmetologist/Barber, Esthetician, Electrologist, and Nail Technician Licensing Act" (Utah Code Ann. § 58-11a-101 et seq.) (hereinafter the "Esthetician Licensing Act") contains the "governing statute" relative to the issue presented. More specifically, Utah Code Ann. § 58-11a-102 of the Esthetician Licensing Act provides, in pertinent part, as follows:

58-11a-102 Definitions.

As used in this chapter:

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(23) "Master esthetician" means an individual who is licensed under this chapter to engage in the practice of master-level esthetics.

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(34)

(a) "Practice of master-level esthetics" means:

(i) any of the following when done for cosmetic purposes on the head, face, neck, torso, abdomen, back, arms, hands, legs, feet, eyebrows, or eyelashes and not for the treatment of medical, physical, or mental ailments:

(A) body wraps as defined by rule;

(B) hydrotherapy as defined by rule;

(C) chemical exfoliation as defined by rule;

(D) advanced pedicures as defined by rule;

(E) sanding, excluding microdermabrasion;

(F) advanced extraction;

(G) other esthetic preparations or procedures with the use of:

(I) the hands; or

(II) a mechanical or electrical apparatus which is approved for use by division rule for beautifying or similar work performed on the body for cosmetic purposes and not for the treatment of a medical, physical, or mental ailment; (Emphasis added.)

¹ Preliminarily, it is noteworthy that the Utah Legislature's enactment of Utah Code Ann. § 58-1-106 expressly grants the Division of Occupational and Professional Licensing ("DOPL") with rulemaking authority, such that it may prescribe and adopt rules for the purpose of administering Title 58 of the Utah Code.

58-1-106 Division - - Duties, functions, and responsibilities.

(1) The duties, functions, and responsibilities of the division include the following:

(a) prescribing, adopting, and enforcing rules to administer this title[.]

ADMINISTRATIVE RULE

The Administrative Rule that corresponds with the governing statute is the “Barber, Cosmetologist/Barber, Esthetician, Electrologist, and Nail Technician Licensing Act Rule” (Utah Admin. Rule R156-11a) (hereinafter the “Esthetician Licensing Act Rule”). The Esthetician Licensing Act Rule sets forth, in pertinent part, as follows:

R156-11a-102. Definitions.

In addition to the definitions in Title 58, Chapters 1 and 11a, as used in Title 58, Chapters 1 and 11a or this rule:

. . .

(22) “Microneedling” means the use of multiple tiny solid needles designed to pierce the skin for the purpose of stimulating collagen production or cellular renewal. Devices used may be in the form of rollers, stamps or electronic “pens”. It is also known as:

- (a) dermal needling;
- (b) Collagen Induction therapy (CIT);
- (c) dermal rolling;
- (d) cosmetic dry needling;
- (e) multitrepannic collagen actuation; or
- (f) percutaneous collagen induction.

R156-11a-103. Authority – Purpose.

This rule is adopted by the Division under the authority of Subsection 58-1-106(1)(a) to enable the Division to administer Title 58, Chapter 11a.

R156-11a-611. Standards for Approval of Mechanical or Electrical Apparatus.

In accordance with Subsections 58-11a-102(31)[sic](a)(i)(G)(II) and (H)², the standards for approval of mechanical or electrical apparatus shall be:

- (1) No mechanical or electrical apparatus that is considered a prescription medical device by the FDA may be used by a licensee, unless such use is completed under the appropriate level of supervision by a licensed health care practitioner acting within the licensed health care practitioner’s scope of practice.

² Although the Esthetician Licensing Act Rule references Subsection (31)(a)(i)(G) of its “governing statute” (Utah Code Ann. § 58-11a-102), it is clear that this is a typographical error, and that the rule should in fact reference Subsection (34)(a)(i)(G) of Utah Code Ann. § 58-11a-102. (It may be prudent for DOPL to amend R156-11a-611 such that it accurately cross-references the correct subsection of Utah Code Ann. § 58-11a-102.)

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- (5) To be approved, a microneedling device shall:
- (a) be used only by a master esthetician:
 - (i) without supervision if needle penetration does not exceed 1.5 mm; or
 - (ii) with general supervision by a licensed health care practitioner if needle penetration exceeds 1.5 mm; and
 - (b) be used specifically for cosmetic or esthetic purposes.
- (Emphasis added.)

LEGAL ANALYSIS

Consistent with the case law cited hereinabove, the powers of DOPL are derived from and created by statute. DOPL has no inherent regulatory powers and can assert only those which are expressly granted or clearly implied as necessary to the discharge of the duties and responsibilities imposed upon it by statute. Moreover, any administrative rule promulgated by DOPL must be in harmony with said rule's governing statute. Accordingly, an analysis of the issue presented must begin with an examination of the governing statute, Utah Code Ann. § 58-11a-102, and more specifically, Subsection (34) thereof.

The governing statute defines the "practice of master-level esthetics" by identifying six separate and specific procedures, all of which fall within the scope of practice of a master-level esthetician. *See* § 58-11a-102(34)(a)(i)(A)-(F). Each of the enumerated procedures must be "done for cosmetic purposes."

Significantly, in addition to the six specific procedures identified in the governing statute, Subsection (34)(a)(i)(G) is somewhat of a "catch-all," allowing for other procedures to come within the scope of practice of a master-level esthetician. These other procedures include those using "a mechanical or electrical apparatus," so long as the same are "approved for use by division rule for beautifying or similar work performed on the body for cosmetic purposes[.]" This subsection clearly and unequivocally grants DOPL the authority to approve, by Division rule, other cosmetic procedures that are permissible and within the scope of practice of master-level esthetics. Indeed, in promulgating Subsection (34)(a)(i)(G), the Utah Legislature granted DOPL wide discretion (albeit not without limitation) to further define the scope of practice of a master-level esthetician.

The next step is to examine Administrative Rule R156-11a (the Esthetician Licensing Act Rule), and determine whether it is in harmony with the governing statute, Utah Code Ann. § 58-11a-102(34)(a)(i)(G).

Pursuant to the authority expressly granted to it by the Utah Legislature, DOPL promulgated Section 102(22) and Section 611 of Admin. Rules R156-11a, therein specifically identifying "microneedling" as a permissible procedure within the scope of practice of a master-level esthetician. In essence, DOPL deemed it appropriate to approve microneedling as one of the "other esthetic preparations or procedures [using] a mechanical or electrical apparatus . . . for

cosmetic purposes[.]” Sections 102(22) and 611 of the Esthetics Licensing Act Rule are controlling, and must be read in concert with one another.

Administrative Rule R156-11a-102(22) defines microneedling as “the use of multiple tiny solid needles designed to pierce the skin for the purpose of stimulating collagen production or cellular renewal.” Section 102(22) further sets forth that the mechanical devices used in microneedling may be in the form of “rollers, stamps, or electronic ‘pens’.” Accordingly, inasmuch as the definition of microneedling describes the process, and makes reference to certain mechanical or electrical devices that may be utilized in the microneedling procedure, said procedure appears to be consistent with the governing statute which allows esthetic procedures to be performed with the use of “a mechanical or electrical apparatus. . . for cosmetic purposes.” However, Section 102(22) fails to make any reference to the microneedling procedure being limited to “cosmetic purposes,” and as such, further inquiry and examination must be made to ascertain whether the microneedling procedure, as defined under agency rule, goes beyond a cosmetic nature, as clearly contemplated by the governing statute.

At this juncture, an examination of Section 611 of Rule R156-11a is particularly instructive in determining whether or not Rule R156-11a is harmonious with the governing statute. Rule R156-11a-611 is captioned “Standards for Approval of Mechanical or Electrical Apparatus,” and begins by making a cross-reference to the governing statute by stating, “In accordance with Subsections 58-11a-102(31)[sic](a)(i)(G)(II) and (H), the standards for approval of mechanical or electrical apparatus shall be . . .”. Section 611 then establishes certain restrictive standards to be taken into account relative to any given “mechanical or electrical apparatus” used by an esthetician during a procedure. Significantly, Section 611 contains a provision mandating that a microneedling device (apparatus) shall be used only for “cosmetic or esthetic purposes.” See R156-11a-611(5)(b).

Section 611 contains additional restrictive standards which ensure that the scope of practice of a master-level esthetician does not transcend the boundaries of the legitimate practice of an esthetician as contemplated by the legislature. Specifically, Section 611 mandates that “[n]o mechanical or electrical apparatus that is considered a prescription medical device by the FDA may be used by a licensee, unless such use is completed under the appropriate level of supervision by a licensed healthcare practitioner . . .” This restrictive standard precludes a master-level esthetician from performing procedures that might otherwise cross the esthetician boundaries, and into the scope of practice of an acupuncturist, physical therapist, or other profession. Similarly, Section 611 mandates that a microneedling device used by a master-level esthetician requires the “general supervision by a licensed healthcare practitioner if the needle penetration exceeds 1.55 mm[.]”

Therefore, when Section 102(22) and Section 611 are read in concert with each other, it is readily apparent that the administrative rule is harmonious with its governing statute, and DOPL has not exceeded its rulemaking authority.

ADJUNCT ISSUE

Does “microneedling,” as defined by Admin. Rule R156-11a-102(22), encroach upon the exclusive scope of practice of acupuncturists?

ANALYSIS

Section 102(22) of Admin. Rule R156-11a states that microneedling is also known as:

- (a) dermal needling;
- (b) Collagen Induction therapy (CIT);
- (c) dermal rolling;
- (d) cosmetic dry needling;
- (e) multitrepannic collagen actuation; or
- (f) percutaneous collagen induction.

As presented to me, the issue at hand is confined to whether or not DOPL exceeded its rule making authority by further defining “Master-Level Esthetics” to include microneedling; however, inasmuch as this issue was brought to the forefront by the Acupuncture Board, it is reasonable to assume that the acupuncturists believe that their “turf” has been encroached upon by the estheticians by virtue of DOPL’s enactment of Section 102(22). More specifically, it is anticipated that the acupuncturists might try to argue that the other terminology for microneedling invades the exclusive province of their profession. I believe that such an argument by the acupuncturists would be without merit. As indicated above, Section 611 of the Administrative Rule R156-11a provides safeguards to ensure that master-level estheticians are not encroaching upon the “turf” of an acupuncturist. That is, Section 611 clearly limits the microneedling procedure (by whatever name) to “cosmetic or esthetic purposes.” Further, Section 102(22)(d) provides that the purpose of the procedure is to “stimulat[e] collagen production or cellular renewal.” Additionally, because of the restrictive standards set forth in Section 611, a master-level esthetician cannot use a mechanical or electrical apparatus that is considered a prescription medical device by the FDA. As such, an esthetician is precluded from engaging in a microneedling procedure (by whatever name) if that procedure utilizes a mechanical or electrical device/apparatus for which the FDA requires a prescription. Thus, an esthetician cannot engage in a procedure using acupuncture needles if the same require a prescription.

Finally, it is noteworthy that the Acupuncturist Licensing Act does not provide that any sort of solid needling technique is exclusive to that profession.

CONCLUSION

The governing statute, Utah Code Ann. § 58-11a-102(34)(a) prescribes that the practice of master-level esthetics includes procedures which use a “mechanical or electrical apparatus” that the Division approves for use for cosmetic purposes. The Division’s enactment of Administrative Rule R156-11a-102(22), in conjunction with Section 611 of the Rule, approves microneedling as a cosmetic procedure using a mechanical or electrical apparatus as

contemplated by the governing statute. Therefore, the administrative rule is harmonious with the governing statute. DOPL did not exceed its rulemaking authority when it further defined “Master-Level Esthetics” to include the procedure of microneedling; nor does the microneedling procedure improperly invade the domain of the practice of acupuncture.