

**State of California
Office of Administrative Law**

In re:
Board of Barbering and Cosmetology

**Regulatory Action: Title 16
California Code of Regulations**

Adopt sections:
Amend sections: 932
Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2011-1213-01 S

SUMMARY OF REGULATORY ACTION

The Board of Barbering and Cosmetology (Board) submitted this proposed regulatory action to require criterion-referenced scoring for licensing examinations.

DECISION

On January 27, 2012, the Office of Administrative Law (OAL) disapproved the Board's rulemaking action for failure to comply with the clarity standard of Government Code section 11349.1.

DISCUSSION

The adoption of regulations by the Board must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. Any rule or regulation adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA coverage. (Gov. Code, sec. 11346.)

Before any rule or regulation subject to the APA may become effective, the rule or regulation is reviewed by OAL for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards a rule or regulation must be legally valid, supported by an adequate record, and easy to understand. In this review OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of rules and

regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on rules and regulations before they become effective.

CLARITY

OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the “clarity” standard. (Gov. Code, sec. 11349.1(a)(3).) “Clarity” as defined by Government Code section 11349(c) means “written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.” “Clarity” is further defined in California Code of Regulations, title 1, section 16(a)(2):

In examining a regulation for compliance with the “clarity” requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

(a) A regulation shall be presumed not to comply with the “clarity” standard if any of the following conditions exists:

....

(2) the language of the regulation conflicts with the agency's description of the effect of the regulation;

....

The proposed language of section 932 is unclear because it conflicts with the Board’s description of the effect of the regulation as expressed in the Initial Statement of Reasons (ISOR). The ISOR states:

Under a criterion-referenced scoring methodology, passing scores would be determined for each examination by subject matter experts under the direction of OPES [Office of Professional Examination Services] and the Board's examination contractor.

Business and Professions Code section 7340 requires the Board to “...establish standards and procedures governing administration and grading...” The ISOR explains that the procedure the Board will use to determine the passing score is based upon subject matter experts under the direction of OPES and the Board’s examination contractor. However, the proposed regulation language states only that the Board “shall establish passing scores for examinations based on criterion-referenced scoring methodology.” There is no reference to the subject matter experts, OPES or the examination contractor. The result is that the proposed text conflicts with the Board’s described effect of the regulation as stated in the ISOR, and therefore, does not meet the “Clarity” standard pursuant to California Code of Regulations, title 1, section 16(a)(2).

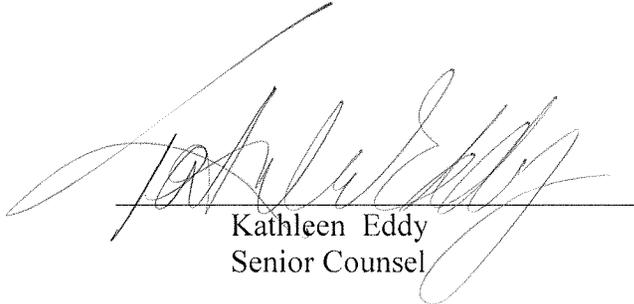
CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. Please also note that:

1. The Fiscal Impact Statement (Std. 399) submitted with the rulemaking file has holes punched in it that obscure the finding that there is no fiscal impact. An unpunched copy should be added to the file.
2. The authority citation for section 932 should include Business and Professions Code section 7338, the requirement for both a practical and written test.
3. The proposed text adds Business and Professions Code section 139 as a reference citation. This section is not being implemented, interpreted or made specific by the proposed regulation. We recommend that it be deleted.

If you have any questions, please contact me at (916) 323-7465.

Date: January 31, 2012



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