



State of Vermont
Office of the Secretary of State

Office of Professional Regulation
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Montpelier, VT 05620-3402
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James C. Condos, Secretary of State
Christopher D. Winters, Deputy Secretary
S. Lauren Hibbert, Director

To: Senate Government Operations Committee
From: S. Lauren Hibbert, Director, Office of Professional Regulation
Date: April 6, 2021

Re: The Role of Criminal Convictions in the OPR License Application Process

Dear Committee,

Thank you for the time you have given to this issue. Since the last Committee hearing, I had a very productive meeting with Michelle Feldman and Joshua Gaines from CSG. I now understand their policy initiative and, on whole, OPR is supportive of their efforts. First, I wanted to provide some context on our current process and finally, I wanted to recommend language around this issue.

A. Current Process:

When an applicant applies for a license in a profession regulated by OPR we ask them the following questions:

Question: Have you EVER been convicted of a crime other than a minor traffic violation? (Driving While Intoxicated and Driving Under the Influence are not minor traffic violations.) Answer: ★
 Yes No

If "Yes," you must provide a detailed written explanation and attach the official court documents (i.e., affidavit of probable cause, information, and/or docket report).

Question: Are any criminal charges pending against you in any jurisdiction? Answer: ★
 Yes No

If "Yes," you must provide a detailed written explanation and attach a copy of the charging documents.

We provide applicants the opportunity to provide context and detail for pending charges and convictions. After an applicant discloses a criminal conviction, the application is screened by OPR licensing staff. If the conviction is a misdemeanor related to the practice of the profession or a felony, it is then referred to the prosecution unit. This analysis is based on the statutory language in 3 V.S.A. §129a(a)(10).

The majority of convictions do not even rise to the level of a preliminary denial review. For instance, the conviction of a DUI 1 is rarely referred for preliminary denial review because it is a misdemeanor and is not related to the practice of any profession regulated by OPR.

The prosecution unit looks at every application on a case-by-case basis, with the specific facts within each application varying widely. Below is the *general* approach prosecutors take when reviewing an application with criminal convictions:

Felonies: Felonies are *per se* unprofessional conduct under 3 V.S.A. §129a(a)(10). However, OPR prosecutors currently undertake the following analysis in deciding whether a felony conviction warrants a finding of unprofessional conduct. All factors are weighed together, with any one outweighing the others based on the facts of each applicant and application:

- Age of conviction: While not a bright line, prosecutors place a great deal of emphasis on the 10-year mark due in large part to the federal rule of evidence regarding impeachment by a felony conviction
- Relation to the practice of a profession
- Rehabilitation and proof thereof

Misdemeanors: Misdemeanors must be related to the practice of the profession to be considered unprofessional conduct under 3 V.S.A. §129a(a)(10):

- Relation to the practice of the profession: If there is no relation to the practice of the profession, the analysis stops
- Age of conviction
- Rehabilitation and proof thereof

Under our current process, deferred sentences are considered convictions until the sentence is fulfilled and final action is taken to expunge/dismiss/etc. This is not an OPR analysis, this is the legal effect of deferred sentences. Additionally, a conviction can have been expunged but the underlying conduct may still constitute unprofessional conduct, in which case prosecutors would not plead a violation of 129a(a)(10). Instead, they will plead a violation of some other statute or rule based on the conduct itself.

Evidence can come from many places other than a conviction or police record. It is also possible for someone to be acquitted and the same analysis to be applied since we have a “preponderance of the evidence” standard which is lower than the criminal standard of “beyond a reasonable doubt.”

If the prosecutor decides that the application should be preliminary denied, they draft a formal notice of preliminary denial. This is filed with our docket clerk and the individual is provided notice by mail, certified mail, and email. They are then given 30 days to appeal the preliminary denial. This needs to be filed with the docket clerk. An example of a preliminary denial is attached to this memo.

The preliminary denial process is found in 3 V.S.A. § 129(e):

- (1) When a board or the Director, in the case of professions that have advisor appointees, intends to deny an application for a license, the board or Director shall send the applicant written notice of the decision by certified mail. The notice shall include a statement of the reasons for the action and shall advise the applicant that the applicant may file a petition within 30 days of the date on which the notice is mailed with the board or the Director for review of its or his or her preliminary decision.
- (2) At the hearing, the applicant shall bear the burden of proving that the preliminary denial should be reversed and that the license should be granted.
- (3) After the hearing, the board or Director shall affirm or reverse the preliminary denial, explaining the reasons therefor in writing.

Appeal rights attach when the final decision is rendered. If a party is aggrieved by the decision, they can file an appeal which is heard before an appellate officer who is contracted by OPR. If a party disagrees with the appellate officer's decision, they can appeal to the Supreme Court.

B. Recommended Language:

OPR does not recommend an exclusion list of criminal convictions. This would restrict OPR's ability to engage in its case-by-case analysis that is tied to the profession being applied for. Crimes that might be disqualifying for a nurse may not be for an accountant, for instance. Additionally, we get applicants from every state and each has a different criminal code so reference to Vermont's criminal code should be avoided.

OPR recommends the following modification of 3 V.S.A. 129a:

(a) In addition to any other provision of law, the following conduct by a licensee constitutes unprofessional conduct. When that conduct is by an applicant or person who later becomes an applicant, it may constitute grounds for denial of a license or other disciplinary action. Any one of the following items or any combination of items, whether the conduct at issue was committed within or outside the State, shall constitute unprofessional conduct:

(1) Fraudulent or deceptive procurement or use of a license.

...

(10) Conviction of a crime related to the practice of the profession or conviction of a felony, whether or not related to the practice of the profession.

(A) If an individual has a conviction of concern, the board or hearing officer, shall consider the following in determining whether to deny or discipline a license, certification, or registration to the individual based on the following factors:

(1) The nature and seriousness of the conviction;

(2) The amount of time since the commission of the crime;

(3) The relationship of the crime to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of the profession; and,

(4) Evidence of rehabilitation or treatment.

(11) Failing to report to the Office a conviction of any felony or misdemeanor offense in a Vermont District Court, a Vermont Superior Court, a federal court, or a court outside Vermont within 30 days.

...

This statutory amendment will only affect those professions and occupations under the OPR umbrella.

OPR will continue to improve our external communication strategy. We have started this work through our work under the Federal Department of Labor grant and the second-chance determinations policy; however, it is important to codify our current approach and to make it accessible. This transparency will empower applicants and inform the public how OPR reviews and processes applications for those individuals who have criminal backgrounds.

Thank you,
Lauren

**STATE OF VERMONT
SECRETARY OF STATE
OFFICE OF PROFESSIONAL REGULATION
NOTARIES PUBLIC**

IN RE:)
)
Application Tracking No.) **Docket No. 2019-**

NOTICE OF PRELIMINARY DENIAL

An Application for licensure as a Notary Public, submitted by [REDACTED] (the “Applicant”), was received by the Office of Professional Regulation on October 10, 2019 (the “Application”). The application was complete on October 10, 2019. The Application has been **preliminarily denied** by the State of Vermont for the following reasons:

Board Authority

1. The Vermont Office of Professional Regulation (the “Office”) has authority to deny an applicant’s license if it finds that the applicant has engaged in unprofessional conduct in any jurisdiction. 3 V.S.A. §§ 129(a), 129a; 26 V.S.A. § 5345; and the Rules of the Office of Professional Regulation.

Basis for Denial

Basis for Denial #1: 3 V.S.A. § 129a(a)(1) Fraudulent or deceptive procurement or use of a license.

2. On the Application, the Applicant answered “Yes” to the question “Have you EVER been convicted of a crime other than a minor traffic violation? (Driving While Intoxicated and Driving Under the Influence are not “minor traffic violations.)”
3. An answer of “Yes” to the above question requires applicants to provide a detailed written explanation and the official court documents from any conviction.
4. Applicant disclosed and provided a detailed written explanation and official court documents for two 2018 misdemeanor convictions.
5. Applicant failed to disclose, provide a detailed written explanation, or the official court documents for an August 22, 2019 conviction for DUI #2 in Docket No. 1-1-19 Gicr, Grand Isle Criminal Division.
6. Applicant failed to disclose, provide a detailed written explanation, or the official court documents for an August 22, 2019 conviction for False Info-Law Enforcement Officer/Implicate Another in Docket No. 1-1-19 Gicr, Grand Isle Criminal Division.

Basis for Denial #2: 26 V.S.A. §5342(a)(2) A fraudulent, dishonest, or deceitful misstatement or omission in the application for a commission as a notary public submitted to the Office.

7. The State re-alleges and incorporates Paragraphs 2 through 6 above.
8. Applicant made a fraudulent, dishonest, or deceitful misstatement or omission in the application for a commission as a notary public submitted to the Office when she failed to disclose the two convictions listed in Paragraphs 5 and 6 above.

Basis for Denial #3: 26 V.S.A. §5342(a)(3) A conviction of the applicant or notary public of any felony or a crime involving fraud, dishonesty, or deceit.

9. The State re-alleges and incorporates Paragraphs 2 through 6 above.
10. Applicant's August 22, 2019 conviction for False Info-Law Enforcement Officer/Implicate Another in Docket No. 1-1-19 Gicr, Grand Isle Criminal Division is a crime involving fraud, dishonesty, or deceit and is therefore unprofessional conduct.

As a result of the foregoing reasons, the Application for licensure is **PRELIMINARILY DENIED**. If you would like this decision to be reviewed please refer to the appeal rights at the bottom of this notice.

DATED at Montpelier, Vermont this ____ day of _____, 2019.

STATE OF VERMONT
SECRETARY OF STATE

By: _____
Elizabeth St. James
State Prosecuting Attorney
(802)828-1218
elizabeth.St.James@sec.state.vt.us

To appeal this preliminary denial, you must file a written appeal with the Docket Clerk within 30 days of the date of this notification. In order to expedite the appellate process, your appeal shall include a statement of issues, that is, why the preliminary denial should be reversed and that the license should be granted.

Please send your appeal to the address below:

Elizabeth Kneen, Docket Clerk
Office of Professional Regulation
89 Main Street, 3rd Floor
Montpelier, VT 05602-3402

A hearing will then be scheduled. The State will be represented by the state prosecutor. At the hearing you will have the burden of showing that this preliminary denial should be reversed and that your license should be granted. 3 V.S.A. §129(e). The tribunal may uphold the denial, in whole, or in part, or may issue an unrestricted license, or may issue a license that is sanctioned. 3 V.S.A. §129(a)(3).

If you do not appeal this preliminary denial it will become final in 30 days. As a final disciplinary decision it will be reported to all required national data banks and shall be public pursuant to 3 V.S.A. §131.

Once the decision is final, it may be appealed pursuant to 3 V.S.A. §130a.