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January 31, 2024

To: Hon. Michael McCarthy, Chair
House Committee on Government Operations and Military Affairs

From: Lauren Layman, General Counsel, Office of Professional Regulation

Re: Proposed OPR Bill 2024

Dear Committee,

Thank you for the opportunity to testify about the Office of Professional Regulation and the draft legislation pending in your committee.

As you may recall from last session, the Office of Professional Regulation (OPR) oversees 51 professions, from nurses to mixed martial arts contestants, and about 80,000 licensees. Our team consists of 41 employees, including 9 licensing administrators, who assist licensees directly and process license applications, and an enforcement unit with 9 investigators (5 certified law enforcement), 4 prosecutors, 2 case managers, and a paralegal. We also have inspectors who are out in the field every day inspecting the businesses we license, a general counsel's unit with 3 lawyers and a policy analyst, a docket clerk to manage disciplinary matters, and a director and assistant director.

OPR issues licenses based on requirements and qualifications established in statutes and rules. We have two different models of regulation in our office – the board-model and the advisor-model. You will see those two different models reflected in our statutes. Our statutes are found in Title 3, which is our umbrella statute, and the majority of the profession-specific statutes are in Title 26. OPR also receives complaints about licensee conduct and, when warranted, investigates and prosecutes licensees for unprofessional conduct.

OPR's core mission is to protect the public. In recent years, we have also been on the forefront of responding to workforce needs, adapting during COVID and emergencies like this summer's floods, and pursuing progressive occupational licensure policies, such as occupational licensure compacts. OPR regularly offers an "OPR bill" to ensure the statutes governing the agency reflect the changing needs of the 51 regulated professions and the shifting demands and requirements of the public, the federal government, the workforce, and marketplace conditions.

Thank you again for having us here to talk about this year's bill.

Section-by-Section Overview



Section 1 -Title 3: Unauthorized Practice Fees

This amendment removes language directing OPR to use civil penalty fees for board and advisor education and training. The purpose of the amendment is to allow OPR to use civil penalty fees to offset other costs of regulating professions because there is not a great demand or need for board member and advisor education.

Under current state law, licensees fund the regulation of their profession. Fees paid by licensees (for licenses and renewal) are deposited into the Professional Regulatory Fee Fund. The Fund is then used by OPR to pay for costs to regulate the profession (e.g., licensing staff, enforcement).

Section 127(b)(3)(A) is the only statute directing OPR to use the Professional Regulatory Fee Fund for a specific purpose (i.e., for board and advisor education and training). There is not a great need for board and advisor education and training, however. Currently, OPR provides most of the training and education for new and existing board members and advisors. The Office offers quarterly new board member and advisor training to educate members and advisors about their role and OPR's functions and processes. OPR's general counsel unit attends all board and advisor meetings to provide members and advisors guidance on laws governing professional regulation. For more specific needs, our staff offers unique trainings. For example, our enforcement unit recently held a day-long training for board members and advisors on the OPR investigation and disciplinary process. Occasionally, there will also be conferences offered by national professional associations that a board member or advisor wants to attend. Usually, some of those conference costs are covered by the association holding the conference and OPR's Professional Regulatory Fee Fund will cover a portion of the costs. In turn, there is a minimal need for funds to be earmarked specifically for board member and advisor education and training purposes.

By removing the language in 3 V.S.A. 127(b)(3)(A), OPR will be able to use the fees paid by licensees to offset more urgent and relevant costs of regulating that profession, such as enforcement and investigation costs, application reforms, and responding to policy needs (e.g., license waivers during states of emergencies).

Section 2 – Title 3: Inclusion of Inspections in Unprofessional Conduct

This amendment makes it unprofessional conduct for a licensee to “unreasonably” fail to reply, cooperate, or produce lawfully requested records in response to an OPR inspection. Failing to cooperate with an OPR investigation is already unprofessional conduct under Vermont law. The amendment allows OPR's investigators and prosecutors to bring charges against licensees for failing to cooperate with lawful inspections, too.

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Estheticians

Sections 3 through 8 clarify the scope of estheticians and the inspection and licensing authority of OPR for esthetics- and manicure-only shops. The current statutes contemplate that manicuring and esthetics will occur only within cosmetology and barber shops. However, OPR is increasingly seeing shops that only provide esthetic or manicure services. The proposed amendments require these shops to be registered and inspected by OPR and provide the opportunity

to develop rules and inspection standards tailored to these shops and their practices.

Section 3 – Title 26, Section 271: Clarifying Scope of Estheticians and Including Esthetics Shops

This amendment revises the definition of “esthetics” to clarify what practices licensed cosmetologists, barbers, and estheticians are permitted to engage in. OPR has received many questions about the scope of practice of estheticians based on the current statutory definition, including questions about treatments for parts of the body other than the “scalp, face, neck” and regarding whether estheticians can perform injections.

The proposed revisions, based on statutory scopes of practice for estheticians in surrounding states, clarify long-existing policies and guidance provided by OPR to licensees, specifically that estheticians, cosmetologists, and barbers may not engage in the practice of medicine by providing injections or intravenous medications. The amended language is also an opportunity to recognize and allow estheticians to provide services for parts of the body other than the scalp, face, and neck.

The amendments to the definitions would also include esthetics and nail technology/manicuring in the definition of “shops”. This will clarify OPR’s authority to license and inspect nail salons and esthetics-only shops, in addition to cosmetology and barber shops.

Section 4 – 26 V.S.A. § 272: Prohibitions

These amendments make it clear that only cosmetologists, barbers, and estheticians may practice esthetics, and only cosmetologists, barbers, and nail technicians may practice manicuring. These amendments are consistent with the current statutory requirements that a license is required to provide manicure and esthetics services.

Section 5 – 26 V.S.A. § 276: Rulemaking Authority

These amendments again include esthetics and manicuring in OPR’s authority to establish, by rule, sanitary and safety standards and practices for shops and licensees.

Section 6 – 26 V.S.A. § 282: Shop Practice

This amendment provides that esthetics and manicuring, similarly to cosmetology and barbering, may only be performed in licensed shops. There are exceptions to this requirement noted in the statute, including exceptions for special events and nursing homes, and for people who are homebound.

Section 7 – 26 V.S.A. § 283: Examinations

This revision would allow OPR to select examinations, both form and vendor, by rule. This revised language is consistent with laws governing many of OPR’s other professions and will allow OPR to be more responsive to changes in the examination requirements and offerings for a profession (e.g., shifting from practical to online examinations).

Section 8 – 26 V.S.A. § 284: Shop License

This amendment authorizes OPR to issue shop licenses for esthetics and manicuring, and is consistent with the requirement that the practice of esthetics and manicuring occur in a shop.

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Nursing

Sections 9-12: 26 V.S.A. §§ 1624, 1628, and 1645

Sections 9 through 12 propose to update the language in the nurse licensure statutes to be consistent with the current term used in nurse practice for “active practice.” Currently, nurses use the phrases “continued competency” and “ongoing practice” rather than “active practice.” The proposed amendments reflect this.

New Section

OPR would also like to request that the number of the nurse chapter be revised slightly. The current nursing licensure chapter includes a subchapter 3, titled “Registered Nurses and Practical Nurses”, and a subchapter 4 titled, “Nursing Assistants”. However, requirements for RN and LPN licenses are listed under the Nursing Assistant subchapter. For purposes of clarity, OPR requests moving Sections 1622-1629, regarding RN and LPN licensure, to subchapter 3 of the nursing licensure chapter. OPR did not include this request in its draft bill because it was discussing the best method for making this change with legislative counsel. Legislative counsel and OPR agree that this change should be included in the proposed OPR bill if possible.

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Osteopathy

Section 13 – 26 V.S.A. § 1753: Osteopathy Students

This amendment would exempt from state licensing requirements osteopath students currently engaged in an organized clinical training program. The amendment would make the osteopath statute and licensing structure consistent with that of allopathic medical students. Importantly, it will allow students of osteopathic medicine to participate in clinical rotations in Vermont, providing needed access for Vermonters and training for students.

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Radiology

Sections 14 and 15 – 26 V.S.A. §§ 2801 and 2803: Inclusion of Residents in Radiology Technology Exemptions

The proposed amendment would allow “limited temporary licenses to practice medicine” (i.e., interns and residents) to be exempt from radiology technologist licensing or to have a modified pathway to obtaining such a license.

Current law requires almost all people who wish to provide radiology technology services to obtain a license in Vermont. There is, however, an exception to licensure or a modified pathway to licensure for certain defined “Licensed Professionals”. A Licensed Professional may be exempt from separate radiology technology licensing if OPR’s Director, in consultation with the radiology technology advisors, determines that a profession’s practice act and rules match or surpass the training requirements for radiation safety and practices that are required for independent radiology technology licensees. Other Licensed Professionals, whose practice acts and rules do not meet this requirement, may still obtain a specialty license to provide radiology technology to humans if they can demonstrate competency to do so.

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Tattooists and Body Piercers

Sections 16 through 20 of the proposed bill will update the tattooists and body piercers licensing chapter, address independent permanent cosmetic shop licensing, and allow OPR to further regulate apprenticeships for tattooists, body piercers, and permanent cosmetologists.

The reason for the permanent cosmetic shop changes is that, when initially adopted, it was assumed that permanent cosmetologists would always work in a cosmetology or tattoo shop. As the practice of permanent cosmetology has become more common, more shops providing only permanent cosmetology services have been established. By authorizing OPR to separately license and inspect permanent cosmetology shops, the agency can establish licensing and inspection requirements tailored to these permanent cosmetology shops rather than trying to apply ill-fitting cosmetology or tattoo shop regulations to these independent shops.

OPR is also seeking the authority to establish rules for tattooing, body piercing, and permanent cosmetics apprenticeships. The reason for this amendment is to make the requirements consistent with OPR's administrative processes and to prevent abuses in the apprenticeship system.

Section 16 – 26 V.S.A. § 4101: Updating Definitions and Including Permanent Cosmetics Shops

These proposed amendments would strike two redundant definitions that are already included in Title 3, which applies to all professions regulated by OPR: the definitions of “disciplinary action” and “special panel”. Additionally, the amendments to the definitions section would include the practice of permanent cosmetics in shops, allowing OPR to license and inspect shops that provide only permanent cosmetics in a tailored manner.

Section 17 – 26 V.S.A. § 4103: Rulemaking Authority Revisions

These amendments would authorize OPR to make rules for tattooing, body piercing, and permanent cosmetic apprenticeships. OPR has heard on several occasions about situations where a supervisor repeatedly refuses to sign off on an apprentice's hours for licensure. The apprentice then has to choose between leaving the apprenticeship, losing a year or more of work, or remaining in the apprenticeship with the hope that the supervisor will eventually approve the completion of the apprenticeship. There are also incentives for supervisors to retain apprentices and their free labor rather than pay for the employee's time or approve the apprentice to open a competing shop. OPR is thus seeking the authority to establish rules for the apprenticeship programs to mitigate or avoid some of these negative consequences.

OPR is also proposing adding “shops” to our authority to establish rules for temporary licensure. We have recently worked with licensees to hold temporary tattoo conventions and encountered difficulty determining what, if any, shop requirements (e.g., hygiene requirements) would apply to a temporary tattooing location. By adding “shops” to this section, OPR would have the authority to establish such rules for temporary shop locations, such as conventions.

Section 18 – 26 V.S.A. § 4104: Advisor Changes

The current statutes call for the appointment of one tattoo advisor who is a professional in the field of public health or medicine, selected from a list provided by the Commissioner of Health. Since the adoption of this requirement, OPR has not been able to identify a public health or medical professional to serve in this role. Rather than continuing to have this role vacant, OPR hopes to amend this provision so that the advisor panel for this profession includes a tattooist, a body piercer, and a permanent cosmetologist.

Section 19 – 26 V.S.A. § 4105: Licensing Process Amendments

The proposed revisions to subsections (b) and (c) of § 4105 are to allow OPR to adapt its application processes as needed. The current language envisions that there is a form that OPR would have signed and submitted. However, since moving to an electronic system in 2017, OPR no longer has forms. Rather than specify the application format in statute, OPR seeks the authority to establish such procedures by rule.

The proposed amendments to subsection (d) of § 4105 address changes to the shop regulation process needed with the inclusion of permanent cosmetic shops. The amendments include permanent cosmetics in the list of licensees that can be designated as responsible for a shop; clarify where tattooing, body piercing, and permanent cosmetics can be performed; and provide that tattoo and cosmetology shops do not need to get an additional license to provide permanent cosmetic services. The changes would also memorialize OPR's process of requiring licensed permanent cosmetologists to inform the Office of which shops they are working in and, under certain circumstances, allowing licensees to retain their shop license after moving their shop.

Section 20 – 26 V.S.A. § 4108: Unprofessional Conduct Updates

These proposed amendments strike antiquated and duplicative provisions in the tattooing and body piercing chapter, including provisions making “addiction to narcotics” and “habitual drunkenness” unprofessional conduct.

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Electrologists

Section 21 – 26 V.S.A. § 4402: Electrologist Scope of Practice

Similar to the need to clarify the scope for estheticians, OPR proposes these amendments to ensure it is clear that electrologists are not permitted to engage in the practice of medicine, including providing injections or intravenous medications, and may use lasers solely for the purpose of hair removal. OPR feels this clarification is needed based on inquiries the Office frequently receives from licensees. However, the change in statutory language reflects long-standing guidance that OPR has provided in response to these inquiries.

Thank you, again, for the opportunity to testify on this proposed legislation and for your consideration of the bill. I look forward working with everyone on this effort.