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Montana Board of Dentistry:

Re: Public Comment in Opposition to Proposed "New Rule II" published in MAR Notice 24-138-76

The law firm of Jackson, Murdo, & Grant, P.C. respectfully submits this public comment on behalf of the Denturist Association of Montana ("the Association") in opposition to the proposed "New Rule II" published in MAR Notice 24-138-76 regarding the imposition of a direct supervision requirement on denturists who fit dentures over implants.

In summary, the Association has both procedural and substantive concerns regarding the Board of Dentistry's (the "Board") consideration of the proposed New Rule II.

I. Procedural Barriers to the Board Adopting New Rule II.

a. The Board has Not Engaged in the Rulemaking Necessary for Valid Active Supervision to Occur

Procedurally, the Board cannot consider New Rule II for final adoption unless proper active supervision as required by § 37-1-121(1)(d), MCA, has occurred. Proposed New Rule II is designed to restrain the trade or commerce of Montana's licensed denturists to practice their profession, and thus is subject to the active supervision requirements of § 37-1-121(1)(d), MCA. This active supervision requires, among other things, that "the commissioner shall determine if the board action is made or taken pursuant to a **clearly articulated state policy** and if the restraint or potential restraint of trade or commerce is reasonable and necessary to protect the public health, safety, or welfare." (emphasis added).

The Montana Supreme Court has held that when action is taken pursuant to an agency policy that the policy itself must be created via a rulemaking process consistent with the Montana Administrative Procedure Act (hereafter "MAPA"). *See, e.g. State v. Vainio*, 2001 MT 220, ¶ 33, 306 Mont. 439, 35 P.3d 948 (explaining that use of the term "policies" throughout the Montana Code assumes the broad definition of "rule" in MAPA which encompasses agency

policies and therefore is "limited to those policies which have been formally adopted as rules."); OPINION No. 69, 38 Op. Atty Gen. Mont. 240 (holding that the Department of Livestock may adopt new policies interpreting responsibilities under statute only if the "policies" are adopted pursuant to the rulemaking requirements of MAPA.); *S. Mont. Tel. Co. v. Mont. PSC, Dep't of Pub. Serv. Regulation*, 2017 MT 123, ¶ 2, 387 Mont. 415, 395 P.3d 473 (holding that a "rubric" used by the Commission to evaluate requests for protective orders "constitutes a de facto rule subject to Montana Administrative Procedure Act (MAPA) rulemaking requirements").

The Court explained in *Vainio* that "the mere insertion of the word 'policies,' [cannot] implicitly override MAPA's intricate protection of the public's constitutional right to participate in administrative government." *Id.* at ¶ 37. Accordingly, when acting "pursuant to a clearly articulated state policy" as required by § 37-1-121(1)(d), MCA, the Commissioner must be acting pursuant to a policy which has been clearly articulated and created by the Board via a formal MAPA-compliant rulemaking process. As noted in *Vainio*, Montanans have a constitutional right to participate in the process of delineating what that policy is—such policy is not defined by the whims of individual Board members.

Compliance with § 37-1-121(1)(d), MCA, is of **vital** import to the members of the Board, as valid active supervision is what protects the Board members from exposure to personal liability in any lawsuit or Federal Trade Commission investigation for anticompetitive behavior under the federal Sherman Anti-Trust Act. *See N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 135 S. Ct. 1101, 1112 (2015) ("[a] state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear . . . policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct.").

Accordingly, adoption of New Rule II prior to a formal MAPA-compliant rulemaking process delineating and defining the "clearly articulated state policy" by which the Commissioner shall conduct his active supervision would violate § 37-1-121(1)(d), MCA, and would leave the members of the Board exposed to potential Sherman Act liability for anticompetitive conduct.

b. The Board Did Not Meet the Requirements of § 2-4-111, MCA.

Section 2-4-111, MCA, requires the Board to determine if the rule has significant and direct impact on small business. The Board took no affirmative steps to make such a determination but instead merely made a conclusory statement that the rule doesn't significantly affect small business. The Denturists asked the Board for all documentation related to it determination, as was set out in MAR 24-138-76, and the Board provided documentation indicating that it merely recited that no impact would occur without any consideration of any relevant facts or evidence.

In fact, the proposed New Rule II will have a considerable effect on small business. All 19 denturists in Montana are small business men and women. This unlawful, arbitrary and capricious rule will certainly result in the loss of revenue for the denturists' small businesses. As implant retained dentures become the standard of care, this unworkable direct supervision rule

(see the public comment of Dr. John Benion, oral surgeon, made at the October 2, 2019 public hearing on this rule) will continue to undermine and will ultimately eliminate the entire profession in Montana—a profession which Montanans voted by initiative to license in this state in 1984 with the Freedom of Choice in Denture Services Act.

As Dr. Benion also noted, compliance with his rule would create an unworkable economic hardship on dentists and oral surgeons who decide in their professional opinions that their patients are best served by incorporating the services of a denturist to fit implant-retained dentures.

This impact is partially pernicious because in many cases it simply shifts the small business revenue of Montanans across the border to Idaho or Canada where Denturists are allowed to fit dentures over implants without unworkable and unreasonable restrictions requiring direct supervision by dentists.

In addition, this rule will require the citizens of Montana, many of whom own and run small businesses, to pay more for dentures.

The Board barely even paid lip service to § 2-4-111, MCA, and does not to appear to have engaged in any fact finding—even minimal fact investigation would reveal the significant and direct economic impact on small business that would be caused by the imposition of regulation causing unnecessary and extensive travel by a denturist or denturist to comply with the wholly unworkable direct supervision requirements. Such an unworkable regulatory burden would cause significant cost to small businesses.

II. The Substance of the Proposed New Rule II Lacks Statutory Authority, Restrains Trade in a Manner not Necessary to Protect Public Health and Safety, is Arbitrary and Capricious, and Violates Montana's Constitutional Right to Privacy.

a. The Board of Dentistry does not have statutory authority to adopt this rule

MAPA provides, in relevant part, that a substantive rule may not be proposed or adopted unless the rule implements and relates to a subject matter or an agency function that is clearly and specifically included in a statute to which the grant of rulemaking authority extends. §2-4-305(3)(b), MCA. Further, whenever by the express or implied terms of any statute a state agency has authority to adopt rules to implement, interpret, make specific, or otherwise carry out the provisions of the statute, an adoption, amendment, or repeal of a rule is not valid or effective unless it is: (a) consistent and not in conflict with the statute; and (b) reasonably necessary to effectuate the purpose of the statute. §2-4-305(6), MCA. The Department's proposed rules meet neither test.

Montana statute specifically defines the scope of practice for denturists. Section 37-29-102(6) defines the practice of Denturitry as:

(a) the making, fitting, constructing, altering, reproducing, or repairing of a denture and furnishing or supplying of a denture directly to a person or advising the use of a denture;

or

(b) the taking or making or the giving of advice, assistance, or facilities respecting the taking or making of any impression, bite, cast, or design preparatory to or for the purpose of making, constructing, fitting, furnishing, supplying, altering, repairing, or reproducing a denture.

This statutory section does not have any limit on where a denturist may fit a denture nor does it contain a supervision requirement. The statute is clear that a denturist may fit a denture "directly to a person." The statute then goes on to provide what services a denturist is *prohibited* from engaging in. Under § 37-29-402, MCA, a licensed denturist may not:

(1) extract or attempt to extract teeth;

(2) initially insert immediate dentures in the mouth of the intended wearer;

(3) diagnose or treat any abnormalities, except that a licensed denturist may apply tissue conditioning agents;

(4) recommend any prescription drug for any oral or medical disease; or

(5) construct or fit orthodontic appliances.

These are the only items a denturist is prohibited from doing. As long as the act of the denturist falls under the definition of the practice of Denturitry and is not prohibited under § 37-29-402, MCA, then the denturist can provide the service. The Board is not authorized to amend § 37-29-402, MCA, to add out of whole-cloth a sixth restriction prohibiting the fitting of an implant-retained dentures without the direct supervision of a dentist.

Nowhere in the Montana Code is the Board authorized to subject the practice of denturitry to the direct supervision of a dentist. Section 37-29-402, MCA, carved out specific services/procedures from the practice of denturitry. It does not list the restriction now being proposed in New Rule II which would prohibit the fitting of a denture over an implant absent the direct supervision of a dentist.

The Montana Supreme Court has explained "[u]nder the canon *expressio unius est exclusio alterius*, we interpret the expression of one thing in a statute to imply the exclusion of another." *Dukes v. City of Missoula*, 2005 MT 196, ¶ 15, 328 Mont. 155, 119 P.3d 61. As the relevant statute expresses specific procedures which a denturist cannot engage in, it implies the exclusion of any other limitations on the scope of practice defined in §37-29-102(6), MCA.

The Board has in the past asserted that a direct supervision requirement for fitting dentures over implants is similar to the restriction on the practice of denturists in Arizona. That is not true and it actually proves the Association's point. Arizona has a *general*, not direct,

supervision requirement for denturists by dentists, and ***that restriction is imposed by statute***. In fact Arizona's statute defines the entire practice of denturitry as being subject to the general supervision of a dentist. *See* § 32-1294, ARS. Denturists are not independent practitioners in Arizona, as they are in all other states which license denturists. Montana ha snot elected to define the practice of denturitry in such narrow terms, and if the members of the Board wish to change that they must talk to their legislators.

Accordingly, stating that the proposed New Rule II is similar to the status of denturitry in Arizona is both factually inaccurate and irrelevant as the Arizona *general* supervision requirement was legally imposed via statute—not imposed via unauthorized rulemaking.

b. The Proposed New Rule II Restrains Trade in a Manner Not Necessary to Protect Public Health and Safety

Even if the Board possessed statutory authority to further restrict the practice of denturists beyond those prohibitions enumerated in § 37-29-402, MCA, this specific proposed rule would still be illegal. Under § 37-1-131, MCA, the Board cannot take action to restrain trade or competition unless **necessary** to protect public health and safety. We know that direct supervision by a dentist of a denturist who is fitting a denture over an implant is not ***necessary*** to protect public health and safety because this is practice happening daily in every other state which licenses denturists as independent practitioners and the public is not being harmed by the procedure.

The Association has for years asked for examples of harm caused by a denturist fitting a denture over an implant, and for years the Board has failed to identify even one case—let alone provide evidence that allowing denturists to fit dentures over implants in Oregon, Washington, Idaho, Maine, Canada, and across Europe increases the failure rate of implants or any other ailment. Nevertheless, the Board has continued to dogmatically insist that the education of dentists is necessary when fitting a denture over an implant despite the existence of a large data set which indicates that denturists can safely fit implant over dentures without the other training that dentists have.

Esteemed Billings-based oral surgeon, Dr. Benion's testimony at the October 2, 2019 public hearing on this New Rule II further detailed the absence of any public safety justification for this proposed direct supervision requirement.

Moreover, a direct supervision requirement is not necessary because the Board cannot identify how it adds any safety value to a more flexible referral-type rule. A rule which requires patients to obtain a referral from a dentist or oral surgeon prior to having a denturist fit a denture would provide the same protection for public safety. The Board has expressed concern that patients would not return to a dentist for the follow-up care despite instruction from a denturist to do so—but that concern remains regardless of whether a direct supervision or referral requirement is in place. No one can force a patient to attend follow-up visits—a patient must

take some responsibility for their own follow-up care and personal responsibility cannot be forced by rulemaking.

As Dr. Benion noted, the direct supervision requirement not only doesn't protect people but it is wholly unworkable. The proposed New Ruel II would have a particularly damaging and discriminatory impact on rural denturists who can be hundreds of miles away from the oral surgeon who installed the implants.

A rule which essentially makes it *defacto* impossible for a rural denturist to practice denturitry as defined by statute should raise particular alarm in a state which prizes its rural heritage and rural small businesses. **Rural Montanans need more access to care, not less.**

c. The Proposed New Rule II is Not Reasonably Necessary

Additionally, MAPA requires that an agency proposing an adoption or amendment of a rule or rules, must provide an explanation of the reasonable necessity for such rule(s). Reasonable necessity must be clearly and thoroughly demonstrated for each adoption, amendment, etc., in the agency's notice of proposed rulemaking. §2-4-305(6)(b), MCA.

A statement that merely explains what the rule provides is not a statement of reasonable necessity for the rule. *Id.* In its proposed rules, the Department does not even go so far as to explain what the rule provides (which in and of itself is not sufficient under MAPA to constitute a valid statement of reasonable necessity), but rather merely restates what it explained on the first page of the notice - - that it is proposing the amendment of certain existing regulations governing external review, and the adoption of certain new rules. This explanation is likewise insufficient to constitute a valid statement as to the reasonable necessity for the proposed regulations.

For the reasons stated in Section II.b. above, and the reasons detailed in the public comments made at the public hearing on October 2, 2019, this proposed New Rule II is not reasonably necessary and would constitute arbitrary and capricious rulemaking.

d. The Imposition of a Direct Supervision Requirement Invades a Patient's Constitutional Right to Privacy and to Make Healthcare Decisions

"Montana adheres to one of the most stringent protections of its citizens' right to privacy in the United States--exceeding even that provided by the federal constitution." *Armstrong v. State*, 1999 MT 261, ¶ 34, 296 Mont. 361, 989 P.2d 364. Even legislation, let alone administrative rules, which invade this right "must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling interest." *Id.*

The right to privacy includes "the right of each individual to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from the interference of the government." *Id.* at ¶ 39. Proposed New Rule II would significantly interfere with the ability of a patient to make a decision in consultation with her

own oral surgeon or dentist as to whether or not direct supervision of a denturist by a dentist or oral surgeon is necessary when fitting an implant over a denture. A dentist could choose to condition her referral of an implant patient to a denturist on direct supervision if that dentist, in consultation with her patient, decided it to be necessary. An implant patient, in consultation with her treating dentist or oral surgeon, could condition her giving business to a denturist on the direct supervision of her dentist or oral surgeon during the fitting of the denture.

But as *Armstrong* makes clear, a patient has the right to make that healthcare judgment herself. This fundamental right can only be infringed upon if justified by a compelling state interest and must be *narrowly tailored* to effectuate *only* that compelling interest. While public safety is a compelling state interest there is no evidence that New Rule II is necessary to protect the public. Dr. Benion's testimony in particular shows it is not necessary to protect the public, and may in fact have the opposite effect. And the daily examples of this procedure happening in other states, Canada, and Europe without harm show the absence of such necessity. Nor is the proposed rule narrowly tailored, a referral rule could also protect public health and safety.

This intrusive regulation of a patient's decision as to which professional is best able to provide them denture services and under what conditions violates the privacy right of Montanans.

CONCLUSION

For the above stated reasons, and those reason raised by other opponents, the Association respectfully requests the Board reject New Rule II and not impose an illegal restriction on the practice of denturitry which would unlawfully require direct supervision by a dentist in order for denturists to fit dentures over implants.

Very truly yours,

JACKSON, MURDO & GRANT, P.C.

Nathan Bilyeu