

October 26, 2012

Donald S. Clark  
Office of the Secretary  
600 Pennsylvania Avenue N.W.  
Room H-113 (Annex X)  
Washington D.C., 20580

Subject: Pet Medications Workshop, Project No. P12-1201

Dear Mr. Clark,

My name is Matthew Mathis. I am a law student at the University and Arkansas, with an especially strong interest in public service. I have several major concerns with the regulations proposed by H.R. 1406 and the way that it would interact with both current and future laws concerning animals which I would like to share with you. My main concerns are:

- H.R. 1406 opens the door to potential veterinary malpractice.
- The value of animals in the courts is increasing, which will lead to more litigation. H.R. 1406 will promote increased litigation, whereas proper regulation should reduce litigation.
- It forces veterinarians to take actions which are against their best judgment, which is bad for the veterinarian, the pet's owner, and the animal itself.
- It prevents the veterinarian from asking the client to sign a waiver releasing the veterinarian from liability, even when the client is taking the prescription somewhere the veterinarian doesn't recommend.
- The regulations propagated by H.R. 1406 are already suggested by the AVMA, which is the appropriate agency to regulate the practice of veterinary medicine.

My memorandum on the issue begins on the next page. I appreciate the opportunity to comment on the proposed rule. I hope that you will find my research and insight useful, and that you will take them into consideration.

Sincerely,  
Matthew Mathis

## **H.R. 1406 and the Law**

H.R. 1406 opens the door to potential veterinary malpractice for a number of reasons. The proposed legislation would force veterinarians to write prescriptions for pet owners which could be taken to another pharmacy to be filled. Veterinarians would have to do this even if they felt it was against the best interest of the animal. Although it is possible that a large number of these foreseeable claims would lack merit, the large number of potential claims would create a flood of litigation which would clog the legal system for other claims that are meritorious.

Oftentimes, medications need to be administered immediately to animals after a procedure. However, some pet owners may not understand how important it is that the medication be given to the animal that quickly. The pet owner may mistakenly believe that a few hours one way or the other will not make much difference, and may request the written prescription in order to save a few dollars by going to a discount pharmacy. Obviously, this time lapse could have a negative effect on the animal, due to the amount of time that passes between the time the medication should have been given to the animal, and the time that it is actually given to the animal.

Furthermore, written prescriptions can get lost in transit. They can also be forgotten about if something else were to come up before you are able to get to the pharmacy. Also, the pharmacist could fill the prescription incorrectly, or mistakenly advise you on how the medicine is to be administered. The proposed legislation introduces a number of new factors which could contribute to more litigation for veterinary medicine as a whole. Additionally, it prevents the veterinarian from having the client sign a waiver releasing him from liability when they are given a portable prescription, which also removes one of the veterinarian's primary defenses. Whether or not it is actually the fault of the veterinarian, angry and hurt individuals filing lawsuits have a tendency to throw everyone who is involved in the situation into the lawsuit. Even if the claim against the veterinarian is dismissed, this still ties up the time of the veterinarian which he could have been using to save the lives of other animals which are brought into his practice.

## **Veterinary Malpractice**

In order to bring forth a successful claim for veterinary malpractice, four elements must be satisfied. The individual bringing the suit must show:

- 1.) The veterinarian had accepted responsibility for the animal by agreeing to treat it, and therefore the veterinarian owed the animal a certain duty of care;
- 2.) The actions, or lack of action, for that matter, did not follow the professional standard required of veterinarians;
- 3.) The failure of the veterinarian to conform to this standard was, in fact, the proximate cause to the further injury or death of the animal for which the malpractice suit is being brought, and;

- 4.) The injury or death of the animal resulted not just in harm to the animal, but to the individual bringing suit. Downing v. Gully, 915 S.W.2d 181, 183 (Tex. App. 1996).

Forcing a veterinarian to take action which is against their best judgment could open the door to claims for veterinary malpractice. If the veterinarian agreed to treat the animal, and provides a written prescription, and because the prescription isn't filled by the veterinarian something goes wrong, the veterinarian could be liable by not filling the prescription and administering the medicine immediately as he should have.

Veterinarians owe a standard of care higher than most individuals within our society. Unlike laypersons, they are licensed medical professionals with responsibilities and duties parallel to those of medical doctors. Veterinarians are privy to knowledge, expertise, education, and experience which most of us do not have.

The expertise of a veterinarian is a fact which is recognized and respected by most people. This is why we trust them so much with our beloved animal companions in the first place. Because of this expertise, people who use the services of a veterinarian are likely to take their word as gospel, and any recovery made by a sick animal which stems from advice given by a veterinarian is going to be credited to the veterinarian.

On the contrary, if the animal takes a turn for the worse it is likely to be blamed on the perceived ineptitude of the veterinarian, regardless of whether it was caused by a factor inside of the veterinarian's realm of control. Because of this, veterinarians are already exposed to claims by people who are dissatisfied with them because of the services they have rendered unto their pet companions. Introducing another factor which is outside of the veterinarian's control which could potentially expose them to more liability, as farfetched as the potential claim may be, is not only unnecessary, but irresponsible.

### **Animal Value in the Courts**

Due to the trend of increased amounts of damages being awarded by the courts in veterinary malpractice suits, it logically follows that more and more suits are going to be brought against veterinarians for malpractice. The more money a court will potentially award, the more likely an individual will be willing to bring a claim for veterinary malpractice, even if the claim is unlikely to be successful.

Historically, domesticated animals, including pets, have been viewed merely as personal property. Therefore, they had no intrinsic value stemming from the owner's emotional attachment to the animal. The only value attributed to the animal companion was the market value, which could be easily determined by the amount another individual would pay for an identical animal of the same age, breed, and physical condition. Market value was defined as "the price for which an article is bought and sold, and is ordinarily best established by sales in the ordinary course of business. Burgess v. Shampooch Pet Indus., Inc., 35 Kan. App. 2d 458, 463-64, 131 P.3d 1248, 1252 (2006). That being said, due to the fact that most pets are not pedigreed animals, they either would have no market value or a market value which was so low that bringing a malpractice claim would be economically inefficient and not worthwhile.

However, this trend is beginning to change. Courts are beginning to take into account the emotional impact on pet owners which occurs when another person kills or injures their companion. A number of states, such as Florida, New York, and Kentucky are beginning to take into account damages which are a result of the pet owner's loss of companionship from the animal, as well as the emotional distress caused to the pet owner by the injury if their animal companion.

Courts have held that "a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property." Corso v. Crawford Dog & Cat Hosp., Inc., 97 Misc. 2d 530, 531, 415 N.Y.S.2d 182, 183 (Civ. Ct. 1979). Therefore, pet owners are able to collect damages other than simply the fair market value of an animal when they incur emotional distress caused by the death of that animal. Burgess v. Taylor, 44 S.W.3d 806, 812 (Ky. Ct. App. 2001). In Burgess v. Taylor, the court awarded the plaintiff \$125,000 in punitive and compensatory damages for the intentional infliction of emotional distress upon them by the defendant. Furthermore, Tennessee's General Patton Act, Tenn. Code Ann. §44-17-403 allowed the guardian of an animal to seek recovery for the animal's pain and suffering from acts of cruelty, as well as emotional distress and loss of companionship from tortious acts against animals. Following this, Illinois enacted the "Humane Care for Animals Act," 510 Ill. Comp. Stat. Ann. 70/16.3. Damages which could stem from veterinary malpractice are undoubtedly evolving in a way which would allow individuals to collect more and more money from suits.

Courts up to this point have been tentative to award damages for loss of companionship to pet owners. Blauvelt v. Cleveland, 198 App.Div. 229, 190 N.Y.S. 881 (4th Dept. 1921). However, courts "must assess the dog's actual value to the owner in order to make the owner whole." Brousseau v. Rosenthal, 443 N.Y.S.2d 285, 286 (Civ. Ct. 1980). It is undeniable that our animals, specifically companion animals such as dogs and cats, occupy a special place in our hearts, unlike other personal property. It appears as if courts are most hesitant to award damages to where pet owners feel the loss of their companions the strongest; for the loss of companionship.

However, there is an unmistakable trend of courts beginning to understand that the true value of pets cannot be quantified, and their definition as mere property is fading. Courts in many jurisdictions have recognized loss of companionship claims. In Smith v. Cook, the court determined that a loss of companionship claim did exist in Oregon. Smith v. Cook, Civil Case No. CCV0303790, (Cir Ct. 2003). On the same hand, in Greenup v. Weaver, the law-and-motion judge ruled that the claim for loss of companionship damages could proceed to trial. Greenup v. Weaver, Civil Case No. CV 04120778 (Or. Cir. Ct. 2004). Although a different judge sitting as trial judge dismissed the claim on the eve of trial during pre-trial motions, the rest of the claim proceeded to trial and resulted in the plaintiffs' being awarded \$50,000 in punitive damages, \$6,000 for their emotional distress, and \$400 for the value of their dog.

In the future, after the ramifications of the proposed legislation regarding the distribution of pet medications has fully bloomed, it is distinctly possible that pets will no longer be deemed personal property by any means and courts will begin to award damages for the loss of companionship as the norm rather than the exception. As you can see, the value of pets is increasing as time goes on, and many courts are beginning to recognize the value of pets to their owners as a whole rather than simply as property. Due to increased potential pay out of

malpractice suits against veterinarians, it stands to reason that more people will be willing to bring suits that previously would have been unworthy of the risk. Therefore, new legislation should work towards closing the door on potential liability claims against veterinarians, rather than forcing the veterinarians to open up the door to litigation against them for malpractice claims by forcing them to write portable prescriptions which are against their best judgment.

### **Trust Veterinarian's Judgment**

Veterinarians are very well educated, intelligent, and generally experienced professionals. They have knowledge and expertise in dealing with animals that the vast majority of society does not have. Because of this, we trust their judgment above our own. We lay in their hands the lives of some of the most precious, valued things in our lives with faith they will be able to make them healthy again.

The legislation proposed, in a way, is a slap in the face to the veterinarian. It's saying to them we no longer trust your judgment to do what's best for the animal. It takes away a portion of the veterinarian's control over the care of the animal which has been entrusted to them and forces them to write a prescription which can be taken anywhere, even though it may be in the animal's best interest for the prescription to be filled immediately, so that the care and healing of the animal can begin straight away.

The American Veterinary Medical Association already recommends that veterinarians provide pet owners with a prescription that can be filled at another pharmacy. This allows a certain amount of leeway to the veterinarian, so they can use their best judgment in order to provide treatment to the animal. Setting rigid standards for which veterinarians to follow in such a sensitive area is unnecessary. The AVMA exists in order to help provide veterinarians guidelines for their practice. It consists of veterinarians itself, meaning that its members are sensitive to the needs of veterinary practice. The AVMA is much more experienced in veterinary matters than legislators. It makes sense to allow them to regulate themselves, rather than forcing to conform to legislation written by individuals who know little to nothing about the practice of veterinary medicine.

H.R. 1406 should not be passed. It is both unnecessary and redundant. The AVMA already suggests that veterinarians provide portable prescriptions to their clients that can be filled at another pharmacy, if they are asked to do so and it is in the best interest of the animal. This bill would force the veterinarian to write this prescription to be filled elsewhere, even if doing so might deny the animal medicine which is needed immediately. Further, prescriptions written by veterinarians are already governed by state law, again making this legislation unnecessary. Lastly, it makes sense that the veterinarian is the person most qualified to advise and fill prescriptions they write. Forcing it out of their hands is illogical. Decisions concerning veterinary medicine should be left to the veterinarian and organizations which truly understand the practice of veterinary medicine, such as the AVMA, rather than administrative government agencies which are unable to genuinely grasp the complexities of the practice. Therefore, for the reasons stated above, H.R. 1406 should not be enacted.

