OUTSIDE COUNSEL

A Legal Update for Animal Care Providers.

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DONAHUE, TUCKER & CIANDELLA

Does Negligence Equal Legal Fault?

The terms "negligence" and "malpractice" have become words frequently used in everyday life but what do they really mean and do they automatically connote legal liability? The two words are synonymous. The term malpractice is simply the term commonly used to describe professional negligence.

The mere filing of a lawsuit after an accident or injury does not necessarily mean that a veterinarian is legally responsible. In order for a person to be legally responsible for an accident or injury, the person making a claim must first show that the veterinarian was negligent and that the negligence was a legal cause of the accident or injury. The law defines negligence as the failure to use reasonable care. This can be in the form of an act or a failure to act. Reasonable care is the degree of care which an "ordinary prudent" veterinarian would use under the same or similar circumstances. Keeping clear, descriptive and contemporaneous records of your work including the reasons you performed particular procedures helps establish your work as being done with "reasonable care". If you come across a particularly unusual condition and consult with a colleague and you both agree on a course of conduct, document it. This could prove useful should a dispute arise.

If negligence is established, the person making the claim must still establish that the negligence, or failure to use reasonable care, was the legal cause of the accident or injury before he or she is entitled to recover from the veterinarian. In order to establish causation, it must be established that the negligent conduct was a substantial factor in bringing about the harm. It need not be the sole cause of the injury but a substantial factor.

Documenting a patient's pre-treatment condition at the time it arrives at the veterinary hospital helps establish a benchmark which a veterinarian can use to establish non-responsibility for an animal's injuries should a claim of negligence subsequently be made.

Employment At-Will.

Absent an employment contract between the employer and employee New Hampshire and Massachusetts both consider the employment relationship to be "at-will".

The "at-will" relationship means in general terms an employer may discharge an at-will employee at any time for any reason not prohibited by law and that the employee may quit at any time for any reason.

New Hampshire recognizes an exception to the at-will relationship. This involves what is known as the implied covenant of good faith which requires the employer and employee to carryout their obligations in the employment relationship in good faith and with fair dealings. Under this exception the termination of an employee can be consider wrongful if, first, the termination was motivated by bad faith, malice, or based on retaliation. The second requirement for this exception to apply is that the termination was for a reason contrary to public policy. Examples of terminations contrary to public policy include the termination of an employee because the employee refused to violate a law, refused sexual advances of an employer, filed a worker's compensation claim or accepted jury duty. Should an employer breach the covenant of good faith, the termination of the employee would be actionable.

Another exception to the at-will doctrine focuses on the language used in an employee handbook or personnel manual. A poorly drafted personnel manual can create an express or implied contract with employees which will transform the at-will employment relationship into a contractual relationship under which the employer no longer has the ability to discharge at-will. Rather, the employer will be contractually obligated to the terms of the personnel manual. If an employer wishes to have its employees subject to the at-will employment relationship, personnel manuals should be carefully drafted to ensure no express or implied contract is made.

Restrictive Covenants

There are several "restrictive" or "negative" covenants that come up in the employment field. Each serves its own purpose and offers different benefits to an employer. These include non-compete agreements, non-solicitation agreements and non-disclosure or confidentiality agreements. Non-competition agreements are enforceable in New Hampshire and Massachusetts but must be reasonable in their restrictions. Generally, a non-compete will prohibit a former employee from working for or becoming a competitor of the employer. The courts, in determining whether a non-compete is reasonable, will look at the scope (e.g. geographic area) and time period.

Non-solicitation agreements preclude a former employee from soliciting the former employer's customers and/or employees. The former employee is still free to work for a competitor and solicit other potential customers and employees. Non-solicitation agreements are less onerous on an employee and therefore, courts are more likely to enforce them even if not restricted in time and scope.

Non-disclosure or confidentiality agreements limit a former employee's ability to use or disclose information designated as "confidential" or "trade secrets." This is even less restrictive on the ex-employee and courts are more apt to enforce these agreements. Although certain restrictions apply to an employee even if he or she hasn't signed an agreement, having a written agreement is more likely to be enforced by the courts as it will show the employee was aware of the restrictions, the confidential nature of the information, and that disclosure could be harmful to his/her former employer.

These types of negative covenants can be placed in employment contracts or separate standalone agreements signed at the time of hire.

Supposing is good, but finding out is better.
-**Mark Twain**

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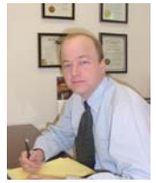

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