

Practical Advice When Faced with VMB Action

by Thomas Redmond, Esq.



Excited about reading another primer on each step taken by the Veterinary Medical Board (VMB) during the process leading up to a citation, fine, or formal accusation? I didn't think so! Instead, let me provide you with a little practical advice on what you can do to avoid or stave off adverse VMB action.

First line of defense. It may be a slight exaggeration, but all experienced defense lawyers will tell you the same thing. Doctors who commit an act of unintentional negligence do not often get sued. Doctors who are abrupt, discourteous, or show a lack of empathy, do get sued even when they were not negligent. The same rule applies to disciplinary proceedings. The first notice that the VMB or its staff have of a problem typically comes from pet owners. So the first line of defense for both veterinarians and staff is to be responsive, courteous, and empathetic in all of your interactions with owners, as well as pets. It is a simple truth that clients who like you and your staff are significantly less likely to complain to a third party, including the VMB, about an adverse outcome in treating their pet.

Good, legible, and complete recordkeeping is your best defense. Incomplete or illegible medical records are one of the most common and frustrating criticisms leveled at veterinarians by the VMB and its staff. I use the adjectives common and frustrating, because you know how it works. Your practice is busy and sometimes chaotic. Your focus, as it should be, is on the quality of treatment, not memorializing after the fact the stellar work you and your staff provided. True or not, that excuse is singularly unpersuasive to the VMB, its staff, and experts. For a variety of reasons, their position is that if it is not in the records, it did not happen. In a fit of candor, investigators or experts may even tell you off the record that they personally believe what you tell them, but their official stance, and that of the VMB, will always be, "If it is not in the records, it did not happen."

Do not "doctor up" your records. Because of the importance of complete and accurate recordkeeping, doctors are sometimes tempted after the fact, to "doctor up" their records by cleaning up short hand notes or adding substantive information to the records that is non-contemporaneous with the act described. It presents a

real quandary for the doctor if a key event that occurred during the course of treatment is not mentioned in the medical records. Do you add to the medical record so that the record is complete or do you stand pat, relying on your ability to persuade staff or the VMB that the event actually occurred and why it was not included in the records? This is always a judgement call and a difficult one at best. It may depend on the precise issue and surrounding facts and circumstances. Obtaining the advice of legal counsel on such a decision may be helpful. Under no circumstances, however, should a veterinarian add a non-contemporaneous note for the purpose of making it look like it was contemporaneous. If you add information to already existing notes, clearly indicate when the note was added. Attorneys who defend doctors for a living will all tell you that they can find a way to defend the truth, but not an attempt at deception. Once you lose credibility with the VMB or staff, you will never get it back.

Make use of available resources. Whenever confronted with a potential investigation, citation, or formal disciplinary action, there are three common factors to consider: the costs incurred in responding or defending; your time and staff's time consumed in responding and defending yourself; and potential adverse outcomes.

The balance of all three factors in any given case can be complex and beyond your control. Professional help may be the best way to ease your burden. Your first step is to contact your insurance company or insurance broker, such as the Veterinary Insurance Services Company. They can tell you whether you have insurance coverage for the incident under investigation and refer you to your insurance company representatives who can answer questions based on their experience. They can also refer you to attorneys who specialize in advising veterinarians or defending them during the investigation. The advice of an experienced attorney can be invaluable under these circumstances. Attorneys who have had experience in dealing with the VMB and its staff may be able to advise you as to your options, tactical defense strategies, and prospects for success on the merits. They can also lessen your burden by representing you directly in interacting

with the VMB and staff to minimize your risks, defend your actions, or negotiate a favorable settlement.

Do not ignore VMB or staff communications. It is somewhat amazing to those of us who represent professionals in disciplinary proceedings how often doctors simply think that if they ignore a VMB inquiry, it will somehow go away. The system does not work that way. In fact, VMB correspondence often requires a response within a fixed number of days. Failure to respond is effectively an admission that you have no response. It also may result in a citation and fine. We find that many doctors look at the VMB communication and decide that they will accept a citation and fine because it appears on its face to be "minor" and not worth the time to fight. This can be a problem which can come back to haunt you later. If you look at the VMB's disciplinary guidelines, fines and citations are progressive in nature. The first citation may not seem important enough to defend, but second and third citations will result in progressively larger and more onerous fines. The VMB will not reduce the fine for a third citation by letting you now challenge the validity of the first or second citation.

Do not assume that the VMB must be right or conversely, must be wrong. For a whole variety of reasons, the VMB, its staff, and attorneys do not always get it right. We often hear from doctors that the VMB would not be threatening a citation and fine or formal disciplinary proceeding unless they had done a thorough investigation and found you guilty as charged. This is not always true. Whether a citation should be issued and a fine meted out by the VMB invariably turns on the facts. Both you and the VMB will likely have different versions of the underlying facts and the burden on both sides is what they can prove, not what they believe the facts to be. Disciplinary proceedings also turn on imprecise concepts like standard of care and expert opinion about which reasonable minds may differ. You may find it surprising that the statutes and regulations under which you and the VMB operate are not always clear. They are often ambiguous, especially as applied to a specific set of facts. That is why getting good help from your insurance company and an experienced attorney may save you in time, cost, and outcome. ■



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