

## **Vetting the Conflict:**

### **Using Disclosure, Apology and Offer to Nip Conflict in the Bud before it Nips You in the Butt**

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In 2015, the American Pet Product Association conducted two studies that measured the impact of pets on their owners lives and pocketbooks. One study listed the total amount of money spent by pet owners in 2015 on animal related care and services at \$60.28 billion dollars. Another study showed that 79.7 million of US households own some kind of pet. . [[http://www.americanpetproducts.org/press\\_industrytrends.asp](http://www.americanpetproducts.org/press_industrytrends.asp) The sky is the limit for veterinarians in this deep pet friendly market. They can practice their craft on small and large animals as well as exotics.

In such a large and broad environment, conflicts are bound to occur. Bedside manner may not be all it could be one day or there may be misunderstanding in the transmittal of information. These misunderstandings and breakdowns in communication can lead to possible conflicts arising between veterinarians and their client. Sometimes these small conflicts escalate into full blown litigation, through no fault of the veterinarian or pet owner.

Vets are systematically told by medical malpractice insurance companies to avoid the conflict conversation in situations described above. They prefer to let 'sleeping dogs lie,' and handle the conflicts themselves only when and if necessary. By doing so, small conflicts often escalate into bigger ones when left unaddressed by veterinarian or the insurance company. Typically, the insurance company waits to be sued and instructs the veterinarian not to speak about the pending incident. Frequently, large amounts of money are expended, on both sides of the conflict, because of this lack of communication. There is a perceived disrespect fuelled by the resulting inability to initially speak about the problem that stokes the fires of litigation.

In a recent article in the Milbank Quarterly, *Disclosure, Apology and Offer Programs: Stakeholders' View of Barriers to and Strategies for Broad Implementation*,<sup>(1)</sup> medical community stakeholders from across the board were interviewed about the reality of implementing the Disclosure, Apology and Offer Program in medical malpractice situations. The article confirmed, what those working in medical venues already knew. Parties are ready to shift they handle medical issues arising from services rendered. The parties on both sides want to be heard. They want to acknowledge each other and minimize the trauma of the event and the future trauma of reliving it in litigation. Veterinary medical malpractice providers may want to lend an ear to this valuable discussion.

In the Milbank Tweed article, it was evident from interviews with medical community stakeholders that they wanted to encourage listening and learning thereby providing a huge win for all parties involved. Current veterinary medical malpractice procedures call for none of the above if future litigation is possible. Veterinarians are systematically told not speak to disgruntled clients. Yet, the Millbank article indicates that in human malpractice disputes, such preliminary conversations often lead to a reduction in overall costs and awards in future similar outcomes. The Milbank Tweed's article quoted a state official as saying, "Let's really look at what happened. Let's get it out in the open

and let's have a good conversation. The next time, it's less likely to happen." For insurance companies to continue a practice of ostrich management (pun intended), awaiting a lawsuit in veterinary disputes before discussing with the parties any of the details of the conflict, is foolhardy.

Right now, veterinarians can make a personal choice to speak with their angry clients. However, to do so may be against their insurers' advice, thereby possibly negating coverage and without the confidentiality protections afforded the discussion by using alternative dispute resolution processes. This personal choice could be supported by two alternative dispute resolution (ADR) remedies, mediation and collaborative practice. Each provides for these conversations to be conducted in a confidential setting. In other medical venues, insurance companies are learning that, by having these initial conversations, using an ADR platform results in awards that are less and relationships that are retained among the insurance company, the medical practitioner and their patients. Right now, the ADR thought process has not systematically carried over to veterinary medical malpractice. Insurance companies are not yet allow their clients, the vet, to have a confidential conversation with their clients, the pet owner, using an ADR platform to try and settle the conflict, similar to their medical counterparts. This results in the possible/probable loss of a patient regardless of whether they sue or not and a displeasure with the insurance company on the part of the veterinarian.

As with all businesses, it is important for veterinarians to retain their patients, retain the respect and responsibility for their practice and feel good about how they respond to the needs of their clients, staff and colleagues. The insurance companies' failure to provide veterinarians with an opportunity to safely and confidentially speak about a conflict, before they are sued, fuels unnecessary discord.

### **Three Potential Barriers To Implementation**

There are three potential barriers to the use of the Disclosure, Apology and Offer Program in veterinarian medical malpractice.

#### **Pets as property**

The fact that pets are, for the most part, still seen as property under the law promotes a lack of motivation on the part of insurance companies to have a realistic discussion involving compensation for the loss of an animal. Insurance companies focus on the lack of proof of malpractice. The replacement value of that pet is minimal. Insurance companies often do not allow a conversation among all interested parties until someone sues someone else. In their opinion there is nothing to discuss until a claim is filed appropriately.

However, with 79.7 million US households own pet and \$60.28 billion dollars was spent on caring for those pets in 2015, there is money out there waiting to test this 20<sup>th</sup> century theory of animal valuation. Current veterinary malpractice processes fail to capture the gravity of the human emotion driving the actions of pet owners. It is foolhardy to believe that parties spending as much money as they do on the care of their animals will not defend those same animals against unexplained wrongs. It is only a matter of time until our domesticated animals at the very least, and all animals at most, will be valued at greater than replacement value. Therein lies the insurance conundrum.

Implementing an intermediary process, like the one discussed in the Millbank study, would meet the emotional and value needs of the pet owner for their pet while limiting the financial exposure of the insurance carrier. Money is already being spent to defend mistakes made by veterinarians, either real or perceived. Most conflicts surrounding animals are based in emotion. Facts play a part, but the high octane fuel for the conflict is the emotional bond present between a pet and their person.

### **Insurance Companies are not open to change**

Veterinary medical malpractice insurance companies seem to refuse to recognize the emotional value people put on their pets. Courts have been slow but are moving toward a recognition of the intrinsic value of pets as both health care providers and emotional support dogs especially for people with disabilities and depression. It makes sense to create a space where discussion can occur between all the parties either as pre-filing requirements or standalone confidential discussions. The process created will support everyone involved.

In most veterinarian medical malpractice cases, client and veterinarian can and would work out their conflict among themselves if given the opportunity to have a meaningful discussion. Insurance companies can be more responsive to the needs of their client, the veterinarian, both financially and emotionally by allowing for such discussions. Veterinarians want to retain their client, spend as little money as possible to settle or defend an action and make whatever changes feel right, from suggestions made by the client, because it may make their practice better.

The parties to the process can then use any of several forms of alternative dispute resolution to initiate their conversation in a safe and confidential setting. In collaborative practice parties hire their own counsel, who has chosen to forego their right to litigate this matter on their client's behalf. In mediation the parties have a much needed discussion, in a confidential environment, with or without their attorneys. Post mediation, if an agreement is not reached, the parties can take the case to litigation if they so choose. Studies have shown, litigation post-mediation is more amicable and the agreements reached afterwards sustainable. As a matter of process, each party feels supported, heard, respected and understood in mediation. They now need the court only to hammer out some outstanding roadblocks to an agreement.

### **Pet Owners not open to Compromise**

Finally, the passion of a pet owner for protecting and championing their animal often leave them initially unavailable for discussion or compromise. These owners should be afforded the opportunity to 'cool off' and consider the long-term benefits of litigation in comparison to the short term incremental changes that may come with ADR. Pet owners often want to take down an entire institution because of their emotional distress over the loss of their pet. In response, insurance companies end communication to assure they are not placed in an untenable position by the inadvertent admissions of a veterinarian. By engaging in a valuable and supported confidential discussion, using ADR, all parties may find a better vantage point from which to view their individual interests. This platform may help them realize the intrinsic value in finding an outcome workable to both of them.

## **Conclusion**

One or all of these three barriers may, in fact, be insurmountable. Hope remains that while we watch the human medical malpractice community change to a more communicative, responsive and reactive practice, the veterinarians' malpractice providers will respond in kind. Each group will benefit by creating a space where discussions can be had, resolutions made, relationships retained and understanding communicated between the parties.

<http://media.americanpetproducts.org/press.php?include=143498>

[http://www.americanpetproducts.org/press\\_industrytrends.asp](http://www.americanpetproducts.org/press_industrytrends.asp)

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