

WHO'S WATCHING THE HOUSE?



Presented by:
Charlotte A. Lacroix, DVM, JD
Veterinary Business Advisors, Inc.
Whitehouse Station, New Jersey
Tel: 908-534-2065

Issue and Plan

- Issue: What are the liability risks associated with a veterinary teaching hospital/private specialty practice, if there is no boarded specialist available to treat/supervise tx of a patient?
- Plan:
 - 9:00-10:30 Lecture exploring the issue
 - 10:30-10:45 Break
 - 10:45-12:00 Panel discussion

Megan
Nunemacher



Mary Clark



University of Pennsylvania Class of 2008
Veterinary Business Advisors, Inc., Externs

Gregory M. Dennis, JD

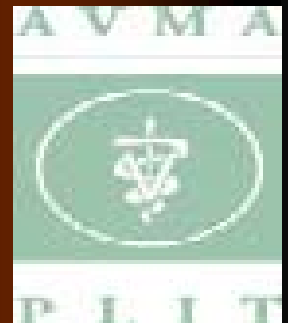


- Kent T. Perry & Co., L.C.
Attorneys and Counselors
- Legal research contributor
- Past President American Veterinary Medical Law Association (AVMLA)

Support



THANK YOU



Mrs. Love and Petie the Poodle



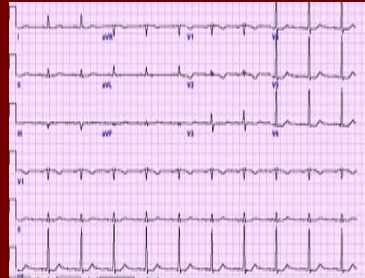
Mrs. Love and Petie the Poodle

- Chest radiographs taken by Mrs. Love's local DVM indicated that Petie had an enlarged heart
- The DVM referred Mrs. Love to University Veterinary Hospital (UVH)



Mrs. Love and Petie the Poodle

- A 2nd year cardiology resident at UVH examined Petie and performed a thorough diagnostic work-up, including



- The resident formulated a diagnosis and recommended a treatment plan to which Mrs. Love consented



Mrs. Love and Petie the Poodle

- Two days before his recheck appointment, Petie died from heart-related causes



- Necropsy reports failed to confirm the resident's diagnosis



Mrs. Love v. UVH

- Mrs. Love files a
 - Civil lawsuit against UVH and resident
 - Complaint against UVH and the resident with the State Board of Examiners
 - [Complaint with the Bureau of Consumer Affairs]
- The attorney discovers that there were no board certified cardiologists present on the day that Petie was seen, nor were any ever consulted



Mrs. Love v. UVH

- Mrs. Love's attorney claims that UVH is guilty of malpractice, breach of contract and fraud:
 - UVH advertises a full service cardiology department operated by board certified cardiologists
 - yet UVH failed to disclose that no cardiologists were present during Petie's evaluation
 - UVH's representation was a major factor in Mrs. Love's decision to bring Petie to UVH
- Mrs. Love claims the resident is guilty of malpractice and misrepresentation:
 - accepted a case that was beyond his expertise and failed to disclose his inexperience



Survey of Veterinary Schools

- 20 of 28 responded
- Is a policy in place?
 - 14 veterinary school hospitals have recognized that specialist absence is indeed an issue and have adopted policies, either written or verbal, that provide guidelines for how to continue providing services when specialists are away



Survey of Veterinary Schools

- Of those 14, 10 require that at least 1 specialist remain at the hospital to supervise the care of hospitalized patients
- 2 schools explained that this coverage may be provided by specialists in other departments; for example, internal medicine specialists may temporarily manage the cardiology department
- 6 schools stated that they will permit residents to run the department if the specialists feel that the resident is competent enough to handle the responsibility



Survey of Veterinary Schools

- Differences based on department size
 - 9 schools impose different coverage requirements for departments based on the number of specialists within the department.
 - These schools allow smaller departments (2 or fewer clinicians) to shut down so that all of the specialists can attend their only CE meeting. No regular appointments are scheduled during these times.
 - Most medium and large sized departments (3 or greater specialist) remain open and at least one specialist stays behind to provide patient care, supervise residents, and instruct students.



Survey of Veterinary Schools

- Adjustments in scheduling
 - Regardless of the size of the department, when multiple specialists are away, the department is likely understaffed
 - All but 1 school explicitly stated that they make efforts to reduce the specialists' case loads by:
 - decreased scheduling of regular appointments
 - accepting emergencies only
 - referring cases to other universities or specialty practices



Survey of Veterinary Schools

■ Emergencies

- All schools either stated or implied that they will continue to accept emergency cases even if a department is technically closed



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Survey of Veterinary Schools

- Notifying the rDVM
 - 11 of the schools confirmed they notify referring veterinarians if they wish to refer a client at a time when there are no specialists available to accept the case
 - 1 school specified that it posts such notifications on its website, which is then available to any veterinarian interested in referring a case



Survey of Veterinary Schools

- Documentation of rDVM communications
 - Of the 11 schools that notify referring veterinarians, only 4 schools confirmed that they document this communication in their records



Survey of Veterinary Schools

■ Notifying clients

- 8 schools reported that they notify clients when specialists are away
- 1 school stated that they leave this to the discretion of the rDVM
- 1 school stated they only notify clients, who ask for a specific clinician when that clinician is unavailable



Survey of Veterinary Schools

- Documentation of Client Notification
 - Same 4 schools reported that they document the communications with clients
 - None of the schools reported the use of informed consent forms that verified the clients' awareness that their pet may not be seen by a specialist



Survey of Veterinary Schools

■ Concerns for liability



- Responses indicated that there is a general concern for liability amongst schools, but only 4 schools indicated that they had specific concerns regarding this matter
 - **Lawsuits; not meeting client expectations due to poor communication; properly informing clients of specialist absence**



Survey of Veterinary Schools

- Concerns for liability



- Of 11 schools with policies in place, most felt that these policies protected them from lawsuits
- Some of the other schools rely on the assumption that clients understand that seeking care at a veterinary teaching hospital, means that their pets may not always be under the direct care of a specialist

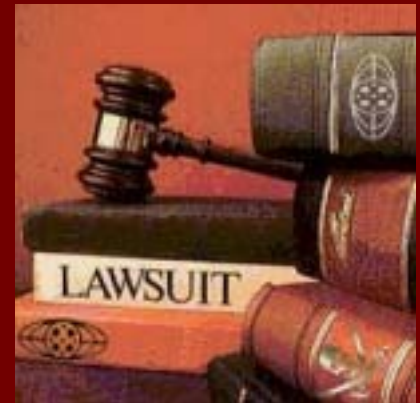
- Begs the question: What is the client's expectation?



Legal Liability

■ Potential legal claims

- Ordinary negligence
- Professional Negligence
- Comparative negligence/fraud
- Violation of the informed consent doctrine
- Fraud (intentional misrepresentation)
- Negligent misrepresentation
- Breach of express warranties
- Breach of implied warranties of fitness for a particular purpose
- Applicability, if any, of a state consumer protection law covering or not covering representations about specialists being on staff



But that won't happen to us...

GOD



DOG

Austin v. State

(The only case Greg Dennis could find that had related fact pattern)

- A local vet referred a dog-owner to the University of Illinois for chemotherapy treatment
- April 8, 1997 dog was treated at the university and responded well
- When the dog-owner returned the following week for a 2nd chemo administration the veterinary oncologist was not present
- The dog then relapsed
- During the 3rd visit, the veterinary oncologist was again present. The oncologist changed the protocol from the initial visit to that which local vet had been administering
- Ultimately, the dog died



Austin v. State

- During litigation, the university could not establish that dog had received the specific drug protocol that was administered during the first visit when the dog was presented for the 2nd visit.
- The dog-owner succeeded on his breach of contract claim based on this discrepancy
- The dog-owner's malpractice claim was unsuccessful as his local veterinarian testified that he could not say to a reasonable degree of certainty that the university had departed from the standard of veterinary care.
- In the end the university was at fault because of the inadequacy of its veterinary medical records, and their inability to prove that the dog was administered the specific drug protocol on his 2nd visit.



Legal Liability

- Let's re-examine the example of Mrs. Love and Petie.
 - Petie's case was managed by a 2nd year cardiology resident
 - None of the boarded cardiologists were contacted for consultation
 - The resident's treatment plan was not successful in treating Petie's condition nor did his diagnosis correlate with the necropsy findings



Legal Liability

- How would the plaintiff's attorney demonstrate medical malpractice in Petie's case?
- Malpractice falls under Tort Law and requires the plaintiff to establish 4 elements by a preponderance of the evidence:
 - (1) duty of care to the client
 - (2) breach of standard of care
 - (3) injury to the client
 - (4) a causal connection between breach of standard of care and the injury suffered



Legal Liability



Would a more experienced, board-certified clinician have managed Petie's case differently?

Does managed differently mean that the case was not handled within the standard of care expected of a resident?

- **There are undoubtedly occasions when information obtained by performing physical exams and diagnostic tests can suggest multiple diagnoses.**
- **Specialist would likely support the resident's actions if the treatment plan was appropriate for one of the diagnoses on the list of likely differentials.**



Legal Liability

- **Are residents held to the same standard of care as specialists?**
 - This may depend on whether or not residents represent themselves as having the same qualifications as being boarded.
- **Many state practice acts and/or board regulations make it unlawful or unprofessional conduct for a veterinarian to advertise, represent and/or imply that he or she is board certified in a particular specialty unless he or she, in fact is boarded**
- **Would this same provision apply to veterinary schools that advertise a particular specialty, if they do not alert clients when specialists are unavailable to manage patient care?**

Jistarri v. Nappi

- This case involved a claim that an orthopedic resident had been negligent in how he applied a cast to a patient's broken wrist without providing adequate padding and thereby causing an ulcer to develop.
- Defendant-resident won at the trial court level, but the plaintiff appealed arguing the trial court had not instructed the jury that the standard of professional care owed by a resident was that of a specialist. In rejecting this argument, the intermediate Pennsylvania appellate court concluded:



Jistarri v. Nappi

"...the trial court did not err in instructing the jury to apply to [the orthopedic resident] a standard of care higher than that for general practitioners but less than that for fully trained orthopedic specialists. Such an instruction recognizes that [the orthopedic resident] has had more training than a general practitioner but less than a fully trained orthopedist.

To require a resident to meet the same standard of care as a fully trained specialist would be unrealistic. A resident may have had only days or weeks of training in the specialized residency program; a specialist, on the other hand, will have completed the residency program and may also have had years of experience in the specialized field.

If we were to require the resident to exercise the same degree of skill and training as the specialist, we would, in effect, be requiring the resident to do the impossible."



Jistarri v. Nappi

- In its conclusion, the court indicated that while its ruling might be favorable to residents, it did not mean a hospital could escape liability for the negligent acts or omissions of a resident.

“In so holding, we do not deny ‘the reality...that the vast majority of the day-to-day treatment which a patient receives is rendered by a resident employed by the hospital,’ *Pratt v. Stein*, 298 Pa. Super. [92,] 157, 444 A.2d [674,] 708 [(1982)],



Jistarri v. Nappi

- *....nor do we leave plaintiffs without recourse if a situation arises in which a resident has been given responsibilities that exceed the level of skill and training reasonably to be expected of one who is still learning his or her specialty.*
- *The ultimate responsibility for the training and supervision of residents lies with the employing hospital, and it is to the hospital that a plaintiff must turn in such a situation."*
 - *Vicarious liability*
 - *Dept chairs...what do your contracts say about indemnification?*



Ethical Obligation



- **AVMA Principles of Veterinary Medical Ethics state it “is unethical for veterinarians to identify themselves as members of an AVMA recognized specialty organization if such certification has not been awarded.”**
- **Generally, the *P.V.M.E.* does not have the force-of-law unless it has been expressly adopted by a state veterinary board as a part of its regulations.**
- **Some states, while not formally adopting the *P.V.M.E.*, have declared that it may be used as a guide.**
- **Other state veterinary boards, while neither formally adopting the *P.V.M.E.* or declaring that it may be used as a guide, have effectively done so through disciplinary decisions.**

Somberg v. Sobol

- A physician's license was suspended for one-year and he was fined \$10,000.00 for having falsely stated that he was board-certified in internal medicine and cardiology.
- In the previously mentioned case of *Jistarri v. Nappi* the court stated, "...research into the law of foreign jurisdictions has revealed a dearth of case law on the standard of care to be applied to a resident. The courts of California have held that a resident who holds himself out as a specialist shall be held to the standard of skill expected of a specialist, even though the defendant physician had completed only one-third of his residency.



Legal Liability

- These examples serve as a caution and should encourage residents to commit to the practice of fully disclosing their level of training whenever they introduce themselves to clients.
- Likewise, universities should take care not to misrepresent their residents' capabilities.
- It takes only a moment to say "Hi, I am Dr. X and I am a X year resident in X-ology," or "Dr. X, an X year resident in X-ology, will be caring for your pet today."



Legal Liability



- BUT, is there an obligation to disclose?
 - Obligation to disclose is more onerous than simply refraining from misrepresentation
 - Review state practice acts and regs
- These may vary from state to state, but will help determine whether or not veterinary school hospitals are vulnerable to lawsuits based on allegations stemming from the negative outcome of a case that lacked boarded specialist supervision or input.
- Ethical obligation?

Legal Liability

- The same allegations of misrepresentation may be applied to veterinary schools that advertise they offer a particular service even if their specialists are unavailable at the time when patients are presented for care.
- Veterinary teaching hospitals who claim, by any means, that they have specialists on staff should be certain that their representations are not misleading.
- Their advertisements should indicate that specialists may not always be present at the facility, or available to respond to a call.

Atkins v. Children's Hospital of Alabama

- This was a multimillion dollar wrongful death action against a hospital arising from the death of a child, supervising board-certified physicians and treating residents.
- While liability was found against the hospital and a treating resident (but not the supervising board-certified physicians) for malpractice, the jury returned a verdict against defendant-hospital on the parents' claim it had misrepresented to them that their child would be treated by a board-certified pediatric surgeon when, in actuality, he was treated by "medical students, unlicensed physicians, and others."



Foster v. George Washington University Medical Center

- In this case the Court of Appeals for the District Court Columbia ruled it was proper for the trial judge to have instructed the jury on the plaintiff's claim that a part of the defendant-hospital's negligence was in allowing a resident to perform the delivery of a baby without first obtaining the plaintiff-mother's consent for the resident to do so.



Legal Liability

- The *Principles of Veterinary Medical Ethics*, IX: *Advertising*, declares that false deceptive advertising or misleading statements or claims, are unethical.



Legal Liability

- Like the *P.V.M.E.*, state veterinary practice acts and/or board regulations tend to have provisions prohibiting veterinarians from making false or deceptive statements or statements likely to deceive or mislead the public in their advertisements.
- Some states have held that the prohibition on false, misleading or deceptive advertising does not require a showing that a professional *intentionally* did so; that a *negligent* misrepresentation may be sufficient to constitute a violation of these legal prohibitions.



Denaro v. New Haven Central Hospital for Veterinary Medicine

- An intern, upon examining a German shepherd, determined the animal required a caesarian section
- The intern phoned the on-call surgeon, who, according to lawsuit, did not show up until 90 minutes later, by which time 4 of the 6 puppies were dead



Denaro v. New Haven Central Hospital for Veterinary Medicine

- The dog-owner sued alleging the veterinary hospital and surgeon were negligent because the surgeon did not arrive at the hospital in a timely manner and sought damages for the loss of the stillborn pups.
- The veterinary surgeon did not answer the lawsuit and was found in default.
- At the time of the trial, the plaintiff dismissed the hospital and the intern and asked for damage award against the surgeon, but because the plaintiff did not have an expert witness to establish what those damages were, the Connecticut court only awarded her nominal damages of \$1.00.



Legal Liability

KEEP IN MIND:

Whether intentional or negligent, misleading or deceptive representations or advertisements that a client relied upon, can lead not only to disciplinary action but also civil liability

A white box truck is shown from a side profile, moving from left to right. The side of the truck's cargo box is painted red and features white text. The text reads "Sick of Lawsuits?" in a large, bold, sans-serif font. Below this, in a smaller font, is the website address "www.SickOfLawsuits.org". The truck is on a paved road with a grassy area in the foreground and a white building in the background.

**Sick of
Lawsuits?**

www.SickOfLawsuits.org

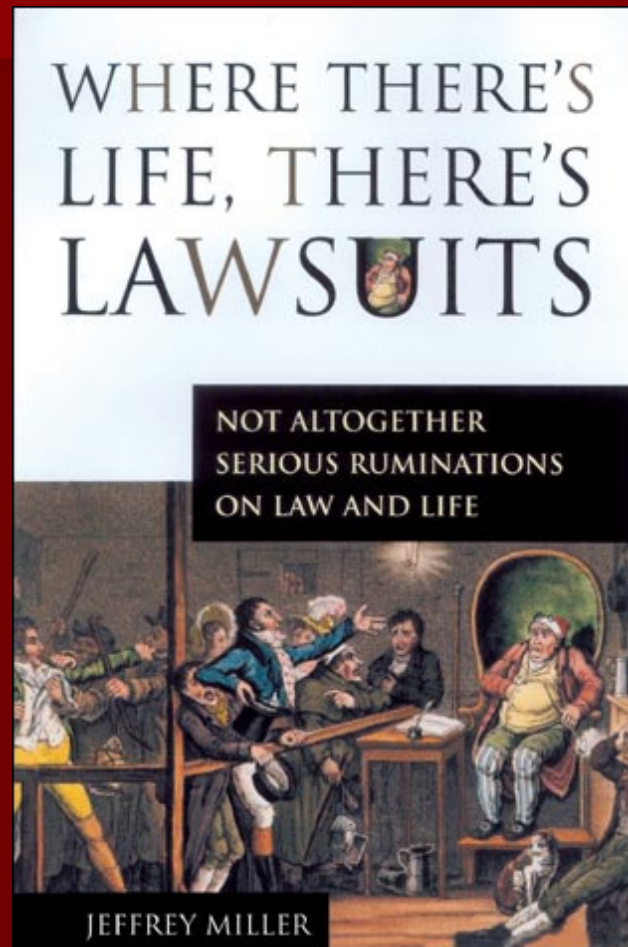
You can't eliminate them but they can be reduced by identifying and managing the risks that lead to them

Don't worry, we want to help!



- In order to assist veterinary schools in managing these risks, we have proposed a written policy, which may be altered to suit the individual needs of the hospital.
- One person should be designated as the facilitator in having final say if situations arise where there is inter-departmental disagreements regarding coverage.

Legal Liability



- Even if the concern for liability and/or lawsuits in these cases is considered to be minimal, it is best to have the protection in place.
- This is especially true considering that we are becoming an increasingly litigious society with each passing day.

Proposed Guidelines

Protections



- In addition to adopting written policies, veterinary schools should ensure that all of their clinicians (interns, residents, general DVM, and specialists) maintain insurance policies for medical malpractice as well as license defense.
- State veterinary colleges are often covered by a state self-insurance program. Claims of veterinary malpractice are usually covered by these programs.
- If a lawsuit alleges both malpractice and fraud, most liability insurance companies will not cover a judgment predicated upon fraud.
 - For example, the AVMA-PLIT policies exclude from coverage claims alleging dishonest or fraudulent activities.
 - Would they cover negligent misrepresentation?

Proposed Guidelines

Coverage Requirements



- **The coverage requirements for individual departments will be based, in part, on the number of specialists which provide service for that department.**

- **Departments with 2 or fewer clinicians shall be permitted to temporarily close the department.**
 - **This time period shall not exceed 3 regular appointment days.**
 - **If the university does not operate an emergency service, the specialty service is responsible for arranging coverage for accepting emergency cases.**
 - **At the discretion of the head of the department, coverage may be performed by competent residents or specialists from other departments.**
 - **The department may also choose to maintain a database of specialists at other hospitals for the purpose of referring emergency cases to these clinicians.**

Proposed Guidelines

Coverage Requirements



- If a department/hospital permits residents to manage patient care without direct supervision of boarded faculty at times when all the specialists of a dept are out of town and unable to return to the hospital in a timely fashion, then at least one should be available for telephone consultation.
- Departments with greater than 3 boarded clinicians should schedule their planned absences (vacation, CE attendance, etc.) so that at least one boarded person will be on the premises during regular appointment times to provide supervision to residents, interns, and students in seeing appointments and managing hospital cases.

Proposed Guidelines

Coverage Requirements



- In order to plan for these occasions, hospitals may wish to require that all boarded clinicians submit their (a) CE requests 1 year in advance and (b) vacation requests 60 days in advance.
- We recognize that, even with the best intentions, times may arise when no specialist is available to be on the premises. In this case, hospitals should request that a specialist remain accessible, and able to arrive within a specified amount of time (**30 minutes?**)

Proposed Guidelines

Provisions for decreased coverage



- All efforts should be made to schedule appointments only when a board certified clinician will be at the hospital.
- Reduce case load by decreasing appointment scheduling when there are fewer than normal numbers of specialists available
- Departments should maintain a list of alternative referral institutions for their respective specialty and refer clients to these institutions when the department is unable to provide appropriate veterinary services.
 - Hospitals should recognize that this may not be a feasible solution if a hospital's specialists are away because they are attending their only annual meeting, as it is likely that other specialists in the area are also attending the meeting.
 - ie, ophthalmology
- Departments may choose to offer services on an emergency only basis.

Proposed Guidelines

Notifying rDVM



- Receptionists should
 - notify rDVM of specific dates when specialist(s) will be unavailable to see appointments in the requested department
 - document this communication

- Universities may wish to utilize the World Wide Web to distribute this information on their homepage, by adding a calendar highlighting days when specialists will be unavailable for each department
 - This would make the information readily available to rDVM and easily updated by the webmaster.

Proposed Guidelines

Notifying Clients



- If the hospital has chosen to allow residents to see appointments while the specialists from that department are away, then when the appointment is made, the receptionist should inform clients that their pet will be seen by a resident or specialist of other department.
- Client should verbally consent to this and receptionist should document this communication.
- If a computer system is used for scheduling purposes, it may be possible to add a feature that prompts receptionists to notify clients when trying to schedule an appointment on a date when boarded clinicians are unavailable.

Proposed Guidelines

Benefits vs. administrative burden



- The hospital may wish to adopt further practices to ensure clients are informed that their pet's condition may be managed by a non-boarded clinician, for example:
 - (a) repeat disclosure when clients are called to confirm appointments
 - and/or -
 - (b) when clients check in for the appointment, have them sign a form acknowledging the disclosure
- The benefit of these measures must be weighed against the increased administrative burden placed upon hospital staff



Proposed Guidelines

Emergencies



- If the hospital's policy is to permit residents or specialists from other departments to accept cases on an emergency basis, the hospital may wish to include a provision in their admission sheet, stating the hospital is willing to accept the case and will attempt to stabilize the patient, but there are no _____-ologists available to address the patient's specific _____-ology problems.

Proposed Guidelines

Client Consent



University veterinary hospitals should

- obtain written informed consents of the owners, that their pet may be treated by an intern or resident and might not be treated by a specialist in the particular specialty for which the owner has brought the animal to the hospital.
- inform the owner, in writing, that over a continuing course of treatment or hospitalization, the animal might not always be directly managed by a specialist. Further, on rare occasions, specialties may be unavailable.

In Summary

- There is no question that veterinary schools and their associated hospitals are dedicated to providing outstanding quality veterinary care.
 - Although research and teaching are also priorities
- In striving to maintain this goal, university hospitals employ specialists committed to furthering their educations and training on a continual basis. Unfortunately, this means that specialists are occasionally absent from the hospital attending meetings and CE conferences.

In Summary

- Veterinary school hospitals should acknowledge occasions when the departments they advertise are not staffed by specialists. One of the main reasons for doing this is to protect themselves from any lawsuits that may arise should a resident lack supervision on a case for which there is a negative outcome
- It seems reasonable that universities would make every effort to ensure that they are protected, especially when presented with a policy that may be easily amended to fit the individual hospital

Whether Schools/Private Practices Address This Issue Will Depend on Their Perception of the RISK.....

- Are we dealing with a situation, where

An OUNCE of prevention is worth a POUND of cure

Or

A POUND of prevention is NOT worth an OUNCE of cure.....it's cheaper to treat the disease

Welcome Panelists

- **Mimi Arighi, DVM, DACVS -Outgoing president of the AAVC, Hospital Director- Purdue University- representing LA specialists and AAVC**
- **Marilyn Stiff, DVM, DACVIM- Chair of the Board-ACVIM, Representing specialists in practice**
- **Rodney Johnson, DVM – Trustee AVMA-PLIT, representing the malpractice insurance industry**
- **Boyd Jones, BVSc, FRCVSc, DECVIM, MRCVS-Professor of SA Clinical Studies Veterinary Sciences Ctr University College Dublin, Ireland**
- **Keith Richter, DVM, DACVIM-owner and practicing specialist in San Diego; representing specialty private practice**
- **Michael Schaer, D.V.M., DACVIM, DACVECC; Professor and Assoc. Chair University of Florida, College of Veterinary Medicine**

Thank You AAVC



Charlotte Lacroix DVM, JD
Veterinary Business
Advisors, Inc.
Tel: 908-534-2065



Dr. Charlotte Lacroix is a veterinary attorney and CEO of Veterinary Business Advisors, Inc., in Whitehouse Station, NJ. She consults with veterinarians and attorneys nationwide on veterinary legal issues, with a focus on veterinary business transactions, including specialty practices. Dr. Lacroix advises on selecting and forming business entities; structuring buy-ins, acquisitions and practice mergers; negotiating and facilitating the sale and purchase of veterinary practices; preparing buy-sell documents, employment agreements, commercial leases; mediating disputes, and advising on malpractice cases, as well as, employment and animal law issues. She also lectures worldwide on these topics and has authored numerous publications