“Confidentiality – The Secret Sin”

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DISCLAIMER

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SIN: an action that is or is felt to be highly reprehensible

SECRET: hidden from sight (Merriam-Webster)

DISCLAIMER

Certainly the release, to unauthorized persons, of confidential personal and business information is, or should be, considered reprehensible. Unfortunately, this “sin” happens in veterinary hospitals all across this country, inadvertently and deliberately, and not just every day but literally many, many times each day. This most commonly happens through gossip or a desire on the part of the veterinary staff to be in some way helpful. Hospital managers should see that their hospitals have strong written policy statements that no information should be released, without the owners consent and that violators will be subject to discipline up to and including dismissal. They should insure that veterinarians and staff are properly educated on what confidential information is, the need for confidentiality, and trained to protect the privileged information.

There are three primary areas where these “sins” of confidentiality occur:

1. Unauthorized release of client and/or patient information;
2. Unauthorized release of confidential hospital or practice information; and
3. Unauthorized release of employee information. We shall discuss these in turn.

CLIENT-PATIENT CONFIDENTIALITY

Veterinarians are expected to keep confidential the medical information of their patients as well as the personal and financial information of the patient’s owners.

This expectation arises in three ways:

Veterinary Code of Ethics: “Veterinarians and their associates should protect the personal privacy of patients and clients. Veterinarians should not reveal confidences unless required to
by law or unless it becomes necessary to protect the health and welfare of other individuals or animals.” Principles of Veterinary Medical Ethics of the AVMA (revised 2008), and

**Fiduciary Duty:** A fiduciary is a person, involved in some undertaking, such as the practice of veterinary medicine, having a duty to act primarily for another’s benefit in matters connected with that undertaking. Often, as with veterinarians, persons held to a fiduciary standard have professional or other special expertise that a client lacks. A veterinarian, as a fiduciary, is often entrusted with a client’s animal and/or is providing trusted advice in relation to those animals. A person with special knowledge who accepts such great trust by another is required to fulfill important legal responsibilities in exercising that trust, specifically the duties of due care, loyalty, fidelity, good faith, candor, and confidentiality. A failure to exercise such care could be a breach of fiduciary duty and result in civil lawsuits for damages, and

**By Law:** Fiduciary duty may be imposed by statute or by the courts. For example, this civil law duty has been applied to veterinarians in California by Thorpe v the Board of Examiners:

> “Certainly the fact that a veterinarian takes his clients' animals, pets often as deeply revered as members of the family, puts him in a position of a bailee for hire and a *fiduciary* as far as the care and protection of this personalty is concerned. In handling this property of his clients, he owes a deep and abiding obligation of honesty and integrity as to his treatment and their care.” *Thorpe v. Bd. of Examiners in Veterinary Medicine*, 104 Cal.App.3d 111, 117

Many states have added confidentiality rules to their state veterinary practice acts. An example is Nevada:


(1) A licensee under this chapter may not disclose information about the licensee's care of an animal to anyone other than the client, as defined in Section 58-28-102, unless:

(a) the client consents to the disclosure in writing;

(b) disclosure to public health officials, animal health or welfare officials, agricultural authorities, or federal, state, or local officials is required, or necessary to protect the animal or to protect public health;

(c) disclosure is required by court order or subpoena; or
(d) the client has placed the veterinarian's care or treatment of the animal or the nature or extent of injuries to the animal at issue in a civil or criminal proceeding.

(2) A licensee who releases medical records under the provisions of this section is not liable to the client or any other person for the release of the records."

Hospital managers should review the veterinary practice act in their state and seek guidance from the state veterinary medical board as to the confidentiality rules in your particular state.

As illustrated above the basic tenets of client patient confidentiality are that a veterinarian, or veterinary hospital staff, should not release medical information on their patients to anyone other than the client of record unless the hospital has written or witnessed oral permission from the client of record.

This can create an occasional ethical crisis as, for example, when an animal comes in for a health check prior to breeding and the veterinarian knows the intended mate has an inheritable defect. The veterinarian, or someone on staff, might want to prevent such a breeding and be tempted to tell the owner. Despite that knowledge, the veterinarian and staff members must keep the information confidential unless the owner of the affected dog grants permission to release the information.

Veterinarians, or their hospital staffs, should not release any information on the client to anyone, except as provided by law, without the express written permission of the owner. This includes names, addresses, telephone numbers, and financial information, especially credit card numbers. Improper release of this information could result in very expensive legal action against the hospital. Client information, especially credit card information, should not be left lying around and should be kept either in locked cabinets, or secured in computers by password. Only authorized personnel should have access.

HOSPITAL/PRACTICE CONFIDENTIALITY

Employees are considered to be agents of the employers and, under the traditional rules of agency, owe a duty of loyalty to those employers. The Restatement (Second) of Agency provides that the duty of loyalty is broad and includes the duty of obedience, confidentiality, and loyalty.

While the duty of confidentiality likely applies in some degree to all employees, it is often related to the degree of responsibility and trust which the employer gives the employee. An employee with access to confidential information or trade secrets, will be under a different standard of confidentiality than an employee who is not so entrusted. Clearly, hospital managers would consider highly trusted employee with access to a multitude of confidential information and should be particularly cautioned of the old WWII admonition, “Loose Lips, Sink Ships.”

This duty of loyalty requires that an employee not disclose important information of value to the employer. Confidential information could include such things as customer identities and
preferences; marketing strategies; pricing schemes; medical or surgical techniques; copyrights; software programs; website designs; marketing brochures; employee information; patentable inventions; and almost anything else you can think of. The release or misuse of confidential material can do an employer serious financial, as well as professional harm.

Therefore, employers and their hospital managers should conduct a thorough self-assessment to determine the extent to which they have and want to safeguard their informational assets and institute policies to ensure, as much as possible, the safeguarding of that information. The extent to which the courts will allow the information to be considered confidential is, in part, determined by the efforts the hospital expends to protect the information.

Given the current general economic downturn and the volatile mix of rapid employee turnover, decreasing employee loyalty, and the increasingly vindictive nature of disgruntled employees, employers must take active responsibility for maintaining the confidentiality of their own secrets. This, like the non-solicitation and non-competition agreements discussed earlier, is most often done through confidentiality agreements or clauses in employment contracts. Employers should be cautioned to also look at vendors, suppliers, independent contractors and business partners as well as employees for breaches of confidentiality and include confidentiality provisions in these agreements where appropriate.

Hospitals with training programs or those with staff members who lecture or write for off-site organizations should insure that all such materials are reviewed for confidential content before presentation.

Because of varying state laws and, as discussed earlier in the section on non-competition and non-solicitation, veterinary employers are advised to seek qualified legal opinions before adding these provisions to your contracts.

Despite the agreements entered into, the hospitals should also draft strong written policy statements reiterating the items below. Each and every hospital employee should sign an acknowledgement of these policies at the time of employment.

**DRAFTING THE AGREEMENT**

In drafting a confidentiality agreement, the employer should consider including the following:

- An acknowledgement that the hospital is in the business of veterinary medicine; and that that business is highly competitive; that the hospital has invested large sums of money and time developing the business and its services.
- An acknowledgement that the employee may create, have access to, or gain knowledge of confidential information.
An acknowledgement that improper disclosure of that information could result in financial loss or other detriment to the hospital.

An agreement that, while employed, the employee will not disclose, divulge or communicate confidential information to any unauthorized person; use any confidential information to his/her own benefit or the benefit of any third party; and that the employee will do everything reasonable within their power to protect the confidentiality of that information.

An agreement that, at the termination of their employment, the employee will deliver all copies and originals of documents, computer disks, tapes, accounts, data, records, papers, designs, specifications, price lists, lists of customers and all other information, whether written or electronically stored, which belongs to the hospital or relates in any way to their business or affairs or the hospital or affairs of any of their suppliers, agents, distributors or customers, or contain any confidential Information, and are in the employees' possession or under his control.

EMPLOYEE CONFIDENTIALITY

Veterinary hospital employers are required by law to keep a variety of records on and about their employees. These records often contain sensitive personal information. It is a significant matter to trust another person, especially strangers, with private and personal information. The employee, like a client, has a right to believe that this information, given in confidence, will only be used for the purposes for which it was given and will not be released to others without their permission.

For the purpose of this discussion, an employee is any person working for the hospital in any capacity, including volunteers, whether full-time, part-time or temporary.

An employee’s record consists of any positive or negative writing, tape, copy, or other electronic or non-electronic memorialization of whatever kind or nature that is maintained, obtained or generated while an employee is working for the employer and that relates to the employment of the employee.

These records include, but certainly are not limited to, such things as applications, resumes, letters of reference, interview notes, health records, credit records, law enforcement records, warning notices, disciplinary actions, evaluations, recommendations, retirement records, wage garnishments, vacation and sick leave, hours worked, wages, SSNs, withholding, benefits, dependents, marital status, previous employment and terminations.
Human nature dictates that most employees would not object to the release of favorable information but would likely be less than pleased about the sharing of negative information. It is then that conflicts will arise.

Information considered to be public and not under the control of the employee include such things as the employee’s name, job title or rank (such as senior surgical technician), salary, degrees or certifications held, date of employment and termination, work location, and work telephone number. You should check the Public Records Act of your particular state on consult a qualified employment law attorney to determine the specific items are allowable in your state. As a matter of note, most applicable federal and state employment laws have some form of nondisclosure regulation. Veterinary hospitals are expected to comply with those as well.

LIABILITY FOR DISCLOSURE

Employees breaching their employee duty of confidentiality should be subject to disciplinary action up to and including termination.

Employers may be subject to administrative fines, civil liability and reference to state licensing boards.

PREVENTION

*Train every staff member on privacy issues.* As hospital managers, you should discuss with all employees, and on a regular basis the types of confidential information they may encounter and the proper way to handle it.

It is not productive for any employee to become the "rumor mill" for the company, and this needs to be consistently and vigorously enforced.

*Treat Employee Information As Property:* As discussed above, information is property. Information about the employee belongs to that employee and the employee, for the most part controls, or should control, what happens to that information. Say an employee needs a short leave of absence to treat a very personal medical problem. To secure the leave, that employee must disclose to the employer or their designee (often the hospital manager) the reason for the request. But, the employee still owns that information and under the privacy rights operating in all states and the federal government, has a right to control the further release of that information. The employer must keep the information secret from others without a demonstrated need to know.

It is appropriate and often necessary, to ask the individual what information he or she is comfortable sharing and what information should not be shared. Make written notes of these responses. Do not make assumptions here as doing so can get both you and your employer into trouble. Open and honest communication about the individual's need for privacy is the best protection.
Adopt a policy. One of the best defenses the employer has to privacy violation claims is to have a clearly written hospital policy on how to handle confidential or sensitive information. This policy should include reference to the types of sensitive information that might become an issue, any procedures you have for protecting the information.

For example, employee files should be:

1. Labeled as CONFIDENTIAL
2. Kept in secure, locked file cabinets or in password protected computer files,
3. Accessible only those people with a job related interest in private employee information
4. Those employees should be specifically instructed on how to maintain the confidentiality of those files. For example:
   A. There should be a tracking system for those files,
   B. The files should never be left out and unattended,
   C. The relevant file cabinets should always be locked, and
   D. Employee files should NEVER remove from the premises

At the same time, it is also a good idea to draft a policy regarding the level of privacy staff members can expect with regard to their own desk, computer, office, and any personal items that might be brought to the workplace.

The hospital should provide no information about an individual until that person becomes an employee of the hospital and once employed, the best policy is not to release any information on them without either a) the employee’s written authorization or b) a subpoena.

When someone calls to check a reference on a current or former employee, you should require that they fax you a form, signed by the employee, authorizing the release of the information. Almost every job application includes such a form. If a release is not provided, confirm only the employee title and the dates of employment. Check with a qualified local employment law attorney about what information can be safely released in your jurisdiction.

CONCLUSION

The unauthorized release of confidential information can expose the hospital to very expensive and time consuming legal battles. As hospital administrators it will be your responsibility to see that doesn’t happen. Go forth and “sin” no more.