

Veterinary Medicine and the Law

The informed consent doctrine: what veterinarians should tell their clients

D. Duane Flemming, DVM, JD, DACVO, and John F. Scott, DVM, JD

In many veterinary practices today, obtaining informed consent consists of the receptionist placing a consent form in front of the client and telling the client that he or she needs to sign the form so the doctor can perform the surgery or treat the animal. Properly obtaining informed consent, however, involves more than simply obtaining the client's signature on a consent form. In particular, ensuring that the client is properly informed is a vital part of obtaining informed consent.

History of Informed Consent

The doctrine of informed consent arose centuries ago in the common law. Doctors, lawyers, and other members of the "learned professions" were thought to have knowledge that was beyond the understanding of the average person, with such knowledge often referred to as the "mysteries of the learned professions." At that time, most people had a broad general knowledge of most of the areas that affected their lives; they knew, for instance, how to build a house or barn, repair a wagon, make clothes, and raise livestock. But because the average person was not expected to know and understand the "mysteries" of law and medicine, the courts imposed a special duty on members of these professions, requiring them to inform their clients and patients of the facts concerning their legal representation or medical care.

In the medical field in particular, the application of informed consent as a legal doctrine was founded on the common law notions that an adult human of sound mind has the ultimate control over his or her own body and that any unconsented touching of that body was a civil wrong. This basic concept has been expanded to encompass the principle that a competent patient has the absolute authority to submit or refuse to submit his or her body to lawful medical treatment.

The idea of legally requiring a doctor to obtain consent from a patient before surgery started with Justice Benjamin Cardozo, of New York state, who in 1914 ruled that "a surgeon who performs an operation without his patient's consent commits an assault." (*Schloendorff v Society of New York Hospital*, 211 NY

125 [NY 1914]) The actual phrase "informed consent" is believed to have originated in California with Justice Bray, who held that a "physician has...discretion [to explain risks] consistent, of course, with the full disclosure of facts necessary to an informed consent." (*Salgo v Stanford*, 154 CalApp2d 560 [Cal 1957])

While there is no provision in the law prohibiting assault against animals, a person does have nearly absolute control over his or her own property, and animals are, for most legal purposes, considered property. Thus, animal owners enjoy certain property rights, and the power to consent or deny consent to a medical procedure is one of those rights. From this, it follows that any unconsented harm caused by a veterinarian to an animal owned by another individual would likely violate a property right and therefore be a form of civil wrong. It is on this basis that the informed consent doctrine applies to animals and, thereby, to veterinarians.

The doctrine of informed consent can also be applied to veterinarians through the principles of fiduciary responsibility. A fiduciary is a person similar to a trustee who has a trustee's duty to act primarily for the benefit of another. Examples of some legally defined fiduciary relationships are doctor-patient, guardian-ward, attorney-client, executor-heir, and veterinarian-client. The principles of fiduciary responsibility apply to veterinarians, in part, because it is assumed that in most instances, animal owners do not have training in veterinary medicine and that the client and veterinarian do not have the same level of knowledge. Clients therefore must rely on the information provided by their veterinarians, and veterinarians, because of their special knowledge and experience, exercise at least some degree of dominion and influence over the animal health care decisions their clients make.

Several states have mandatory informed consent statutes as part of their veterinary practice acts. Idaho and Missouri, in particular, require that consent be given in writing. The Idaho statute (IDAPA §46.01.01.152.12[1991]), for instance, states that "a veterinarian shall where possible obtain written consent from the patient's owner or other caretaker before administering general anesthesia and performing any surgical procedure." The Missouri statute (4 CSR §270-6.011[19]) states that "a licensee shall obtain the informed written consent of the client prior to placing any patient under anesthesia or performing any surgical procedure, or both, except in an emergency." Similarly,

From the Contra Costa Animal Eye Clinic, 2100 Monument Blvd, Ste 7, Pleasant Hill, CA 94523-3440 (Flemming); and the Law Offices of John F. Scott, Esq., 500 S Taylor, Ste 505, Amarillo, TX 79101.

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Address correspondence to Dr. Flemming.

although they do not specifically mention that consent must be in writing, Arkansas (ACA §17-101-305[a] [2002]), Florida (FSA §474.214 [1999]), Kansas (KAR §70-8-1 [1997]), Kentucky (KAR §16:010.32 [1998]), Massachusetts (13 MIRC §256:7.01[2000]), Minnesota (MR §9100.0800 Subpt9 [1998]), New York (NYEduc RBR §29.1[11] [2001]), Oregon (ORS §875-010-0060 [1996]), and Texas (TAC §573.45(c)[2001]) all have provisions indicating that consent must be obtained prior to treatment. In Missouri (*Missouri Veterinary Board v Schatzman*, Missouri Administrative Hearing Commission, No. 02-0085), as in other states, failure to obtain the required informed consent could result in disciplinary action against the veterinarian.

Clearly, therefore, veterinarians have a duty, under common law or state statute, to provide our clients with sufficient information for them to validly consent to treatment.

What Information Must Be Disclosed for Consent to Be Informed

For informed consent to be proper, the individual obtaining the informed consent must disclose the following information to the person providing the consent:

- The diagnosis or nature of the patient's ailment.
- The general nature of the proposed and any alternative treatments and the purpose or reason for each treatment.
- The risks or dangers involved in the proposed treatments.
- The probability or prospects of success with each alternative treatment.
- The prognosis or risk if the client refuses treatment.
- The costs of the various alternative treatments.
- If the treatment involves surgery, the individual who will actually perform that surgery if not the same as the individual obtaining consent.
- The location and method of transportation to that location if the treatment is to be administered at another site.

Many veterinary practice management speakers and writers today advocate recommending to each client the highest level of treatment for any condition found in an animal brought for treatment. They base this recommendation on the expectation that by offering the highest quality medical care available, veterinarians will be protected from claims that informed consent was not obtained. This practice, however, does not supply clients with sufficient information to provide proper informed consent. In particular, a client cannot provide proper consent for a particular treatment if he or she has not been informed of alternative treatments, as well as the risks and probable outcomes of those alternative treatments regardless of their cost, sophistication, or desirability.

For a consent to be valid, clients must have a clear understanding of the information presented. Veterinarians must remember that effective communication is essential to that understanding. However, clients do not have to completely understand every nuance of the proposed treatment, and broad strokes are usually sufficient.

Veterinarians are not expected to provide their clients with an entire veterinary school curriculum. In fact, detailed technical expositions are not legally required and are usually not desired as most clients will be overwhelmed if presented with unintelligible technical jargon they are not able to understand or use in reaching an informed animal health care decision. Conversely, a blunt and insensitive recitation of the facts can also impede the process of client understanding.

In providing the necessary information, the veterinarian should take into account the experience, education, and linguistic abilities of the client. A first-time pet owner may require more information from the veterinarian to make a valid decision than a breeder with much greater animal experience. A client who speaks a foreign language may not understand the risks involved in a medical procedure if the necessary information is provided only in English. Similarly, a person with limited education may not understand technical information suitable for a college graduate with advanced training in science or medicine. While veterinarians are not expected to do a complete background check on their clients, they are expected to evaluate the client and to tailor their presentation to each client's particular needs.

Standards of Duty in Providing Information for Informed Consent

As indicated, veterinarians are not expected to provide extensive medical information when obtaining informed consent. They have a duty, however, to provide sufficient information that their clients can reasonably make informed treatment decisions. Over the years, 3 standards—the reasonable practitioner standard, the reasonable patient (client) standard, and the individual patient (client) standard—have been used by the courts to provide guidelines on the extent and depth of information that must be provided so that individuals can provide informed consent.

Importantly, although the standards of duty may vary among the states, veterinarians do not have the option of selecting which standard they are most comfortable with. The applicable standard is determined by the law in each state. Practicing veterinarians should consult with qualified attorneys in their states to determine which standards apply to them.

Regardless of the standard that is applied, veterinarians should ensure that they have provided all the relevant information their clients need. Lawyers are taught that when asking an individual to list something, such as all the ways in which he or she has been harmed by another person, they should always ask, "What else?" when the person appears to have finished his or her response and should keep asking, "What else?" until the person says, "That's all." In the same way, a veterinarian obtaining informed consent should, after providing the relevant information, always keep asking, "Do you have any more questions?" until the person replies, "No."

The reasonable practitioner standard—The reasonable practitioner standard requires a physician to disclose facts that a reasonable medical practitioner in a similar community and of the same school of medical

thought would have disclosed regarding the proposed treatment. (*Karp v Cooley* 493F2d 411 [5th Cir] [1974]) This used to be the accepted standard in most jurisdictions, but is a rather paternalistic approach because it assumes that the physician can decide what each patient needs to know in making medical decisions. This standard has fallen from favor in recent times because medical patients and animal owners have become more knowledgeable concerning medical care and want to take a more active part in determining medical care for themselves and their animals.

The reasonable patient (client) standard--The reasonable patient or reasonable client standard requires a practitioner to disclose all risks that would be material to a reasonable, prudent person in the patient's or client's position. (*Canterbury v Spence*, 464 F2d 772 [DC 1972]) A "material risk" is a risk that, if known, would cause the patient or client to alter his or her consent. Under this standard, the practitioner no longer decides what he or she thinks the patient or client needs to know, but must disclose what a reasonable patient or client would want to know. This is a step away from the paternalistic approach of the reasonable practitioner standard and is the standard applied in most jurisdictions today. This standard recognizes that patients and clients today are more informed of medical issues and want to be more involved in decisions regarding the medical care of themselves and their animals.

The individual patient (client) standard--Under the individual patient or individual client standard, the practitioner must determine what risks are material to the particular patient or client he or she is dealing with and disclose those risks that are material to that individual. (*Scott v Bradford*, 606 P2d 554 Okla [1979]) This is the most demanding standard on the practitioner and has not found favor in many jurisdictions.

Instances When Nondisclosure Is Permitted

There are certain situations when veterinarians are not required to obtain informed consent prior to initiating treatment. The most common of these situations is in an emergency. It is presumed that when an animal is brought to a veterinarian for care, the very least the client wants the veterinarian to do is to provide emergency care to save the animal's life and stabilize its condition. Of course, this applies only in truly life-threatening emergency situations and does not, for instance, absolve a veterinary emergency clinic from obtaining informed consent prior to treating animals with conditions that require prompt treatment but are not life threatening.

Strictly speaking, a practitioner is also not required to provide full disclosure if the client specifically requests not to be told of the possible risks and alternative treatments. This is the client who says, "I trust you; just do whatever you think is best." However, veterinarians should exercise caution in relying on this waiver of disclosure. In particular, such statements should be relied on only if made by clients who are known by the practitioner to be reliable. Just as clients who say, "Money is no object," are often the first to refuse pay-

ment, those who say, "Do what you think is best," are often the first to complain that they were not informed of the risks of treatment when something goes wrong. For truly minor and insignificant matters, such a waiver by a client may suffice. But in situations where the risks are substantial, the veterinarian should refuse to proceed without the client's informed consent. Legally, it is the client's right to know the risks, and it is the client's decision whether to accept those risks. Except in emergency situations, a veterinarian should never assume the responsibility of deciding for a client what medical procedures should or should not be performed.

The only other situation in which nondisclosure is permitted is when consent is implied by actions. The classic legal case illustrating this principle involved people being vaccinated on a cruise ship. A person got in line and received a vaccination, then later complained that he had not consented to the vaccination. The court held that by standing in line watching other people getting vaccinations and then stepping forth and letting the nurse administer an injection, the person had consented to the vaccination. Although one might argue that the consent was not informed, the court ruled that consent was given by the actions of the person involved.

Facts That Do Not Require Disclosure

No disclosure is required if a risk is so remote that it is not material. For example, although anaphylactic reactions can occur in animals given penicillin, the risk of such reactions is so remote that it is not necessary to warn clients of the danger every time a penicillin injection is administered.

By the same token, no disclosure is required if the risk is obvious or within common knowledge. For example, it is common knowledge that injections often hurt. Therefore, there is generally no need to inform every client getting vaccinations for his or her animal that the animal may experience slight pain from the injection.

There also is no need to disclose risks that are already known to the client. For instance, there is no need to disclose the risks of treatment if the veterinarian knows the client has had formal training as a medical professional or if this is the third animal the client has brought for ovariohysterectomy and the veterinarian has obtained informed consent for the same procedure on the previous occasions.

Finally, a veterinarian does not need to disclose the risks of treatment if he or she determines that the disclosure of such risks might be harmful to the client. However, veterinarians should use this principle only with great caution, as it has more applicability in the field of human medicine. For example, a doctor might determine that disclosing the risks of chemotherapy to a patient with a severe heart condition might result in greater harm to the patient's well-being than the chemotherapy itself. Such situations rarely occur in veterinary medicine, although some veterinarians may have clients who are so mentally or physically fragile that the veterinarian may believe that they should not be informed of the risks of treatment of their beloved pets.

Who Should Obtain Consent

Practitioners often want to know who should

obtain the informed consent of the client before instituting treatment or proceeding with surgery and, particularly, whether a technician or receptionist can obtain informed consent. Of course, the ideal is that informed consent is always obtained by the veterinarian who will treat the client's animal. However, it is probably acceptable to say that the consent may be obtained by anyone who is familiar enough with all the alternative procedures to answer the client's questions.

Thus, who may obtain informed consent will vary with the procedure involved. When a client brings an animal in for ovariohysterectomy, a procedure with well-recognized risks and few alternatives, any well-trained and well-informed veterinary assistant would likely be able to answer the client's questions and obtain valid informed consent. At the other end of the spectrum, the attending veterinarian is probably the only person who can obtain informed consent from a client who brings an animal in with a comminuted, compound fracture of the humerus. In that situation, it is likely that the veterinarian is the only individual familiar enough with the risks of treatment (eg, infection and nonunion) and with the various alternative treatments (eg, open reduction and internal fixation, external fixation, external coaptation, and amputation) to be able to fully describe the risks and alternative treatments to the client.

As indicated previously, the person obtaining the informed consent should always ask, "Do you have any more questions?" until the client says, "No." In addition, if the person obtaining the informed consent is not the veterinarian, then he or she should also ask whether the client would like to speak with the veterinarian.

Use of the Consent Form

Once the veterinarian has provided the appropriate information and effectively communicated it to the client, he or she should, as a separate act, specifically ask for and obtain the client's consent to the proposed procedure. In fact, the failure to specifically obtain the client's consent even after appropriate disclosure could be negligent and result in legal liability for veterinary malpractice.

Except in Idaho and Missouri, the consent does not necessarily have to be in writing. However, a written agreement is still the best way to legally establish the granting of informed consent. In the opinion of the authors, it is extremely unwise to pursue a course of treatment that is hazardous or capable of producing a harmful effect without first securing a written statement of consent.

However, it must be pointed out that having a client sign a consent form does not in itself protect the veterinarian. It merely creates a rebuttable presumption of informed consent. In plain English, that means the signed consent form is simply a piece of evidence that the client consented; it is not absolute proof. In fact, there are many circumstances in which the signed form might not protect the doctor.

For example, a client under the influence of drugs or alcohol might not be considered capable of giving informed consent even if he or she was given all the proper information and signed a proper form. Similarly, informed consent based on false, misrepresented, or incomplete information would not be valid

and might even be considered fraudulent. Blanket consent forms that authorize the veterinarian to undertake any and all surgical procedures are legally undesirable and will likely not be upheld by the courts. Equally suspect are consent forms signed at the onset of the veterinarian-client-patient relationship that purport to grant unending consent to any and all future and unspecified procedures. Because state laws differ slightly as to the requirements for informed consent, veterinarians should have their consent form evaluated by qualified attorneys in their states.

Even when well-crafted, an informed consent form, standing alone, is often of little value. Remember, it is not the form but the information and the consent that are important. An informed consent form should simply document and summarize the information that has been provided to the client by the veterinarian or the staff. The person obtaining the consent should first provide all of the necessary and relevant information. Clients often do not know what questions to ask and may not even have any questions to ask until they are provided with information concerning the risks of treatment and any possible alternative procedures. This is why we so strongly suggest that clients be asked whether they have any more questions. Only after this dialogue has occurred should there be any consideration of signing a form.

Two general suggestions are offered to guide veterinarians when disclosing risks and alternatives to clients. First, use common terms. If the possibility of death exists with the treatment or surgery, state that the animal might die, not that there may be an "adverse outcome." Second, use accurate terms. Many clinics now refer to general anesthesia as "sedation." Sedation and anesthesia are not legally the same thing, and these terms should not be used interchangeably. Some veterinarians justify such usage by saying they do not want to be harsh or frighten clients, when in reality they are trying to minimize the appearance of risk. Such minimization of the appearance of risk will be regretted when the client in a lawsuit says he or she was not accurately informed of the risks.

In addition to the consent form, the veterinarian should accurately chart in the client's record all warnings and recommendations, as well as all failures of the client to follow the doctor's advice. For all extensive procedures and for most of the common ones, the veterinarian should provide a handout detailing the procedure and the client's responsibility for the animal's care.

Conclusion

It must be remembered that the purpose of informed consent is to provide the client enough information that he or she can make an informed decision for or against the recommended health care. Veterinarians should provide adequate information as to the relevant risks and benefits of all important medical and surgical procedures proposed to the client. Proper information, clearly and accurately conveyed, will ultimately do far more to protect the veterinary practitioner from liability than any signed consent form, no matter how well crafted.