MEMORANDUM

TO: [redacted], Esq.

FROM: [redacted], Esq.
[redacted]

RE: [redacted] D.V.M. and [redacted] Animal Hospital Matter

DATE: [redacted], 2006

This Memorandum addresses the three separate questions we discussed this past Wednesday and Thursday regarding the above-referenced matter.

The questions posed are:

- In order to lawfully own an interest in a veterinary clinic or hospital, must an individual be licensed as a veterinarian?

- In the fact situation involving Dr. [redacted] in which negotiations are underway whose outcome could involve Dr. [redacted]'s acquiring the interest of his now-disaffected partner in a licensed veterinary clinic or hospital, what effect(s) will the pending license revocation proceedings against Dr. [redacted] personally have (i) if a purchase/sale transaction is concluded before the proceedings are terminated; and/or (ii) if Dr. [redacted] does not prevail in the disciplinary proceedings?

- With specific respect to the allegations contained in the disciplinary Accusation regarding "Patient [redacted]," what defense(s), if any, are available to Dr. [redacted]

Our discussion and analysis with respect to each of these questions follows.

MUST A VETERINARY CLINIC OR HOSPITAL OWNER BE A LICENSED VETERINARIAN?

The answer to this question is a very clear "NO." Virtually anyone can own a full or partial interest in a veterinary clinic or hospital facility in California irrespective of whether or not he or she holds a veterinary license.

Under the California regulatory scheme, veterinarian licenses are issued to individuals, whereas "premise permits" are issued separately to clinics and hospitals. An individual with a veterinarian license does ***not*** have the ability to simply open a clinic or hospital and begin

practicing there. In order to do so, he or she must first obtain a separate premise permit from the Veterinary Medical Board of the Department of Consumer Affairs.

This is apparently what Dr. ████ has done; his personal Veterinary License No. ███ was, according to both the Accusation as well as the Board's website's database, issued to him on ███, 2██. Premise Permit No. ██ was, according to these same two sources, issued with respect to ██████ Animal Hospital ("██AH") on ████, 2██. It is unclear what type of entity ██AH is; the California Secretary of State's Office has no record of its ever having been incorporated or registered as either a limited liability company or a limited partnership. The Accusation alleges (p. 1, lns. 27-28) that the Premises Permit was issued to Dr. ████ the Board's website regarding the status of current licenses does not have a category that provides this information. Presumably, at least as far as the Board is concerned, ██AH is a sole proprietorship owned by Dr. ████

Conversely, nothing under California law prevents any individual, corporation, or other type of firm from applying for and obtaining a Premise Permit and thereafter operating a veterinary clinic or hospital at the location to which the Permit pertains. This is true irrespective of whether or not the person or entity seeking the Permit is a licensed veterinarian.

There is no express provision of California statutory law, or administrative regulation, that comes right out and says: "You don't need a veterinarian license to own and operate a veterinary clinic or hospital." Nor do any of the reported California cases involving veterinary licensing address this issue directly. But this conclusion is supported by the following:

- The California statutory scheme regulating the practice of veterinary medicine is for the most part contained within the ***Business and Professions Code*** (there is some overlap with the ***Health and Safety Code*** and the ***Penal Code***). Collectively, the controlling statutes are commonly referred to as the ***California Veterinary Medicine Practice Act***. The Act is published in booklet form by lexisnexis, and the most recent 2006 edition may be ordered by phone by calling 1-800-533-1637 or online at www.lexisnexis.com/bookstore. The Act provides -- optionally -- for the ability of veterinarians to establish professional corporations, similar to those sometimes established by medical doctors, attorneys, and other recognized professionals. And, just like in these professions, in order to be a shareholder of a veterinary professional corporation, an individual must first be a licensed veterinarian. ***Business and Professions Code § 4910*** *et seq*. specifies the requirements for veterinary professional corporations, and in the final section of this portion of the statute (***§ 4917***) provides clearly that: "Nothing in this article requires an applicant for or a holder of a certificate of registration of veterinary premises described in Section 4853 to be a veterinary corporation." So: A professional veterinary corporation ***can*** own a licensed veterinary clinic or hospital, but regardless of whether it does or does not, all of its shareholders must be licensed veterinarians. But not ***only*** professional veterinary corporations are qualified to own licensed clinics and hospitals: Anyone, or any entity, can hold such ownership, provided that the requisite Premise Permit is obtained.

- This view was confirmed (anonymously) yesterday during a telephone conversation with a member of the Licensing Division of the California Veterinary Medical Board.

- This view was also confirmed (anonymously) yesterday during a telephone conversation with the senior veterinarian at the California Veterinary Medical Association, who described in depth the history of the statutory scheme and the theory behind why non-veterinarians should not be prohibited from owning all or a part of a clinic or hospital.

WHAT EFFECTS, IF ANY, COULD THE PENDING DISCIPLINARY PROCEEDINGS AGAINST DR. ██████ HAVE WITH RESPECT TO HIS ONGOING NEGOTIATIONS TO BUY-OUT HIS NOW-ADVERSARY PARTNER IN A LICENSED CLINIC OR HOSPITAL?

It is important to note initially that while the Board had the power and authority to move preemptively against Dr. ██████ by immediately going to court and seeking a temporary restraining order that could, in effect, have suspended his veterinarian's license, as well as the Premise Permit of ██████ Animal Hospital, it did not do so. That is simply an observation on my part; it is not meant to inspire great optimism concerning the answers to the questions addressed in this section. I mention it because as will be described below, this situation could change, depending on what Dr. ██████ does next.

Of great importance is the fact that while a veterinary hospital or clinic may be owned by one or more non-licensed, non-veterinarians, the facility must still have a "responsible licensee manager" who must be a licensed veterinarian. In this regard, ***Business and Professions Code § 4853(c)*** provides: "Every application for registration of veterinary premises shall set forth in the application the name of the responsible licensee manager who is to act for and on behalf of the licensed premises. Substitution of the responsible licensee manager may be accomplished by application to the board if the following conditions are met: (1) The person substituted qualifies by presenting satisfactory evidence that he or she possesses a valid, unexpired, and unrevoked license as provided by this chapter and that the license is not currently under suspension. (2) No circumvention of the law is contemplated by the substitution."

So even if Dr. ██████ succeeds in making an arrangement to buy out his partner and become the sole owner of a hospital or clinic facility -- a process that should not be susceptible to interruption by the Board while it is pending -- he will need to have a "responsible licensee manager." At this moment in time, that person could presumably be Dr. ██████ himself, since his license has not been either suspended or revoked. The last sentence should have been prefaced with the qualifier, "***Theoretically*.**" I say that because given the magnitude of the serious offenses of which Dr. ██████ stands accused in the Accusation, it would in my opinion be "playing with fire" to taunt the Board by filing a brand new application for a second facility (the one involving the partnership buyout) and attempting to name himself as the "responsible licensee manager." It would be very surprising to me if the Board did nothing; and what they would most likely do, in my estimation, is run off to court to obtain the TRO they probably could already have obtained the first time around had they bothered to try. So while strictly speaking,

Dr. [redacted] is not ***yet*** ineligible to be a "responsible licensee manager," I think to advise him to proceed as though nothing were amiss, in the face of the pending disciplinary proceeding, would be unwise. At best, I think the soundest advice that could be given at this time would be to the effect of telling him "Whether you end up owning one or both of the facilities when this is all over, you had better reconcile yourself to the prospect of having a 'responsible licensee manager' in each facility, because it's probably not going to be you." That is, of course, assuming he does not prevail in the license revocation proceeding involving his personal veterinarian's license. (This area is addressed in the section which follows.)

There is also a related situation that will need to be addressed assuming that Dr. [redacted] does not prevail in the license revocation proceeding as it is directed toward him, personally; i.e., toward his veterinarian's license. It is probably safe to assume that if his personal license is revoked, the Premise Permit relating to [redacted] Animal Hospital will be revoked as well -- the charges are each factually interwoven to the extent that, in my opinion, to lose one will be to lose both. If this happens, two interesting factors come into play:

- When a person or entity is applying to the Board for a ***new*** Premises Permit, the signature on the application by the new owner(s) is not required. Only the signature of the designated "responsible licensee manager" need be set forth. See the form of the application itself at http://www.vmb.ca.gov/premises_app_info.pdf. The owner(s) identities' are listed, but they are not required to make any representations about themselves and they need not even sign the application.

- When a person or entity is applying to the Board for a ***renewal*** of an existing Premises Permit, the situation is reversed. The signature of the "responsible licensee manager" is not required. But the signature of the owner is required, and -- guess what? -- the first question on the form is: "CONVICTION INFORMATION. Since you last renewed your license, have you been convicted or pled nolo contendere to a felony or misdemeanor, other than a minor traffic violation, or had any disciplinary action taken against you by any licensing/regulatory agency in this or any other state?" You can view the form itself at http://www.vmb.ca.gov /premise_renewal.pdf.

Thus we appear to have a problem, at least insofar as [redacted] Animal Hospital is concerned. Dr. [redacted] has evidently listed himself as the ***owner*** of that facility, and if its Premise Permit is revoked along with his veterinary license, I imagine that persuading the Board to ***renew*** it, with the same owner in place, will likely be impossible.

Where I believe this leaves us is in something like the following position: If we assume that Dr. [redacted]s personal veterinary license is revoked, it is unlikely that he will be able to jump right back in and own -- as a sole proprietor, at least -- a facility holding a valid Premises Permit. The only practical solution that I see having a chance of working will be for him to form two new corporations; rearrange the ownership situation so that each corporation takes title to each facility; each corporation then files an application for a ***new*** premises permit, with each application signed by a "responsible licensee manager" other than Dr. [redacted] The Board is not going to be fooled by any of this -- it will certainly come to their attention that Dr. [redacted] or his wife, or someone obviously controlled by him will own the new corporate shares -- but as

the statutes are written, it does not appear that so long as the premises are applying for a ***new*** permit, anyone other than the "responsible licensee manager" will have to pass legal muster.

If I were reading this Memo for the first time, like you are, I would be thinking to myself, "This sounds fishy." It ***does*** sound fishy. But after reviewing the entire statutory scheme for both individual veterinarian licensees, professional corporation licensees, and non-professional corporate, partnership, and other types of licensees, it is the only structure I have been able to come up with that appears to slip between all of the cracks that Dr. ████s predicament has created.

WHAT POSSIBLE DEFENSES CAN DR. ████ PLAUSIBLY ASSERT IN CONNECTION WITH THE "PATIENT ████" PORTION OF THE ACCUSATION?

This part of the Accusation says, in essence, that Dr. ████s receptionist, ████ ████, who was neither a licensed veterinarian nor even a licensed Registered Veterinary Technician (both facts that I confirmed earlier today by reviewing the California Veterinary Medical Board's databases), nevertheless paid a house call on the owner of a ██-year old ████ dog and, after first failing to calm it down with two doses of an unknown oral medication, euthanized it by injecting it abdominally, which resulted in an agonizing 3-minute death during which the excited animal howled and cried before finally expiring.

All of which gave rise to a Pandora's Box comprising the Accusation's Sixth, Seventh, Eighth, Ninth, and Tenth "Causes for Discipline." The Sixth cause alone has seven separate subparts. The underlying gist of the "Patient ████" part of the Accusation rests on Dr. ████s failure to adequately supervise his employees.

I wish I could tell you I've come up with something really novel in the way of a defense, but I just don't think it's there. The obvious position to take will be to deny that Dr. ████ ever authorized this particular employee to do anything except answer the phone; that he didn't even know she knew anything about how to euthanize an animal; that he had no idea she had access to the drugs she used to carry out the procedure; and that, above all else, he certainly had no advance knowledge of her "Kill ████" mission's existence. It would be better still if he could truthfully say that as soon as this event came to his attention, he was outraged and promptly fired Ms. ████. From the overall picture that the Accusation paints, however, I somehow doubt that this is how it turned out.

I've run down the proverbial laundry lists of potential affirmative defenses, and most of them come up short. There is no applicable statute of limitations on a regulatory licensee revocation proceeding unless the particular statutory scheme that regulates the particular type of license involved imposes one, and that is not the case here. There would be no harm, I suppose, in throwing in a Doctrine of Laches claim, but that will undoubtedly be met by the Agency's pointing out that they are not seeking any equitable remedy against Dr. ████ the remedy they are seeking, namely licensure revocation or suspension, is purely legal and is a creature of statute. Trying to argue that the Agency is equitably or otherwise estopped because of its delay in taking action is probably worth pleading, but once again the comeback is likely to be that the

statutory scheme fails to impose any time limits, plus the pattern of conduct started off with relatively minor offenses only to culminate, some many months later, in the Gawdawful "Patient " situation, so estoppel does not apply. I've considered all of the other "standard" affirmative defenses as well, and in my opinion none would likely prove successful given Dr. s fact situation.

CONCLUSION

I have not written about any of the other allegations made against the doctor or possible defenses to them, but I do have an opinion that pretty much covers them across the board, for whatever it may be worth, it goes like this:

Since I started clerking for the Senior Partner of a busy litigation firm in 1976, I have during the past thirty years of my career defended five medical doctors, two dentists, one psychiatrist, and one MFCC (marriage, child, and family counselor) in administrative license revocation/suspension proceedings. You are not even in court yet; you will first be sitting through the administrative hearing part with an ALJ at some future point. The only thing I have against ALJs is that in my experience, they are deaf as posts when it comes to really impartially weighing all of the evidence; they are so agency-oriented that losing at the administrative stage is practically a foregone conclusion unless the agency has just totally dropped the ball by not waiting until it had a large enough barrage to unload on your client. I don't think that has happened here; they have obviously been taking their time building a substantial case against Dr. for quite some time, then finished it off with two separate physical inspection trips to his hospital/clinic. I think the only way to eventually succeed in what promises to be a very drawn out, not to mention expensive, ordeal that, following the ALJ charade, will eventually land you in court attempting to overturn the ALJ's decisision, is at least three-fold:

- You need to put together the longest list possible of Dr. s other happy, satisfied clients and get ready to put on the combined testimony of this newly-constituted "Dr. Fan Club," before the ALJ so as to preserve your record;

- You need to pre-interview, and then select, some primo veterinarian experts who not only look and sound great on the witness stand, but who are also prepared to put the best possible face on the "mistakes" or "oversights" that Dr. may have made, and persuade the listener that, OK, shit happens, but on balance Dr. s operation was well within the standards of the profession when you take the whole picture into account.

- I think refuting the actual, specific allegations of the Accusation is going to be pretty tough. But putting together the testimony of still-friendly employees who are able to just say flat out that, no, most of what's in the Accusation just simply never happened, would sure be a real plus if such witnesses are available and can be relied upon to stick with their stories.

Having read and re-read the Accusation, I'll close by saying you certainly have your work cut out for you. Anything that we at to help will, of course, be our pleasure.

By: [redacted], Esq.