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MEMORANDUM

DATE	July 9, 2021
TO	Veterinary Medical Board (Board)
FROM	Kristi Pawlowski, RVT, Chair Multidisciplinary Advisory Committee (MDC)
SUBJECT	**Agenda Item 5.C. Discussion and Potential Recommendations to Amend Business and Professions Code (BPC) Section 4825.1, Add BPC Section 4826.3, and Amend Section 2032.1, Article 4, Division 20, Title 16 of the California Code of Regulations (CCR) Regarding Telemedicine**

Due to legislative deadlines, the MDC Telemedicine Subcommittee (Subcommittee) is requesting the MDC and the Board review the below information and recommendation during their respective July 2021 meetings. If the MDC approves the legislative and regulatory proposals during the July 21, 2021 meeting without substantive changes, the Board will be requested to consider approving the language during their July 22-23, 2021 meeting.

Introduction

The Subcommittee recognizes that the ability to provide veterinary care through electronic means is a valuable tool in many situations and all populations. The COVID-19 pandemic further highlighted the critical issues regarding access to veterinary care. Access to care afforded by electronic veterinary services is particularly important for high risk populations. The ability to intervene early and leverage the continuum of care afforded by electronic veterinary services are benefits that the Subcommittee is encouraging the MDC and Board to consider. To resolve concern raised at the MDC's April 2021 meeting regarding the effect of the "diagnosis" definition in Business and Professions Code (BPC) section 4825.1 on proposed regulations for electronic veterinary services, and because veterinary professionals do not have a clear understanding or guidance as to the electronic services they may provide to animal patients, the Subcommittee recommends defining these types of services in statute.

Background

In May 2020, the Board voted to request the Director of the Department of Consumer Affairs(DCA) issue a temporary waiver of CCR, title 16, section 2032.1, subsection (b)(3), to the extent it requires a veterinarian to have communicated with the client a course of treatment appropriate to the circumstance in order to establish a veterinarian-client-patient relationship (VCPR).

The Board requested the waiver be effective for the duration of the current State of Emergency issued by Governor Gavin Newson on March 4, 2020, or until January 1, 2021, whichever date was earlier.

In addition, the Board voted to request a waiver of CCR, title 16, section 2032.1, subsection(c), to the extent it prohibits a veterinarian from prescribing a drug for a duration longer thanone year from the date the veterinarian examined the animal and prescribed the drug. This temporary waiver was requested for issuance of prescriptions for a duration of no longer than 18 months from the date of last examination and prescription of the medication or untilthe Declaration of Emergency ends, whichever date was earlier.

Pursuant to Governor Newsom's Executive Order N-39-20, on June 4, 2020, the DCA Director issued an Order Waiving Restrictions on Telemedicine and Extending Time to RefillPrescriptions (June 4 Order), which contained two waivers regarding the VCPR.

Telemedicine Waiver

With respect to telemedicine restrictions related to the VCPR, the June 4 Order was extended on July 31, 2020, and extended again on September 17, 2020, so the waiver was in effect through December 31, 2020. In November 2020, the Board's Executive Committee requested the DCA Director extend the waivers for 60 days, allowing for the Board to decide if it would like to further extend the waivers.

On December 15, 2020, the Director issued a new Order (December 15 Order) further extending the June 4 Order waiving, until February 28, 2021, specified telemedicine restrictions related to the VCPR. On February 26, 2021, the Director issued a new Order (February 26 Order) further extending the June 4 Order waiving, until April 30, 2021, the specified telemedicine restrictions related to the VCPR. On April 30, 2021, the Director issued a new Order (April 30 Order) further extending the June 4 Order waiving, until June 30, 2021, the specified telemedicine restrictions related to the VCPR. On July 1, 2021, the Director issued a new Order (July 1 Order) further extending the June 4 Order waiving, until August 31, 2021, specified telemedicine restrictions related to the VCPR.

Prescriptions

For prescription refills associated with the VCPR, the June 4 Order authorized prescription refills up to 18 months for refills based on an in-person examination of an animal patient lastperformed by a veterinarian between June 1, 2019 and August 1, 2019. On November 25, 2020, the Director withdrew and superseded that waiver and issued a new order (November 25 Order) authorizing prescription refills up to 20 months for refills based on an in-person examination of the animal patient last performed by the veterinarian between June 1, 2019 and August 1, 2019.

On July 31, 2020, the Director issued an order (July 31 Order) authorizing prescription refills up to 18 months for prescriptions that may be not be refilled between August 2, 2020, and October 1,2020, due to the one-year time limitation for refilling a prescription from the date the veterinarian last examined the animal patient and prescribed the drug.

On September 17, 2020, the Director issued an order (September 27 Order) authorizing prescription refills up to 18months for prescriptions that may be not be refilled between October 2, 2020, and December 31, 2020, due to the one-year time limitation for refilling

a prescription from the date the veterinarian last examined the animal patient and prescribed the drug.

The December 15 Order authorized prescription refills up to 18 months for prescriptions thatmay not be refilled between January 1, 2021, and February 28, 2021, due to the one-year time limitation for refilling a prescription from the date the veterinarian last examined the animal patient and prescribed the drug.

The February 26 Order authorized prescription refills up to 18 months for prescriptions that may not be refilled between March 1, 2021, and April 30, 2021, due to the one-year time limitation for refilling a prescription from the date the veterinarian last examined the animal patient and prescribed the drug. The April 30 Order authorized prescription refills up to 18 months for prescriptions that may not be refilled between May 1, 2021, and June 30, 2021, due to the one-year time limitation for refilling a prescription from the date the veterinarian last examined the animal patient and prescribe the drug.

The July 1 Order authorizes prescription refills up to 18 months for prescriptions that may not be refilled between July 1, 2021, and August 31, 2021, due to the one-year time limitation for refilling a prescription from the date the veterinarian last examined the animal patient and prescribed the drug.

MDC Telemedicine Review

During the July 2020 Board meeting, the Board directed the MDC to evaluate the telemedicine waiver and determine whether it should be made permanent. MDC Chair, Kristi Pawlowski, RVT, joined Dr. Richard Sullivan to form the Telemedicine Subcommittee (Subcommittee) to research this matter further and facilitate the MDC's collaborative discussions during the October 21, 2020 meeting.

During the October 2020 meeting, MDC members heard from stakeholders with differing perspectives regarding the benefits and concerns of providing veterinary care through telemedicine. The MDC members asked questions of the stakeholders and engaged in a collaborative discussion. No actions were taken during this meeting.

The MDC continued its discussion on these matters during the January 27, 2021 MDC meeting. MDC members heard from the Executive Director of The College of Veterinarians of Ontario (CVO) about how they regulate telemedicine with the least restrictive requirements in North America. Notably, there are very few consumer complaints submitted to the CVO – only 250 per year. CVO's Professional Practice Standard and related Guide regarding telemedicine were provided to the MDC. The MDC also asked to hear from the American Association of Veterinary State Board's Virtual Veterinary Care panelist, Aaron Smiley, DVM; however, he was unable to attend.

During the January 2021 meeting, the Subcommittee discussed concerns with legislative telemedicine proposals that would change the scope or standard of practice which could have an effect on consumer protection. The Subcommittee also addressed concerns with how the Board would protect consumers when telemedicine services are rendered from out-of-state. Veterinarians have shared specific conditions in which they are concerned telemedicine would be inappropriate, and in fact, could harm patients if given incorrect diagnoses via telehealth modalities. These conditions include feline urinary symptoms,

heart murmurs, and generalized pain. The MDC heard numerous examples in which telemedicine already could have been legally practiced, however, the profession seemed unaware of what they could or could not do under the current laws.

In addition, California Veterinary Medical Association (CVMA) submitted written comments detailing concerns that telemedicine used to establish a VCPR lowers the quality of veterinary medical service, the condition-specific component of the VCPR should be maintained, telemedicine may increase inappropriate use of antibiotics in veterinary medicine, telemedicine does not help underserved populations, clients are not trained to assess or interpret clinical symptoms and behaviors, telemedicine is largely not permitted in other states, expanding prescription refill times can increase risk to the patient, expanded telemedicine use impacts compliance with minimum standards, expanded use of telemedicine will put undue pressure on veterinarians, and current telemedicine law is widely misunderstood.

In a November 18, 2020 memorandum to the CVMA Directors, their Executive Director provided information regarding how other states define the VCPR, and whether/how those respective definitions allow for the establishment or maintenance of a VCPR through telemedicine. That memo is attached for reference. Notably, CVMA's national canvass found only two states that appear to permit the exclusive use of telemedicine to initiate a VCPR.

At the January 27, 2021 MDC meeting, the MDC approved a recommendation to the Board to maintain the existing VCPR condition-specific language to adequately protect consumers and animal patients in the provision of veterinary telemedicine.

At its January 28, 2021 meeting, the Board reviewed and discussed the VCPR waiver orders and approved a motion to request the DCA Director to issue extensions and/or authorize the Executive Committee to approve extensions of the two VCPR waivers until the end of the State of Emergency or until the MDC provides final recommendations to the Board, whichever occurs first. Based upon the Board's discussion of VCPR issues and feedback from stakeholders regarding access to veterinary medicine through telemedicine, the Board directed the MDC to define telemedicine, telehealth, teletriage, and teleconsultation.

At the April 21, 2021 MDC meeting, the Subcommittee presented a regulatory proposal to amend CCR, title 16, section 2032.1, to add definitions for telemedicine, telehealth, teletriage, and teleconsultation. Due to the number of conflicting definitions and lack of education in the California veterinary profession, and to protect consumers and animal patients, the MDC discussed the importance of providing clarity through definitions of telemedicine, telehealth, teleconsultation, and teletriage.

For telehealth, the Subcommittee focused on broadening the scope of telehealth to define what a non-veterinarian can do and what a veterinarian can do in light of being able to diagnose through electronic means. For telemedicine, the Subcommittee focused on what telemedicine is and what it is not. Teletriage and teleconsultation were defined in terms of the current understanding and usage in the veterinary medical profession. To develop these definitions to suit the needs of California practitioners and consumers, the Subcommittee referenced various sources including, but not limited to, the American Association of Veterinary State Boards (AAVSB), American Veterinary Medical

Association (AVMA), American Animal Hospital Association (AAHA), California Veterinary Medical Association (CVMA), Canadian Veterinary Medical Association, Centers for Disease Control (CDC), GuardianVets, United States Department of Health and Human Services, Center for Connected Health Policy, American Telemedicine Association, and Veterinary Innovation Council.

During the April 2021 meeting, the MDC received public comment expressing concern regarding a potential statutory conflict in the definition of “telehealth” in proposed CCR, title 16, section 2032.1, subsection (h). That subsection would authorize a California-licensed veterinarian to diagnose through electronic means the condition of an animal patient to provide general veterinary health information and education to the client. However, because BPC section 4825.1, subsection (a), defines “diagnosis” as the act or process of identifying or determining the health status of an animal through examination, concern was raised there may be confusion as to whether a physical examination would be necessary to provide a diagnosis through telehealth. Based upon the concerns, the MDC chose to have the Subcommittee review and clarify the proposed definitions before presenting the final draft to the Board.

At the April 22, 2021 meeting, the Board reviewed the MDC’s January 27, 2021 recommendation to maintain the existing VCPR condition-specific language and approved a motion to continue extensions of the two VCPR waivers until the end of the State of Emergency.

Subcommittee Recommendation

To resolve the concerns raised during the April 2021 MDC meeting, the Subcommittee reviewed the relevant statutes for diagnosis, telehealth, and telemedicine and noted inconsistencies with the use of telehealth on humans and animals. To begin, BPC section 686 establishes the ability of a health care practitioner to provide services via telehealth, subject to the requirements and definitions set forth in BPC section 2290.5 (the Medical Practice Act), to the practice act relating to their licensed profession, and to the regulations adopted by a board pursuant to that practice act.

For purposes of the Medical Practice Act, BPC section 2290.5 defines “telehealth” to mean the mode of delivering health care services and public health via information and communication technologies to facilitate the diagnosis, consultation, treatment, education, care management, and self-management of a patient’s health care. Notably, for humans, “telehealth” is intended to facilitate patient self-management and caregiver support for patients. (BPC, § 2290.5, subd. (a)(6).)

With respect to telemedicine, the Medical Practice Act provides that “telehealth” includes “telemedicine” as the term is referenced in the Code of Federal Regulations, title 42, sections 482.12, 482.22, and 485.616. (BPC, § 2290.5, subd. (i)(3).) Notably, those federal regulations apply to conditions of participation for hospitals, critical access hospitals, and medical staff providing human health care services through Medicare and Medicaid, which do not apply to veterinary health care. There is no other definition of “telemedicine” in the BPC, and the regulations supporting the Medical Practice Act do not further clarify this term.

For animals, CCR, title 16, section 2032.1, subsection (f), authorizes telemedicine to be practiced within an existing VCPR, with the exception for advice given in an emergency until the animal patient(s) can be seen by or transported to a veterinarian. That subsection, which relies on the telehealth authority established in BPC sections 686 and 2290.5, defines "telemedicine" to mean the mode of delivering animal health care services via communication technologies to facilitate consultation, treatment, and care management of the patient.

Since BPC section 2290.5, and federal regulations referenced therein, do not readily apply to animal patients, and because of the fundamental differences between humans and animals in communicating and identifying sickness or symptoms, the Subcommittee determined that to properly use telehealth in accordance with the BPC section 686, it is necessary to establish statutory provisions in the Veterinary Medicine Practice Act for the performance of electronic veterinary health services, including telehealth, for animal patients. Following enactment of the legislative proposal, regulatory amendments to CCR, title 16, section 2032.1, attached, would be necessary to remove superseded and redundant references to telemedicine.

Legislative Proposal

To properly accommodate electronic veterinary health services for animal patients, the attached legislative proposal would define telehealth, telemedicine, teletriage, and teleconsultation and establish the authority of veterinary professionals to provide such services. In addition, this legislative proposal seeks to address stakeholder concerns raised during the Board's January 2021 meeting, described in further detail in the Board's Meeting Minutes, regarding the racial and economic inequities resulting in a lack of access to veterinary care facilities and difficulty for consumers to travel with their pets to veterinary premises. These legislative changes are designed to protect public interests and consumer safety and are intended to address social and economic disadvantages in rural and low income communities by expanding the use of electronic technology and media to increase access to veterinary health care services for the benefit of consumers and their animals.

After in-depth consideration, the Subcommittee believes it is in the best interest of improving veterinary care for consumers, animals, and veterinary professionals to include the legislative proposal in the Board's Sunset bill. Due to legislative time limitations, the Subcommittee anticipates presenting the legislative proposal to the Board at its July 22-23, 2021 meeting, if the MDC approves a recommendation to the Board.

Definitions for Electronic Veterinary Services

The legislative proposal would create statutory definitions regarding four types of professional veterinary services that could be performed through electronic means, as follows.

Teleconsultation

The proposal would clarify teleconsultation to mean the use of electronic technology or media, including interactive audio and/or video, for communication between a California-licensed veterinarian, who has established the VCPR for the animal patient(s), and a licensed veterinarian or other person whose expertise, in the opinion of the California-licensed veterinarian, would benefit the patient(s) but who does not have a VCPR for the

patient(s). (Prop. BPC § 4825.1, subd. (e).) This definition would maintain the existing limitations on veterinary consultants under BPC section 4830, subdivision (a)(2), in which the veterinary consultant is prohibited from establishing the VCPR, cannot have direct communication with the client, and cannot have ultimate authority over the care or primary diagnosis of the animal patient.

To further maintain consistency with BPC section 4830, subdivision (a)(2), which authorizes an out-of-state licensed veterinarian to consult with a California-licensed veterinarian, the proposal also would not require the consultant to be licensed in California to provide an electronic consultation on the case. To accommodate situations in which the California-licensed veterinarian seeks advice or assistance for the benefit of the animal patient(s) from an expert not otherwise licensed as a veterinarian, the proposal would allow electronic consultations with non-veterinarians. This provision is modeled on the "consultant" definition in the AAVSB guidelines for the appropriate use of telehealth.

Telehealth

The proposal would define "telehealth" to mean the use of electronic technology or media, including interactive audio and/or video, to deliver general veterinary health information and education to the client or the client's representative. (Prop. BPC, § 4825.1, subd. (f).) Although various veterinary telehealth guidelines have defined "telehealth" as a general term that encompasses all uses of technology to remotely provide telemedicine or general veterinary advice, the Subcommittee crafted a simpler definition to accommodate for the electronic provision of general veterinary advice and education, and separately crafted a definition for telemedicine, described below.

Telemedicine

Under the existing regulatory definition of "telemedicine" in CCR, title 16, section 2032.1, subsection (f), non-emergency consultation, treatment, and care management for the medical condition of the animal patient require an established VCPR, created via an in-person examination, or by medically appropriate and timely visits to the premises where the animal(s) are kept. The requirement to establish a VCPR to provide treatment complies with federal law (*see* 21 USC § 360b; 21 CFR Part 530) and is consistent with other states' laws and veterinary guidelines. To address stakeholder concerns that the current regulatory definition of "telemedicine" limits the use of technology in veterinary medicine practice and results in decreased consumer access to veterinary care, the legislative proposal would narrow the definition of "telemedicine," so more electronic veterinary services could be provided through telehealth.

Under the proposed definition, "telemedicine" would mean the use of electronic technology or media, including interactive audio and/or video, by a California-licensed veterinarian to practice veterinary medicine provided within an established VCPR for the patient(s). (Prop. BPC, § 4825.1, subd. (g).) When the veterinarian needs to prescribe treatment of whatever nature for the animal patient(s)' medical condition, this new telemedicine definition would ensure practitioners are in compliance with federal and California state law and animal patients are properly protected by having a VCPR established before the treatment could be provided electronically. For situations where no VCPR has been established for the animal patient(s) for a medical condition, telehealth, described above, could be used to provide general veterinary health information and education. By narrowing the definition of telemedicine and establishing a

definition for telehealth, consumers will have more options available to receive veterinary health care for their animals.

Teletriage

The legislative proposal would define "teletriage" to mean the use of electronic technology or media, including interactive audio and/or video, to diagnose and treat a medical emergency, as defined, until the animal patient(s) can be transported to, and/or seen by, a veterinarian. (Prop. BPC, § 4825.1, subd. (h).) This definition would expand the existing VCPR exemption in CCR, title 16, section 2032.1, subsection (f), which authorizes advice given in an emergency.

Pursuant to CCR, title 16, section 2032.1, subsection (a), in order to treat an animal patient, a VCPR must be established. This requirement is consistent with federal law, other state laws, and veterinary association guidelines that limit the ability to prescribe and/or treat a medical condition. However, BPC section 4826.4 authorizes a California-licensed veterinarian to render necessary and prompt care and treatment, including dispensing and prescribing a dangerous drug or device, to an animal patient without establishing a VCPR if conditions are such that one cannot be established in a timely manner. To conform to the emergency provisions in BPC section 4826.4 and ensure necessary and prompt care and treatment of animal patients, the definition of teletriage would include electronically diagnosing and treating a medical emergency.

Specified Electronic Veterinary Services

The legislative proposal would establish specific veterinary services that could be performed through electronic technology or media, as follows.

Telemedicine Services

The proposal would authorize a California-licensed veterinarian to further evaluate an animal patient(s)' progress, and diagnose and treat the medical condition for which the VCPR has been established. (Prop. BPC, § 4826.3, subd. (a).) A VCPR is established, among other things, when the veterinarian has sufficient knowledge of the animal(s) to initiate at least a general or preliminary diagnosis of the medical condition of the animal(s) by being personally acquainted with the care of the animal(s) by virtue of an in-person examination of the animal or by medically appropriate and timely visits to the premises where the animals are kept. (CCR, tit. 16, § 2032.1, subs. (b).) Because animal patients cannot communicate their sickness or symptoms to the veterinarian and the animal patient may not display symptoms that are obvious to the client, it is essential for the veterinarian to be personally acquainted with the care of the animal(s).

Since the proposal would authorize treatment through electronic means, the telemedicine provision was narrowly crafted to authorize telemedicine to be performed only after the veterinarian has established the VCPR. This limitation on the use of telemedicine is consistent with the AAVSB guidelines for the appropriate use of telehealth, as well as CCR, title 16, section 2032.1, which requires a VCPR to treat an animal patient.

The proposal necessarily would maintain the existing prohibition on establishing a VCPR by telephonic or other electronic means in CCR, title 16, section 2032.1, subsection (e), which is consistent with the AVMA Model Veterinary Practice Act, as well as federal law. (*See* 21 USC § 360b; 21 CFR Part 530; AVM A, *Federal requirements for the veterinarian-*

client-patient relationship, footnote 10, citing United States Food and Drug Administration (FDA) letter to the AVMA, Apr. 6, 2017 (for purposes of the federal definition, a VCPR cannot be established solely through telemedicine (e.g., photos, videos, or other electronic means that do not involve examination of the animal(s) or timely visits to the premises)).) Notably, the FDA also recently reiterated that the federal VCPR definition requires animal examination and/or medically appropriate and timely visits to the premises where the animal(s) are kept, so the federal VCPR definition cannot be met solely through telemedicine. (FDA, *Enforcement Policy Regarding Federal VCPR Requirements to Facilitate Veterinary Telemedicine During the COVID-19 Outbreak*, Mar. 2020.) As such, the proposal would ensure practitioners are in compliance with federal and California state law and animal patients are properly protected by having a properly established VCPR in place before treatment could be provided electronically.

Telehealth Services

The legislative proposal would authorize telehealth services to be provided by a California-licensed veterinarian, and those services could include a general or preliminary diagnosis of the general health of the animal patient(s) using a virtual examination of the animal patient(s). (Prop. BPC, § 4826.3, subd. (b)(1).) This provision was crafted carefully to conform with the existing definition of "diagnosis," which is defined to mean the act or process of identifying or determining the health status of an animal through examination and the opinion derived from the examination (BPC, § 4825.1, subd. (a)). To benefit consumers by expanding the use of electronic technology and increasing access to veterinary health care services, the new telehealth provision would specify that the examination could be performed virtually in order to provide a general or preliminary diagnosis of the general health of the patient. Since this telehealth provision would not authorize treatment to be electronically provided, it could be used without establishing a VCPR, which would otherwise require an in-person examination or by medically appropriate and timely visits to the premises where the animal(s) are kept.

To further increase access to veterinary health care, the telehealth provision would allow an RVT or VA to use telehealth to determine the seriousness of a medical situation and advise the client or client's representative of the urgency of the animal patient(s) being seen. (Prop. BPC, § 4826.3, subd. (b)(2).). This provision is consistent with current practice when consumers telephone or email a veterinary clinic for advice on whether to bring in their animal for veterinary medical assistance.

The telehealth provision would authorize a registered veterinary technician (RVT) or veterinary assistant (VA) to provide telehealth to consumers as long as no diagnoses or treatment of any condition is provided. This limitation is consistent with the prohibitions on RVTs and VAs providing a diagnosis or prognosis of animal diseases and prescribing drugs, medicine, and appliances established under BPC section 4840.2, and clarified in CCR, title 16, sections 2036, subsection (a), and 2036.5, subsection (a).

Teletriage Services

The proposal would make clear to practitioners and consumers that teletriage cannot be used for treatment of non-life-threatening cases, but may be used in an emergency, as specified. (Prop. BPC, § 4826.3, subd. (a).) Currently, advice can be provided through telemedicine in an emergency without establishing a VCPR. (CCR, tit. 16, § 2032.1, subs. (f).) To benefit consumers by increasing access to critical veterinary care, the proposal

would replace that provision and, using the emergency provisions under BPC section 4826.4, subdivision (a), would authorize a California-licensed veterinarian, without establishing a VCPR, to utilize teletriage to diagnose and treat the animal patient(s) until the animal patient(s) can be seen by, or transported to, a veterinarian. (Prop. BPC, § 4826.3, subd. (c)(1).)

In addition, this proposal would authorize an RVT to use teletriage in an emergency (Prop. BPC, § 4826.3, subd. (c)(2)) and is consistent with the existing RVT lifesaving aid and treatment authority under BPC section 4840.5, which is clarified by CCR, title 16, section 2069.

Regulatory Proposal

If the legislative proposal is enacted, the telemedicine provisions in CCR, title 16, section 2032.1 must be updated to reflect the new statutory provisions. The attached regulatory proposal is intended to be submitted as a CCR, title 1, section 100 rulemaking for expedited enactment. Under CCR, title 1, section 100, the Board is authorized to add to, revise, or delete regulatory text without complying with the usual rulemaking procedure under Article 5 of the Administrative Procedure Act if the change does not materially alter any requirement, right, responsibility, condition, prescription, or other regulatory element of any CCR provision.

Currently, CCR, title 16, section 2032.1, subsection (f), authorizes telemedicine to be practiced within an existing VCPR, with the exception for advice given in an emergency until the animal patient(s) can be seen by or transported to a veterinarian. That subsection defines "telemedicine" to mean the mode of delivering animal health care services via communication technologies to facilitate consultation, treatment, and care management of the patient.

However, the legislative proposal would specify the varying levels of veterinary practice that may be performed through electronic means, including telemedicine and emergency advice. As such, if the legislative proposal is enacted, the new electronic veterinary services statutes would supersede the telemedicine and emergency advice provisions in the existing regulation. Accordingly, the regulatory proposal would strike the telemedicine and emergency advice provisions in CCR, title 16, section 2032.1, subsection (f).

The regulatory proposal also would make technical revisions to simplify the regulation by inserting "VCPR" in place of "veterinarian-client-patient relationship." In addition, the regulation authority citations would be updated to reflect the new statutory placement of electronic veterinary services, including telehealth and telemedicine. The reference citations would be updated to provide clarity for the new electronic veterinary services VCPR provisions.

Although the Subcommittee previously proposed to include in the regulatory proposal the informed client consent amendment to CCR, title 16, section 2032.1, subsection (b)(3), which was previously approved by the Board in January 2019 and January 2020, the Subcommittee now recommends moving that substantive amendment in a separate rulemaking. The January 2019 meeting materials and January 2020 meeting materials are available on the Board's website for more background on the informed consent provision.

Action Requested
Please review the attached legislative and regulatory proposals. If the MDC approves the attached legislative and regulatory proposals during their July 21 meeting without any substantive changes, please entertain a motion to approve submission of the legislative proposal to the California State Legislature to amend BPC section 4825.1 and add BPC section 4826.3 and include the proposal in the Board's Sunset bill.

In addition, please entertain a motion to approve the regulatory proposal to amend CCR, title 16, section 2032.1 and direct the Executive Officer to take all steps necessary to initiate the section 100 rulemaking process, make any technical or non-substantive changes to the rulemaking package, and adopt the proposed regulatory changes.

Attachments
1. Electronic Veterinary Services Legislative Proposal to Amend BPC Section 4825.1 and Add BPC Section 4826.3
2. Regulatory Proposal to Amend CCR, Title 16, Section 2032.1 Through CCR, Title 1, Section 100 Action
3. VCPR/Telemedicine: National Canvass Memo to CVMA Directors, November 18, 2020

VETERINARY MEDICAL BOARD

LEGISLATIVE PROPOSAL

ELECTRONIC VETERINARY SERVICES

Amend section 4825.1 and add section 4826.3 to Article 2, Chapter 11, Division 2 of the Business and Professions Code as follows:

4825.1. These definitions shall govern the construction of this chapter as it applies to veterinary medicine.

(a) “Diagnosis” means the act or process of identifying or determining the health status of an animal through examination and the opinion derived from that examination.

(b) “Animal” means any member of the animal kingdom other than humans, and includes fowl, fish, and reptiles, wild or domestic, whether living or dead.

(c) “Food animal” means any animal that is raised for the production of an edible product intended for consumption by humans. The edible product includes, but is not limited to, milk, meat, and eggs. Food animal includes, but is not limited to, cattle (beef or dairy), swine, sheep, poultry, fish, and amphibian species.

(d) “Livestock” includes all animals, poultry, aquatic and amphibian species that are raised, kept, or used for profit. It does not include those species that are usually kept as pets such as dogs, cats, and pet birds, or companion animals, including equines.

<u>(e) “Teleconsultation” means the use of electronic technology or media, including interactive audio and/or video, for communication between a California-licensed veterinarian who has established the veterinarian-client-patient relationship for the animal patient(s), and a licensed veterinarian or other person whose expertise, in the opinion of the California-licensed veterinarian, would benefit the patient(s), but who does not have a veterinarian-client-patient relationship for the patient(s), does not have direct communication with the client, and does not have ultimate authority over the care or primary diagnosis of the animal patient(s).</u>

<u>(f) “Telehealth” means the use of electronic technology or media, including interactive audio and/or video, to deliver general veterinary health information and education to the client or client’s representative.</u>

<u>(g) “Telemedicine” means the use of electronic technology or media, including interactive audio and/or video, by a California-licensed veterinarian to practice veterinary medicine provided within an established veterinarian-client-patient relationship for the patient(s).</u>

<u>(h) “Teletriage” means the use of electronic technology or media, including interactive audio and/or video, to diagnose and treat a medical emergency as defined under Section 4840.5, until the animal patient(s) can be transported to, and/or seen by, a veterinarian.</u>

4826.3. (a) Telemedicine may be used by a California-licensed veterinarian to further evaluate the animal patient(s)' progress, and diagnose and treat the medical condition for which the veterinarian-client-patient relationship has been established.

(b) Telehealth may be used as follows:

(1) By a California-licensed veterinarian and may include a general or preliminary diagnosis of the general health of the animal patient using a virtual examination of the animal patient(s), but shall not include treatment of whatever nature for any condition.

(2) By a registered veterinary technician or veterinary assistant to determine the seriousness of a medical situation and advise the client or client's representative of the urgency of an in-person examination of the animal patient(s), but shall not include a diagnosis or treatment of any condition.

(c) Teletriage shall not be used for non-life-threatening cases. In an emergency, as defined under Section 4840.5, teletriage may be used as follows:

(1) By a California-licensed veterinarian to diagnose and treat the animal patient(s), until the animal patient(s) can be seen by, or transported to, a veterinarian.

(2) By a registered veterinary technician as provided under Section 4840.5.

(d) Teleconsultation may be used by a California-licensed veterinarian to obtain advice or assistance on an animal patient(s)' medical condition.

DEPARTMENT OF CONSUMER AFFAIRS
TITLE 16. VETERINARY MEDICAL BOARD

PROPOSED REGULATORY LANGUAGE
Telemedicine

Legend:	Added text is indicated with an underline. Omitted text is indicated by (* * * *) Deleted text is indicated by ~~strikeout~~.

Amend section 2032.1 of Article 4 of Division 20 of Title 16 of the California Code of Regulations to read as follows:

§ 2032.1. Veterinarian-Client-Patient Relationship.

(a) It is unprofessional conduct for a veterinarian to administer, prescribe, dispense or furnish a drug, medicine, appliance, or treatment of whatever nature for the prevention, cure, or relief of a wound, fracture or bodily injury or disease of an animal without having first established a veterinarian-client-patient relationship (VCPR) with the animal patient or patients and the client, except where the patient is a wild animal or the owner is unknown.

(b) A ~~veterinarian-client-patient relationship~~VCPR shall be established by the following:

(1) The client has authorized the veterinarian to assume responsibility for making medical judgments regarding the health of the animal, including the need for medical treatment,

(2) The veterinarian has sufficient knowledge of the animal(s) to initiate at least a general or preliminary diagnosis of the medical condition of the animal(s). This means that the veterinarian is personally acquainted with the care of the animal(s) by virtue of an examination of the animal or by medically appropriate and timely visits to the premises where the animals are kept, and

(3) The veterinarian has assumed responsibility for making medical judgments regarding the health of the animal and has communicated with the client a course of treatment appropriate to the circumstance.

(c) A drug shall not be prescribed for a duration inconsistent with the medical condition of the animal(s) or type of drug prescribed. The veterinarian shall not prescribe a drug for a duration longer than one year from the date the veterinarian examined the animal(s) and prescribed the drug.

(d) As used herein, “drug” shall mean any controlled substance, as defined by Section 4021 of the code, and any dangerous drug, as defined by Section 4022 of the code.

(e) No person may practice veterinary medicine in this state except within the context of a veterinarian-client-patient relationship or as otherwise permitted by law. A ~~veterinarian-client-patient relationship~~<u>VCPR</u> cannot be established solely by telephonic or electronic means.

~~(f) Telemedicine shall be conducted within an existing veterinarian-client-patient relationship, with the exception for advice given in an “emergency,” as defined under section 4840.5 of the code, until that patient(s) can be seen by or transported to a veterinarian. For purposes of this section, “telemedicine” shall mean the mode of delivering animal health care services via communication technologies to facilitate consultation, treatment, and care management of the patient.~~

Note: Authority cited: Section~~s 686 and~~ 4808, Business and Professions Code. Reference: Sections~~ 686, 2290.5,~~ 4022<u>, 4825.1, 4826.3</u> and 4883, Business and Professions Code.

MEMORANDUM

From: Dan Baxter

To: CVMA Directors

Date: November 18, 2020

Re: VCPR/Telemedicine: National Canvass

I. Introduction

This memorandum discusses the way in which the various states of the Union define the veterinarian-client-patient relationship (VCPR), and more specifically whether and how those respective definitions allow for the establishment or maintenance of a VCPR through "telemedicine."

I prepare this memorandum on the heels of the recent October 2020 meetings of the California Veterinary Medical Board and its Multidisciplinary Committee, at which telemedicine proponents indicated that California is the only state—or one of very few states—whose legal framework does not specifically recognize telemedicine as a valid pathway through which a VCPR may be created or maintained. Also posited by those same individuals was the proposition that California is the only state—or one of very few states—that treats the VCPR as a condition-specific relationship.

II. Summary of Conclusions

While additional commentary regarding the various states' treatment of telemedicine is set forth in Part IV, *infra*, the overall takeaway from my assessment is that the above-described pronouncements made by the telemedicine proponents are inaccurate. Indeed, based on my review, only eleven states other than California actually address telemedicine in their respective statutory or regulatory frameworks. Of those, most permit the use of telemedicine in a limited manner, with only two states appearing to permit the exclusive use of telemedicine to initiate a VCPR. Moreover, since the vast majority of states follow the AVMA's lead relative to the definition of the VCPR, it is impossible to maintain that those states view the VCPR as anything other than condition-specific.

Accordingly, my overall conclusion is that (a) California is neither the only state nor one of few states that does not specifically allow for the expansive practice of telemedicine, and (b) California is similarly unexceptional in treating the VCPR as condition-specific.

III. AVMA Treatment of the VCPR and Telemedicine

Because many states' treatment of the VCPR is wholly or partly drawn from definitions utilized by the AVMA, it is useful to set forth those definitions. According to the AVMA's Principles of Veterinary Medical Ethics (hereinafter, "the AVMA's Principles"), and as relevant to the issue at hand, a VCPR "can only exist when…"

> …the veterinarian has performed a timely physical examination of the patient(s) or is personally acquainted with the keeping and care of the patient(s) by virtue of medically appropriate and timely visits to the operation where the patient(s) is(are) managed.

The use of the terms "timely physical examination" and "personally acquainted…by virtue of…visits to the operation" is strongly indicative of the AVMA's view that the existence of the VCPR is condition-specific, and dependent on either (1) the personal laying of hands on the animal patient, or (2) "timely" physical visits to the "operation" at which the animal patient resides. This latter alternative is likely directed to situations where the animal at issue is part of a herd, flock, litter, or other large group of similarly-situated animals, such as those found in an agricultural, commercial, laboratory, or shelter setting.

The AVMA's Principles are silent with respect to telemedicine. Indeed, the Principles' only mention of telephonic or electronic interfacing comes in their definition of the practice of veterinary medicine, which is stated to include the "[r]endering of advice or recommendation by any means including telephonic and other electronic communications with regard to [diagnosis or treatment]." However, the AVMA does maintain a self-described telemedicine "policy" on its website. That policy states, *inter alia*, that "veterinary telemedicine should only be conducted within an existing (VCPR), with the exception for advice given in an emergency until that patient can be seen by a veterinarian," and further instructs that "[w]ithout a VCPR, any advice provided through electronic means should be general and not specific to a patient, diagnosis, or treatment." The policy also sets forth the AVMA's opposition to "remote consulting, including telemedicine, offered directly to the public when the intent is to diagnose and/or treat a patient in the absence of a VCPR."

Based on the above, I am comfortable concluding that one cannot use the AVMA's Principles—or other AVMA commentary—as a foothold for arguing that the VCPR may be created or materially maintained via telemedicine alone, or that the VCPR is *not* a condition-specific relationship that must be reestablished for each clinical course.

IV. State Laws

A significant majority of United States jurisdictions follow the AVMA's definition of the VCPR, in whole or in substantial part. In that regard, the "timely physical examination" and "personally acquainted…by virtue of…visits to the operation" criteria set forth by the AVMA is used verbatim, or in substantially similar form, by 41 states, including California. An additional state, Hawaii, does not have specific statutory or regulatory language dealing with the VCPR, but expressly incorporates the AVMA's Principles in its statutory framework. Pennsylvania also does not explicitly reference the VCPR, but its brief definition of "under the veterinarian's care" indicates that "the veterinarian or one of the veterinarian's licensed associates has examined the animal or has made medically appropriate and timely visits to the premises where the animal is kept." Finally, while Tennessee's regulatory language departs somewhat from the AVMA's, Tennessee *expressly prohibits* the exclusive use of telemedicine in veterinary medicine: "The

veterinary-client-patient relationship cannot be established or maintained solely by telephone or other means."

Of the remaining seven jurisdictions not accounted for above, four of them (Alaska, Delaware, the District of Columbia, Michigan) have no relevant laws currently on the books,[1] while the remaining three (Alabama, New Jersey, and South Dakota) follow language that materially differs from the AVMA's Principles. Of those last three, only New Jersey and South Dakota's laws can legitimately be read to allow for a more magnanimous application (than directed by the AVMA) of telemedicine to establish or maintain a VCPR. In that vein, neither New Jersey nor South Dakota insist on a physical examination of—or similarly "personal" acquaintance with—the animal as an antecedent to the creation or continuance of the VCPR.[2]

Other than California, only 11 states address the issue of telemedicine in their statutory/regulatory structures. Those states are discussed alphabetically below.

1. Colorado

In addition to being one of the many states that generally follows the AVMA's Principles in defining the VCPR, Colorado also has the most extensive legal framework relative to telemedicine. While Colorado's regulations do not "allow the establishment of a [VCPR] solely by telephonic or other electronic means," the Colorado State Board of Veterinary Medicine issued a series of policies and guidelines in October of 2018, including several guidelines relative to the use of telemedicine.[3] While the guidelines are carefully drafted and stop short of serving as a panacea for telemedicine's application (in fact, they reiterate the need for a VCPR to be established consistent with the definition found in the AVMA's Principles), they do strongly suggest that once the VCPR has been *established*, the maintenance of that relationship may be continued entirely via telemedicine where the client provides informed consent to same. (See Veterinary Policies and Guidelines, Part III, pp. 23-24—https://drive.google.com/file/d/0B-K5DhxXxJZbeTF2SDJ1T3hza0U/view.) And, while these guidelines are not crystal clear (to be sure, they are heavily reliant on the veterinarian's duty to follow "generally accepted standards of practice"), I believe they can legitimately be read for the proposition that a VCPR in Colorado is *not* a condition-specific relationship, but one that may be initiated one time for an animal, with potential blanket application over all conditions going forward.

2. Georgia

Georgia's regulations have one line devoted to telemedicine, indicating that "[a] veterinarian/client/patient relationship cannot be established solely by telephone, computer or other electronic means." The pregnant negative of this prohibition is that the VCPR in Georgia

[1] Per my communications with the AVMA's Director, State Advocacy Division (Ashley Morgan, DVM), there is currently a VCPR-related bill making its way through the Michigan legislature.
[2] Both states, in relevant part, simply require "sufficient knowledge" of the animal(s) at issue "to initiate at least a general or preliminary diagnosis" of the condition.
[3] Colorado and several other states' frameworks employ the word "telehealth" instead of "telemedicine."

may be *continued or maintained* solely via telemedicine. However, while Georgia—like California—has issued emergency rules modestly loosening telemedicine restrictions, it does not appear to have offered any general guidance on the extent to which telemedicine may be utilized in the context of a VCPR.

3. Idaho

Idaho law on telemedicine is extremely terse, simply indicating that the practice of veterinary medicine includes that performed through "telephonic, electronic, or other means." However, on June 18, 2018, the Idaho Board of Veterinary Medicine adopted Policy No. 2018-2, which contains guidelines strongly suggesting that in certain circumstances, a VCPR may be both established and maintained via telemedicine:

> The veterinarian must employ sound professional judgment to determine whether using Telehealth is appropriate in particular circumstances each and every time animal care is provided and only provide medical advice or treatment via Telehealth to the extent that it is possible without a hands on examination. A veterinarian using Telehealth must take appropriate steps to obtain Informed Consent, establish the VCPR and conduct all appropriate evaluations and history of the patient consistent with traditional standards of care for the particular patient presentation. As such, some situations and patient presentations are appropriate for the utilization of Telehealth as a component of, or in lieu of, hands on medical care, while others are not.

After this and other language, Idaho's policy concludes with language mirroring the AVMA's Principles relative to prescriptions, indicating that prescriptions made via telemedicine modalities require "sufficient knowledge of the animal or group of animals by virtue of a history and inquiry and either physical examination or medically appropriate and timely visits to the premises where the animal or group of animals is kept."

In light of the above language, it appears that Idaho will allow for a VCPR to be established and maintained via telemedicine when (a) it is deemed clinically appropriate by the veterinarian and (b) informed consent is provided by the client. For a prescription to be issued, however, there appears to be a physical/locational component that can only be fulfilled by an in-person examination or personal visits to the place where the animal resides.

4. Illinois

Like Georgia, Illinois directs one line—albeit via statute rather than regulation—to telemedicine, indicating that a VCPR "does not mean a relationship solely based on telephonic or other electronic communications." Unfortunately, the Illinois Veterinary Licensing and Discipline Board does not appear to have offered any guidance that fleshes out whether and to what extent telemedicine can permissibly play a role in the creation or maintenance of the VCPR.

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5. Iowa

Iowa is similar to Georgia and Illinois, offering a one-sentence regulatory prohibition stating that a valid VCPR "cannot be established by contact solely based on a telephonic or electronic communication." While the Iowa Board of Veterinary Medicine has temporarily suspended the enforcement of that prohibition for companion animals "until further notice" due to COVID-19, it has maintained the prohibition for livestock.

6. Mississippi

Mississippi's relevant statute is similar, stating that "a veterinarian-client-patient relationship cannot be established solely by telephonic or other electronic means." And, although Mississippi has—like Iowa—adopted a COVID-19 protocol allowing for the limited use of telemedicine, that protocol specifically does *not* permit the initiation of a VCPR via telemedicine modalities.

7. Oklahoma

An analysis of Oklahoma's veterinary telemedicine law/policy is essentially identical to that of Idaho. Oklahoma's relevant statute defines the practice of veterinary medicine to include telemedicine, and the Oklahoma Veterinary Board issued a position statement in 2018 with language very similar to the guidelines issued by the Idaho Board of Veterinary Medicine. Therefore, my conclusions relative to Oklahoma's treatment of the issue are the same as with respect to Idaho.

8. Tennessee

Tennessee's statutory language—referenced at the beginning of this section—is the most explicitly prohibitive of telemedicine utilization, indicating that "[t]he veterinary-client-patient relationship cannot be established ***or maintained*** solely by telephone or other electronic means." I have been unable to determine whether the Tennessee Board of Veterinary Medical Examiners has issued any temporary regulations or guidelines regarding the enforcement of this prohibition during the pendency of COVID-19.

9. Texas

Texas is another state whose relevant statute provides that a VCPR "may not be established solely by telephone or electronic means." The Texas Board of Veterinary Medical Examiners indicates on its website that Texas law "allow[s] for veterinarians to provide care via telemedicine to existing patients," but that "a veterinarian client patient relationship may not be established solely through telemedicine." The Board then states that because "[t]here is no written guidance on how often a veterinarian must see an animal to maintain the valid client-patient relationship," practitioners are "encourage[d]…to use their best judgment and use telemedicine and use telemedicine where they can to meet the needs of their clients and patients."

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10. Utah

Utah's statute is identical to Texas's, and I have been unable to find any further governmental guidance regarding the application of the statute, either generally or with respect to practice in a COVID-19 environment. The only possibly-relevant authority I have located is a March 25, 2020 gubernatorial order that allows medical providers to render telemedicine services to patients when certain disclosure and consent requirements are fulfilled. (Veterinary medicine appears in Utah to be governed in part by more general healing arts-related directives, but it is unclear in this instance whether the March 25 order has any application to veterinary medicine.)

11. Virginia

Virginia's pertinent mention of telemedicine comes in its directives relative to controlled substance prescriptions, which cover both human healing arts and veterinary medicine. In its statutory framework, Virginia allows the prescription of enumerated controlled substances upon the establishment of "a bona fide practitioner-patient relationship by an examination through face-to-face interactive, two-way, real-time communications services or store-and-forward technologies," provided that various conditions attendant to the communications are met. I have found no guidance issued by the Virginia Board of Veterinary Medicine regarding the use of telemedicine, either in general or with respect to practice in a COVID environment.

V. Conclusions/Takeaways

Based on my above-described review and findings, I have reached the following conclusions:

1. The AVMA's Principles and policies do not support the proposition that the VCPR may be initiated or materially maintained solely via telemedicine.

2. The AVMA's Principles and policies do not support the proposition that the VCPR is not condition-specific.

3. 41 of the 51 United States jurisdictions reviewed follow—either verbatim or in substantively similar terms—the AVMA's definition of the VCPR, including the alternate criteria of "timely physical examination" and "personal[] acquaint[ance]…by virtue of…visits to the operation." Two other states not counted among those 41 jurisdictions (Hawaii and Pennsylvania) are to the same effect.

4. Two states—New Jersey and South Dakota—define the VCPR in a manner in which it appears that neither a physical examination nor a similarly "personal" acquaintance with the animal patient is a condition precedent to the creation or continuance of the VCPR.

5. Only eleven states (not including California) explicitly address telemedicine in their respective statutory or regulatory frameworks. None of those states erect an

outright ban on veterinary telemedicine, and all of them appear to contemplate that telemedicine may be utilized—to at least some extent—in the context of an established VCPR. Out of those eleven states:

a. Two of them (Idaho and Oklahoma) appear to contemplate that a VCPR may be established *and* maintained via telemedicine modalities, even exclusively.

b. One state, Illinois, appears to permit telemedicine to be used to establish *and* maintain a VCPR, but not exclusively.

c. Six states—Colorado, Georgia, Iowa, Mississippi, Texas, and Utah—appear to permit the use of telemedicine (perhaps even exclusively, in certain circumstances) to maintain the VCPR, but telemedicine may not be the sole or exclusive means through which a VCPR is established.

d. One state, Tennessee, expressly prohibits the exclusive use of telemedicine to establish *or* maintain the VCPR.

e. One state, Virginia, appears to follow a general healing arts model under which prescriptions may possibly be issued via telemedicine.

6. Among the 11 states having telemedicine laws on the books, none of them explicitly address whether and to what extent the VCPR is seen as a condition-specific phenomenon, a once-and-for-all proposition, or something in between.

Accordingly, my overall conclusion is that the aforementioned pronouncements of the telemedicine advocates that (a) California is the only state (or one of few) that does not specifically allow for the expansive practice of telemedicine, or (b) California is an outlier in treating the VCPR as condition-specific, are incorrect.