



Law and Veterinary Medicine

First Hour: Disclosure
November 27, 2006

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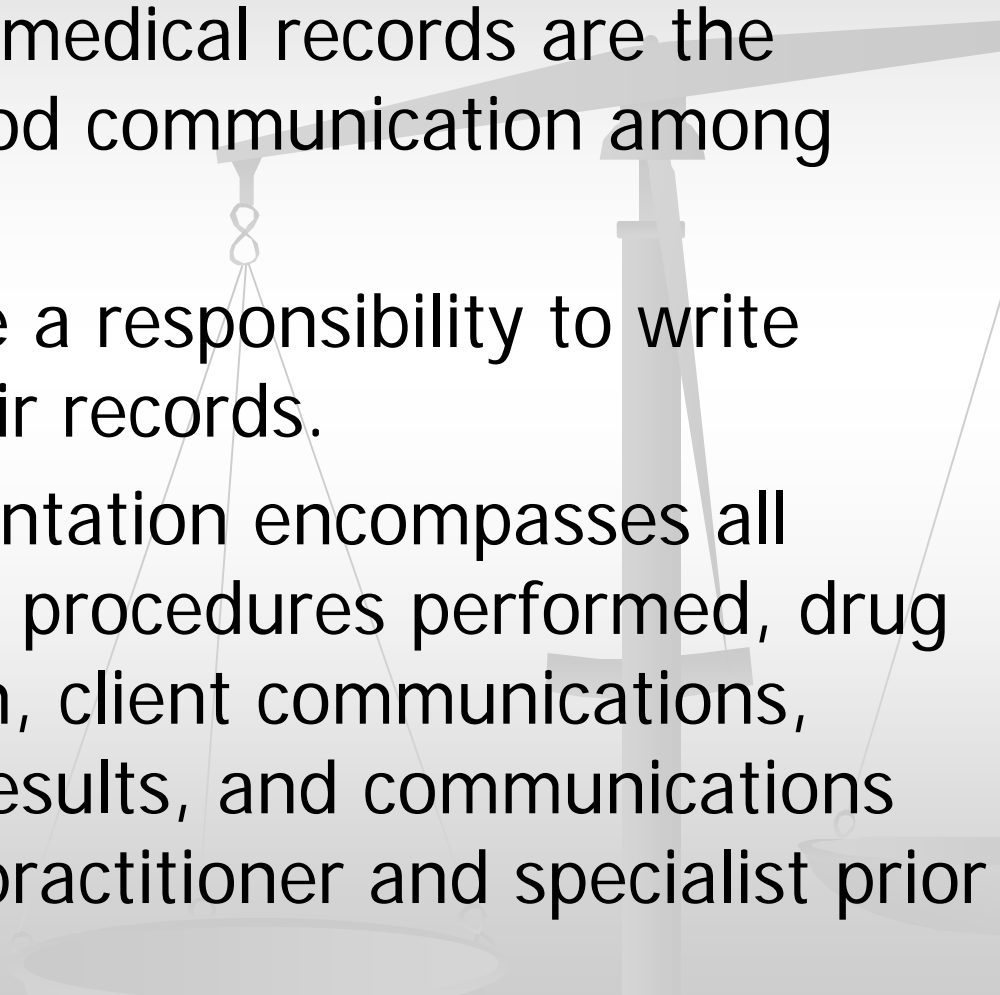
Importance of today's topics

- These two lectures complete one portion of this course's engagement with "substantive law" ...
- ... these are crucial topics—communication, disclosure, confidentiality, informed consent
- 4 assigned JAVMA articles test your ability to read law-related articles in your professional journal

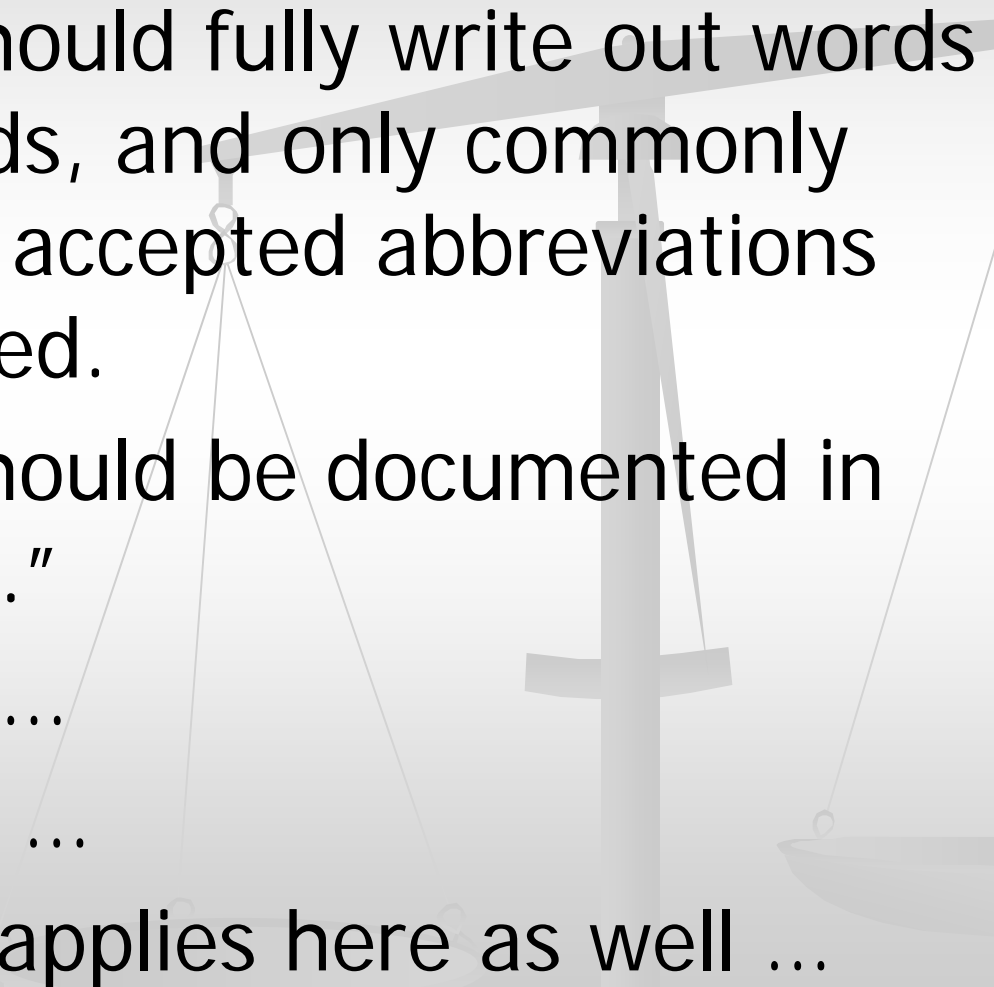
Reading from Session 2

- Relevant—JAVMA, April 15, 2006, “The relationship between general practitioners and board-certified specialists in veterinary medicine”
- “With the proliferation of tertiary care referral and emergency care hospitals and the increasing access to board certified specialists, it is clear that more and more animals will be cared for by multiple veterinarians, often at more than one veterinary hospital.”

JAVMA, April 15, 2006

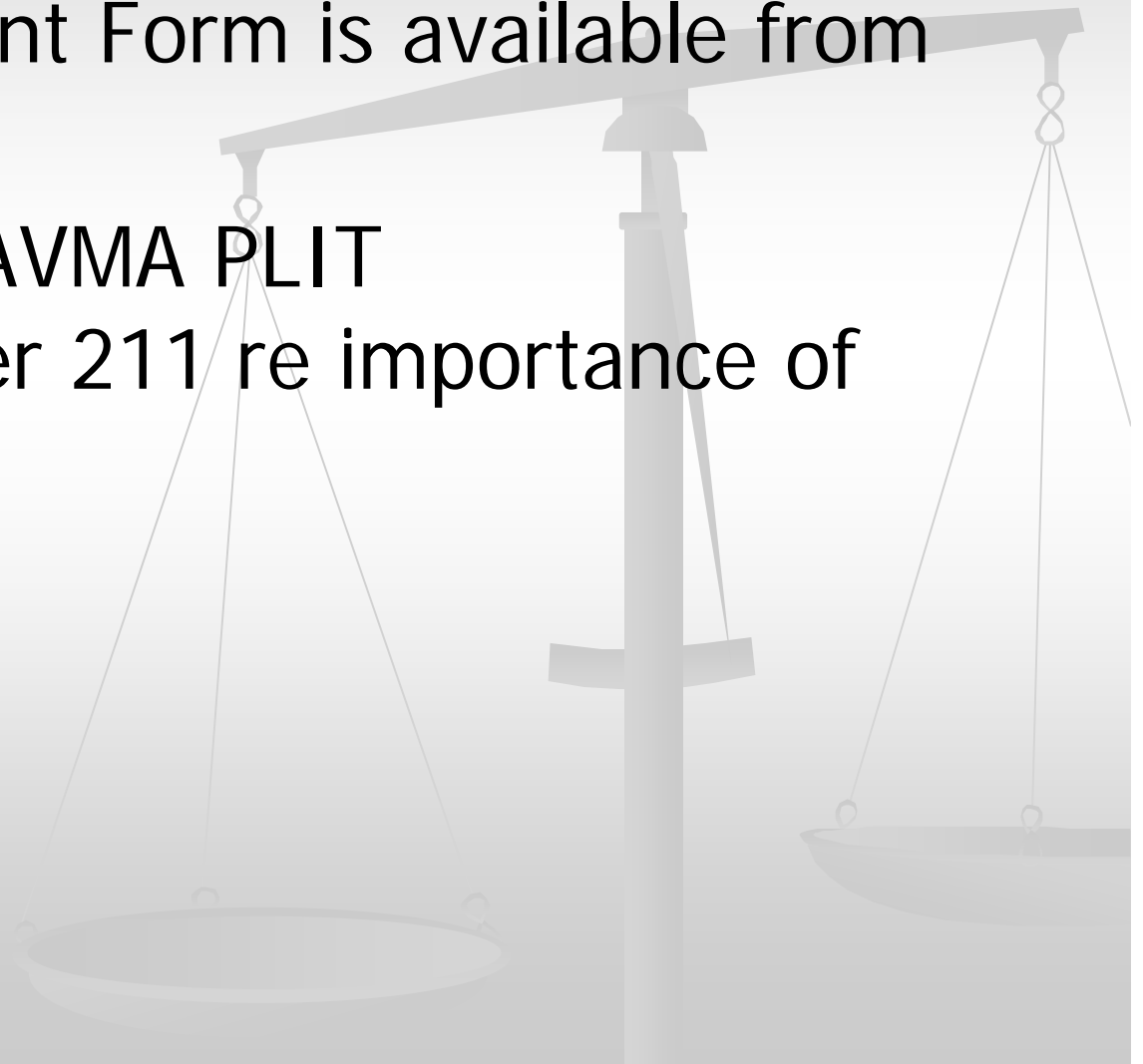
- “Clear and legible medical records are the cornerstone of good communication among veterinarians.
 - Veterinarians have a responsibility to write legibly or type their records.
 - Thorough documentation encompasses all diagnostic testing, procedures performed, drug dosing information, client communications, outstanding test results, and communications between general practitioner and specialist prior to referral.”
- 

JAVMA, April 15, 2006

- “Veterinarians should fully write out words in medical records, and only commonly used and widely accepted abbreviations should be included.
 - Medical errors should be documented in patients’ records.”
 - A high standard ...
 - ...a fair standard ...
 - The golden rule applies here as well ...
- 

HELP from PLIT

- Standard Consent Form is available from AVMA PLIT
- Might also see AVMA PLIT Question/Answer 211 re importance of consent forms

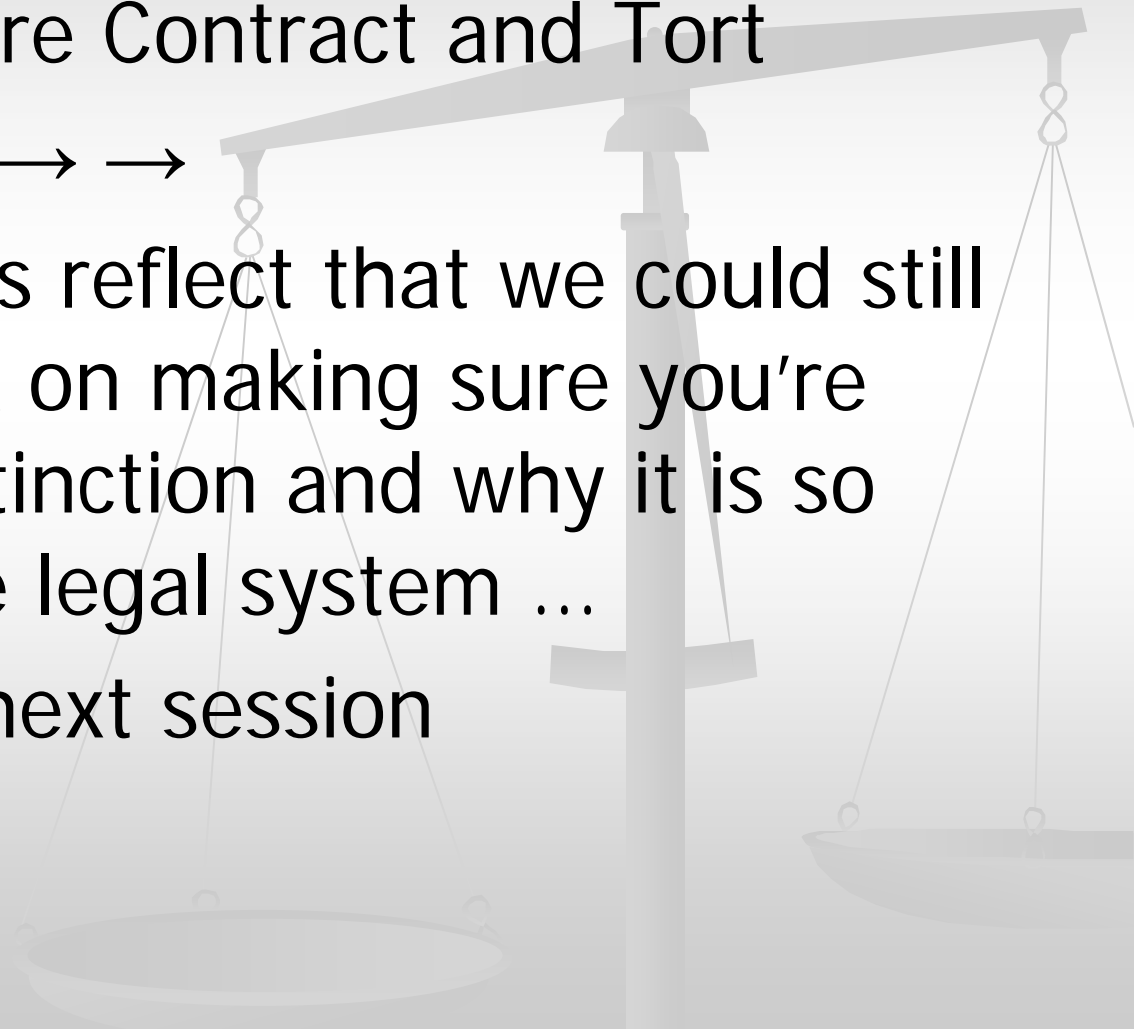


Pfizer policy announcement

- Veterinary Practice News April 2006
- Pfizer policy to disclose as much as possible, and making brochures available on its products
- Notice relevance to ... and pressure on ... disclosure sufficient to permit **informed** consent

Business

- Minutes Papers re Contract and Tort
- Generally good → →
- ... some answers reflect that we could still use a little work on making sure you're clear on the distinction and why it is so important in the legal system ...
- ... we'll do this next session



Next Minutes Paper—at beginning of November 30 session

- **On malpractice standard**
- “A veterinarian *must* exercise the care and diligence ordinarily exercised by **skilled veterinarians**”



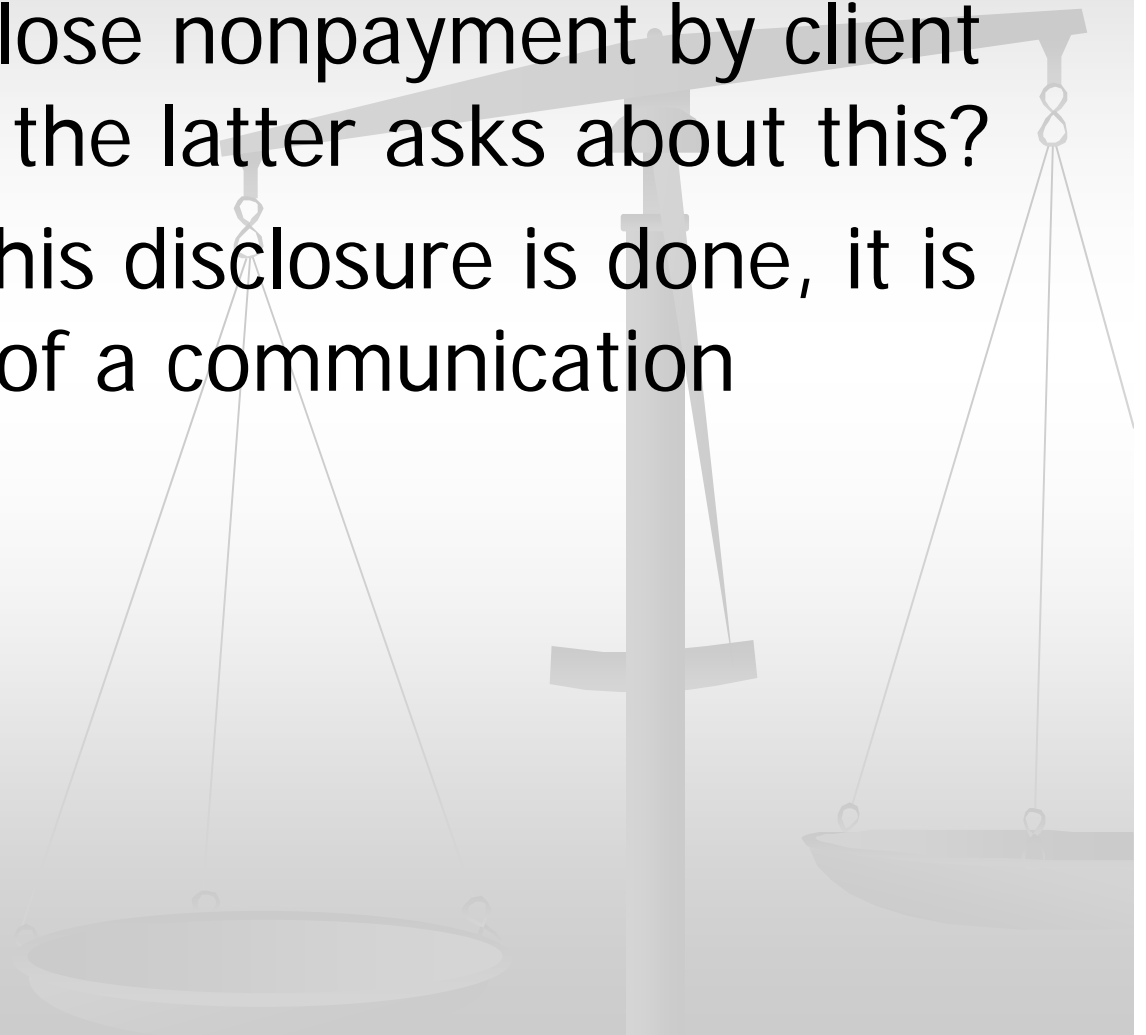
Initial hypotheticals



- A groomer calls your veterinary office to ask questions about a certain pet's medical records
 - What do you tell the groomer?
- A state government employee calls and asks your office to send records to the local courthouse
 - Can/should you do this?

Hypothetical #3

- Can vet #1 disclose nonpayment by client to vet #2 when the latter asks about this?
- Remember—if this disclosure is done, it is NOT disclosure of a communication



Hypotheticals #4 and #5

- You see a dog in your office and you suspect the injuries came from either cruelty or dog fighting
 - What can you do?
 - Is there anything you *must* do?
- On the same visit, you notice that the wife and the couple's four-year old child have bruises and you suspect domestic violence
 - What can you do?
 - What *must* you do?

Today's issues



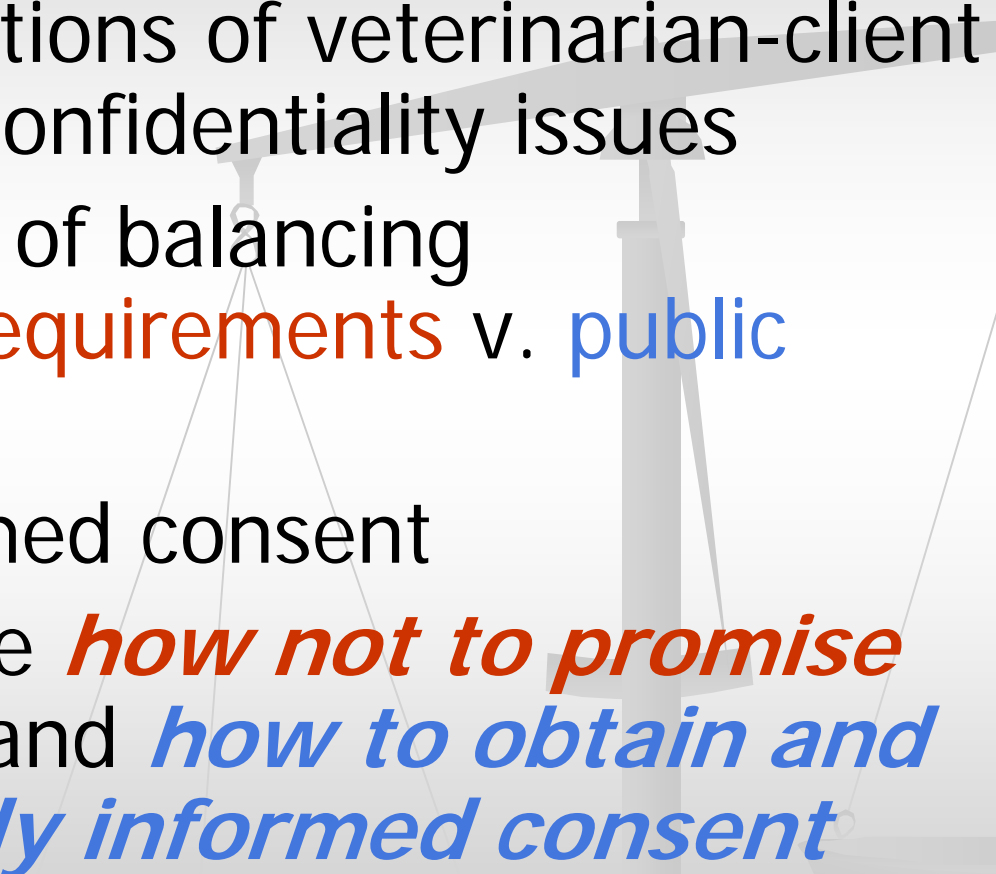
- What can you disclose?
- What ***must*** you disclose?
- What are your obligations to maintain confidentiality?
- What obligations do you have to limit access of others to veterinary records?
- What are the legal and practical issues raised by the problem of consent?
- And, why does it matter who owns the dog?

Tensions

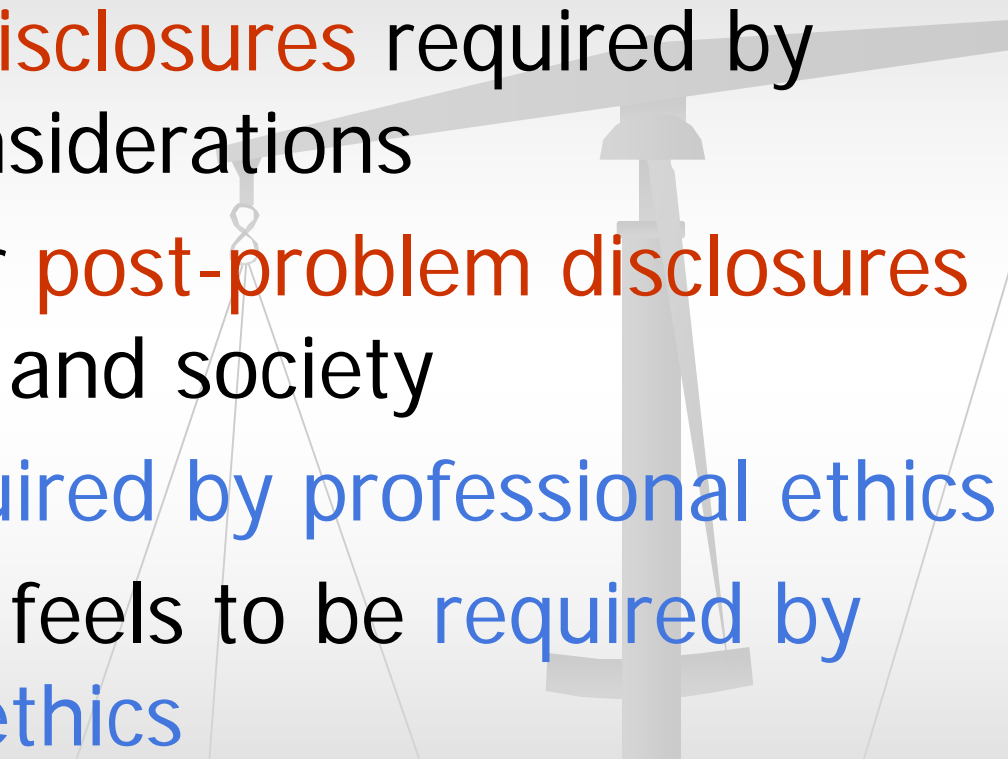
- ... potential tensions ...
- ... between your disclosure obligations
 - ... duty to share ...
- ... and your confidentiality obligations
 - ... duty not to share ...



What you should know after studying PowerPoint slides

- Extent/complications of veterinarian-client disclosure and confidentiality issues
 - The importance of balancing **confidentiality requirements** v. **public health concerns**
 - Details of informed consent
 - Practical ideas re ***how not to promise good results***, and ***how to obtain and document truly informed consent***
- 

4 Different Disclosure Considerations

- Pre-treatment disclosures required by strictly legal considerations
 - After-the-fact or post-problem disclosures required by law and society
 - Disclosures required by professional ethics
 - Disclosures one feels to be required by one's personal ethics
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Pre-treatment disclosures required by strictly legal considerations

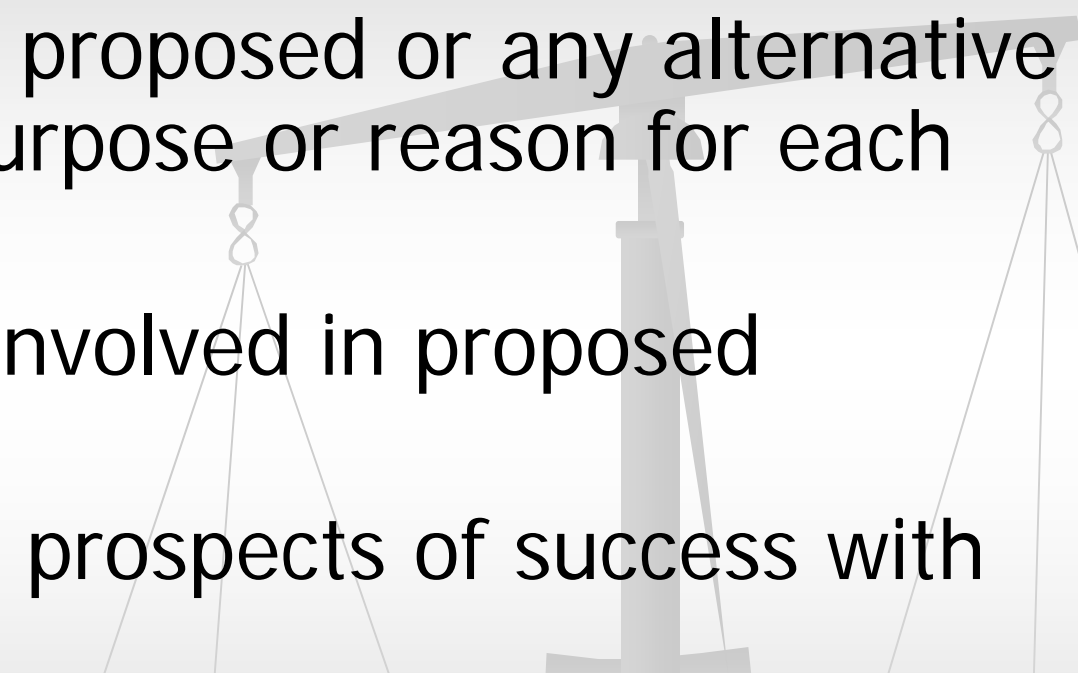
- The most basic pre-treatment issue—**informed consent**
- JAVMA May 2004 article, "*The informed consent doctrine: what veterinarians should tell their clients*"



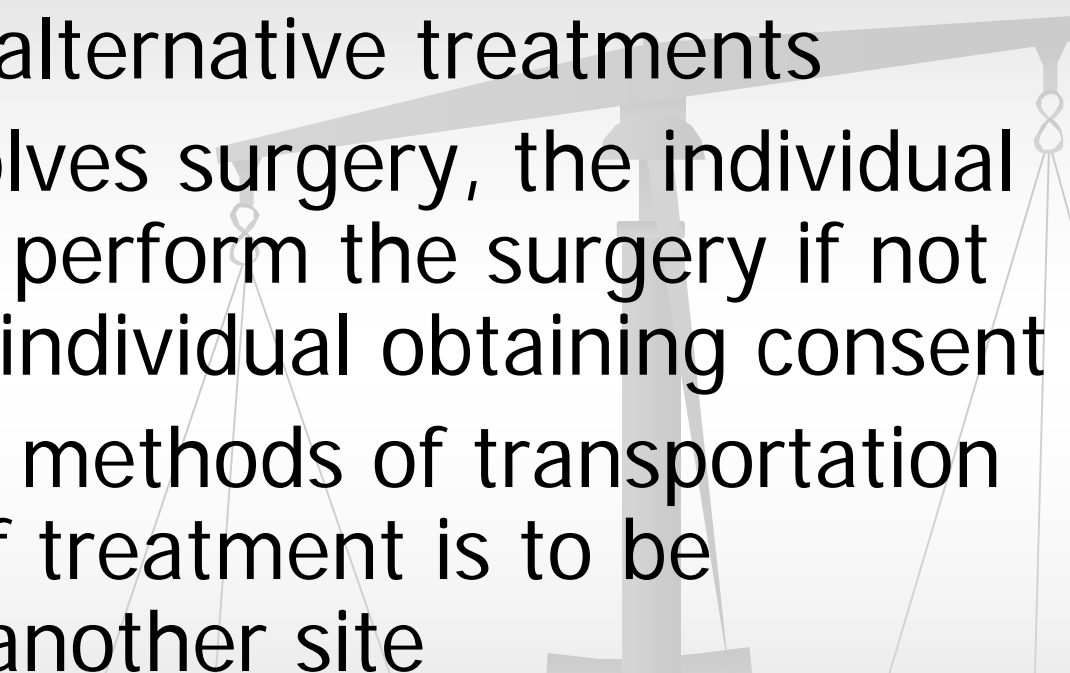
Pre-treatment disclosures

- Summary—by law, you are obligated to give the decision maker information needed to make a reasonably informed judgment about action to take or avoid
- Note the list on page 1437 of the 2004 JAVMA article (left-hand column)—**be in the “fact-downloading” mode on these**

List on page 1437

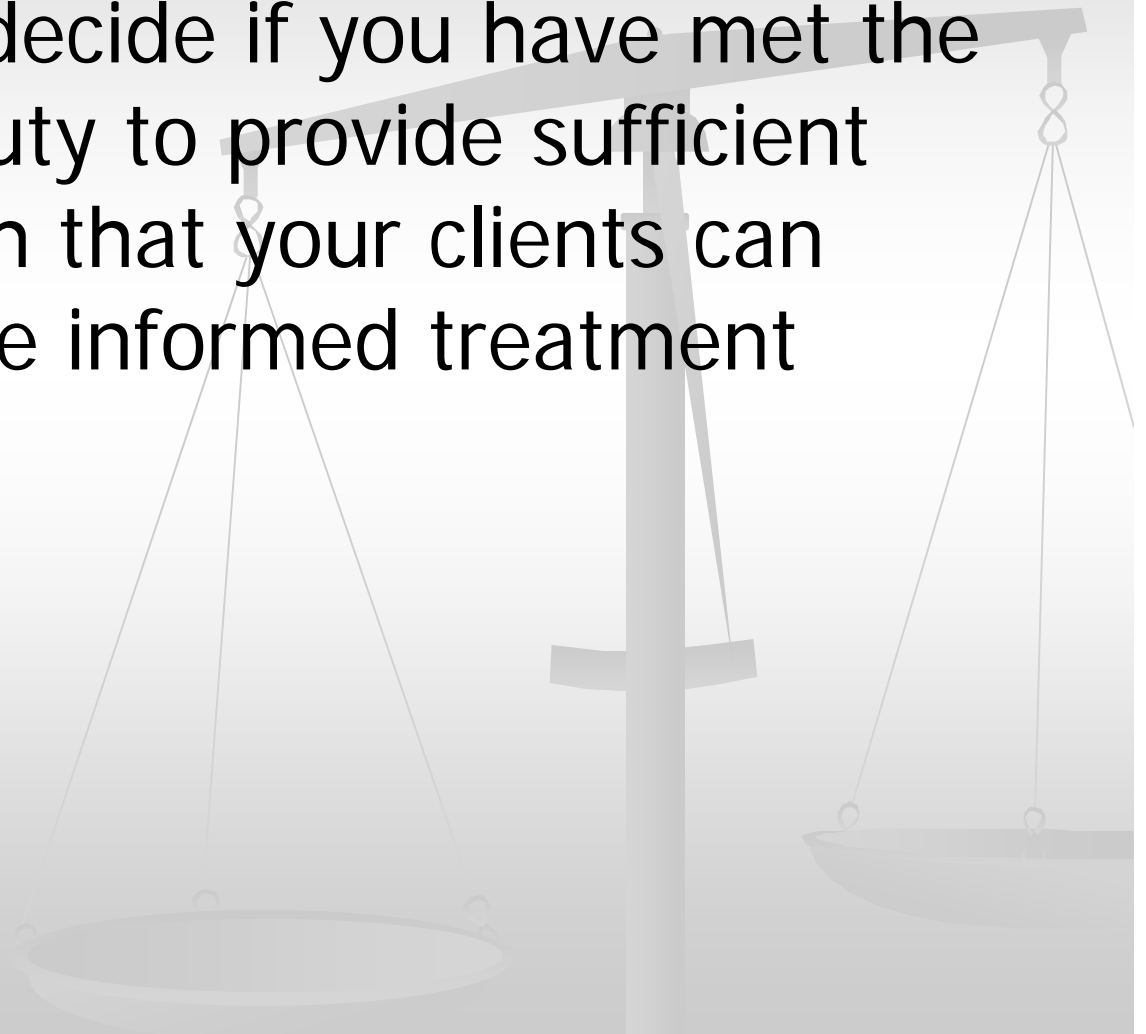
- Diagnosis or nature of the patient's ailment
 - General nature of proposed or any alternative treatments and purpose or reason for each treatment
 - Risks or dangers involved in proposed treatments
 - The probability or prospects of success with each treatment
- 

List on page 1437

- Prognosis or risk if client refuses treatment
 - Costs of various alternative treatments
 - If treatment involves surgery, the individual who will actually perform the surgery if not the same as the individual obtaining consent
 - The location and methods of transportation to that location if treatment is to be administered at another site
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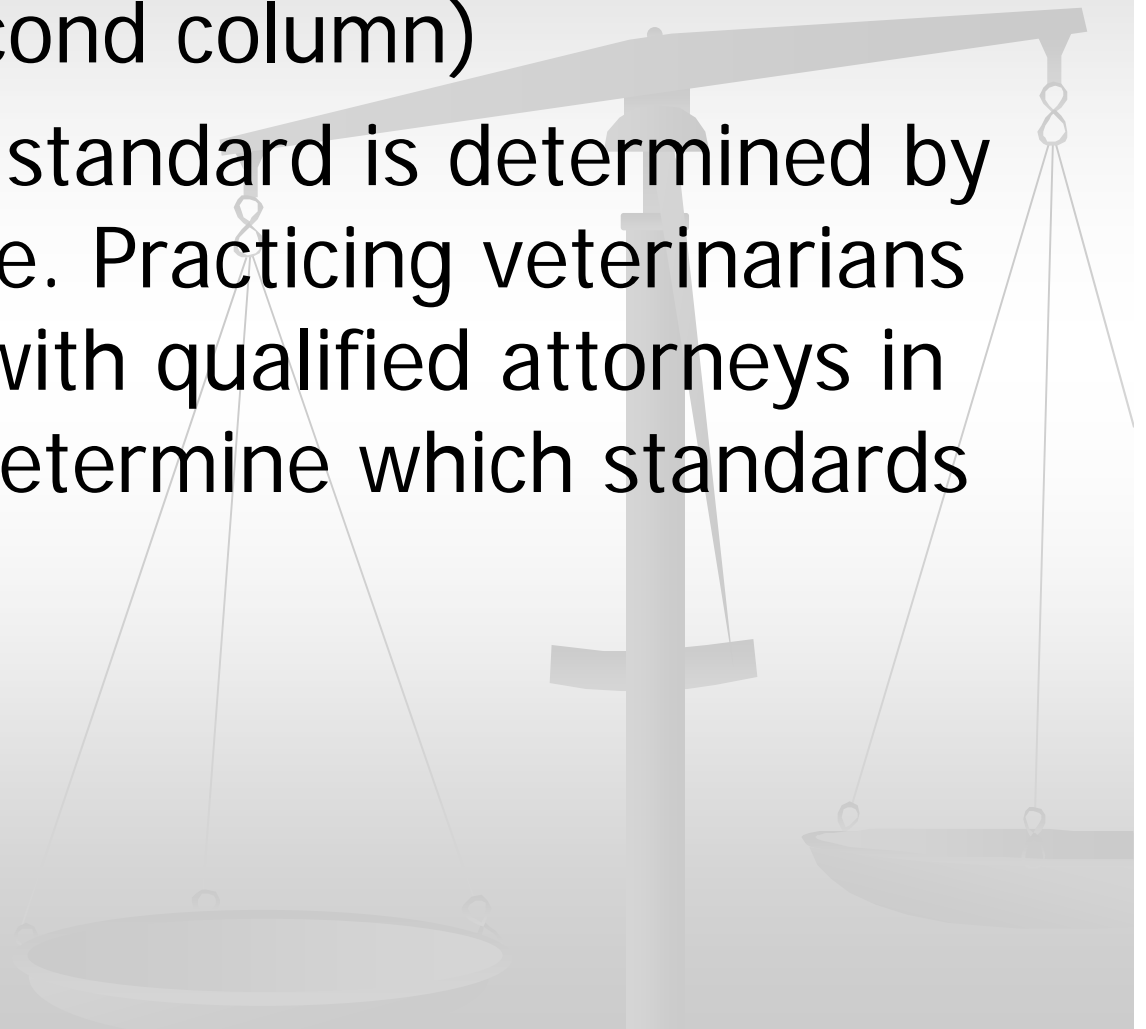
Pre-treatment disclosures

- How do courts decide if you have met the veterinarian's duty to provide sufficient information such that your clients can reasonably make informed treatment decisions?



Pre-treatment disclosures

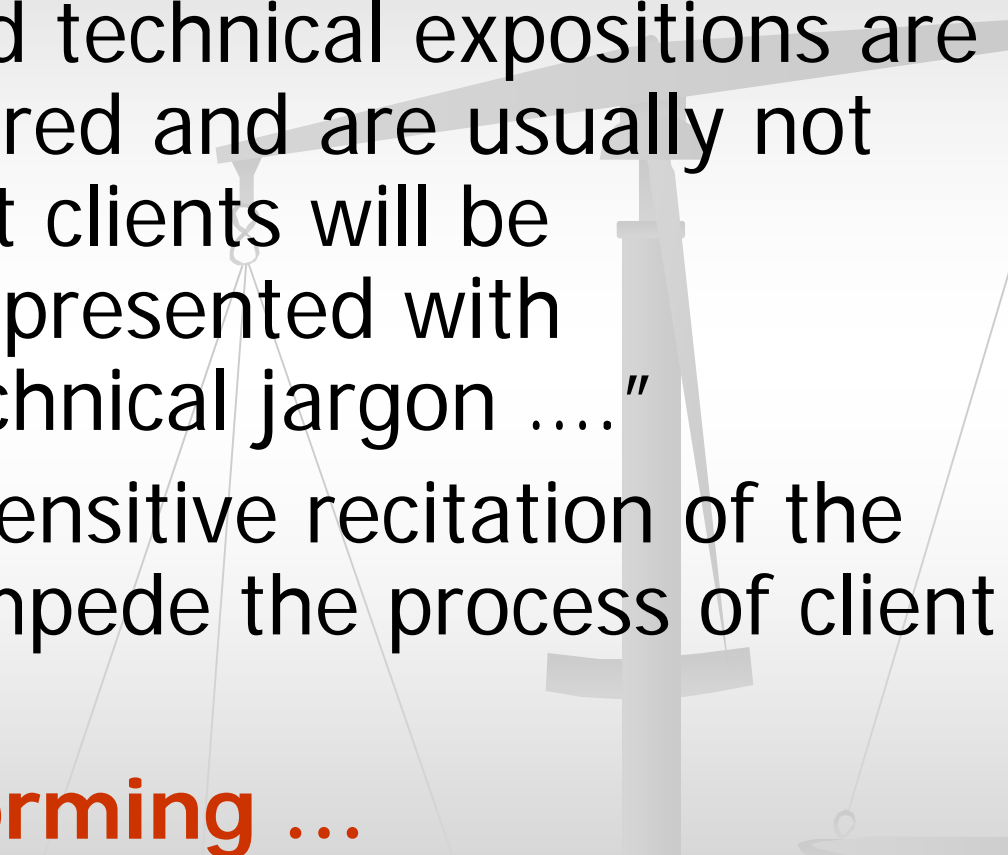
- page 1437 (second column)
- “The applicable standard is determined by law in each state. Practicing veterinarians should consult with qualified attorneys in their states to determine which standards apply to them.”



When does “informed consent” exist?

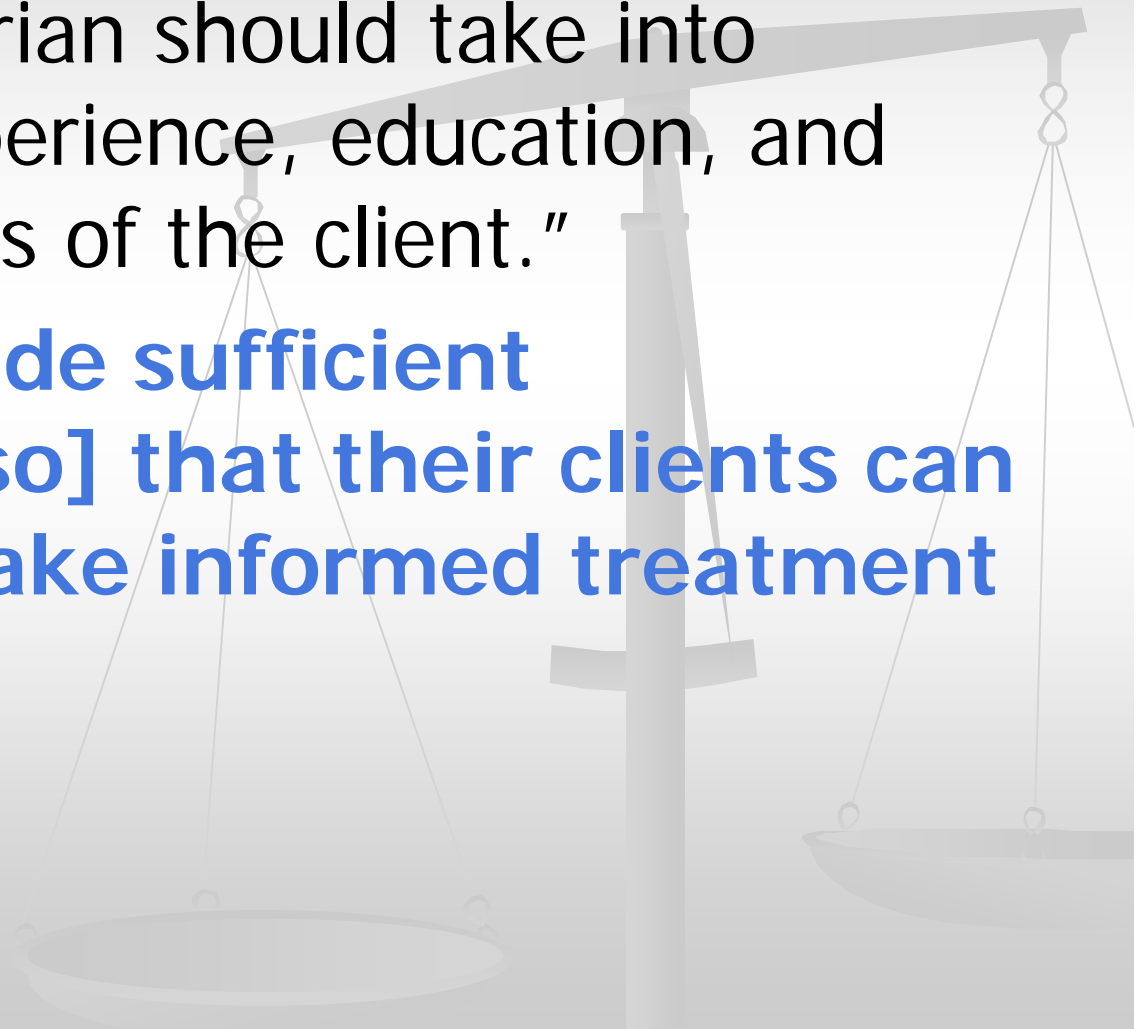
- (page 1437) “For a consent to be valid, clients must have a clear understanding of the information presented. ...
- ... clients do not have to understand completely every nuance of the proposed treatment, and broad strokes are usually sufficient. Veterinarians are not expected to provide their clients with an entire veterinary school curriculum.” →

When does “informed consent” exist?

- “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”
 - “a blunt and insensitive recitation of the facts can also impede the process of client understanding.”
 - **The art of informing ...**
- 

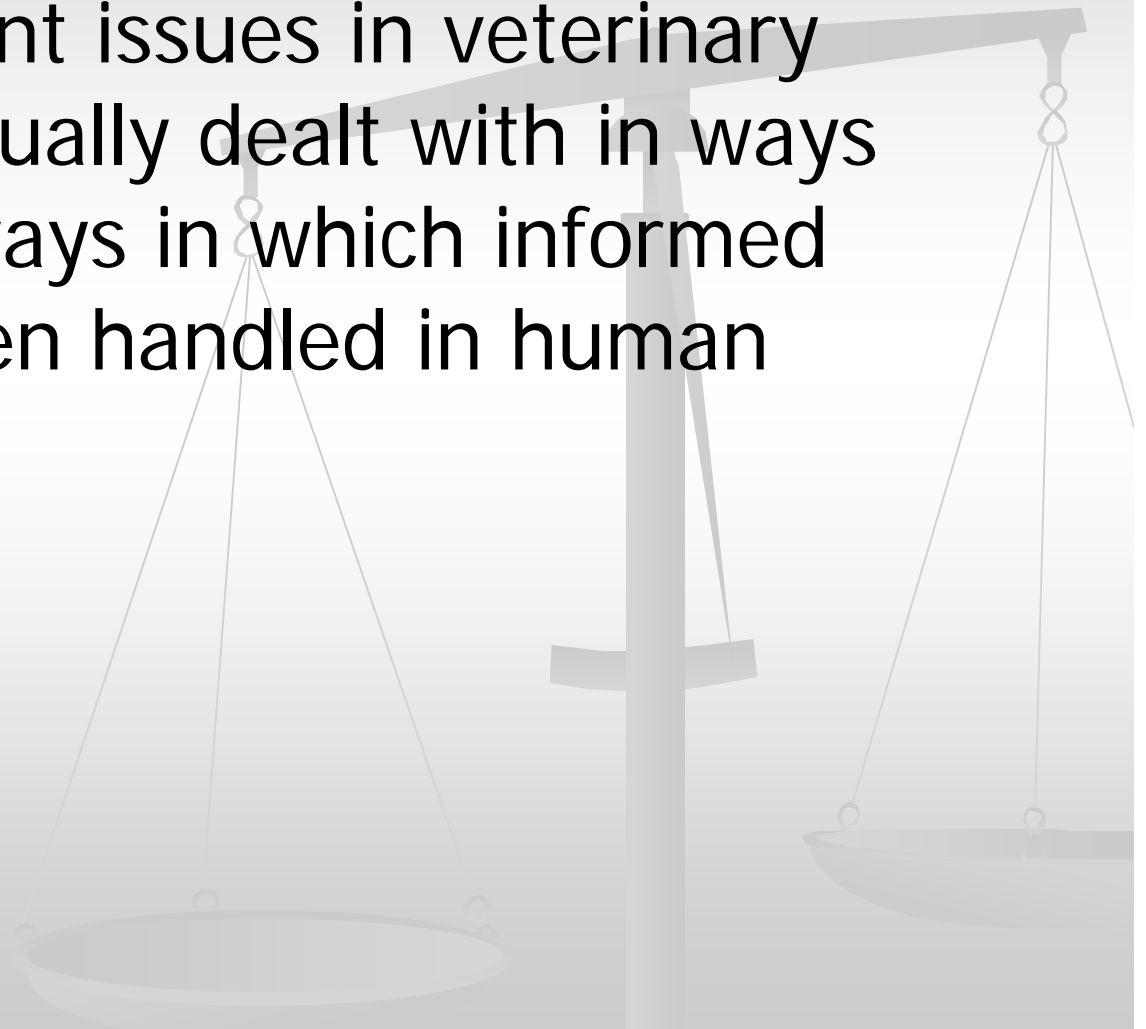
When does “informed consent” exist?

- “... the veterinarian should take into account the experience, education, and linguistic abilities of the client.”
- **“Duty to provide sufficient information [so] that their clients can reasonably make informed treatment decisions.”**



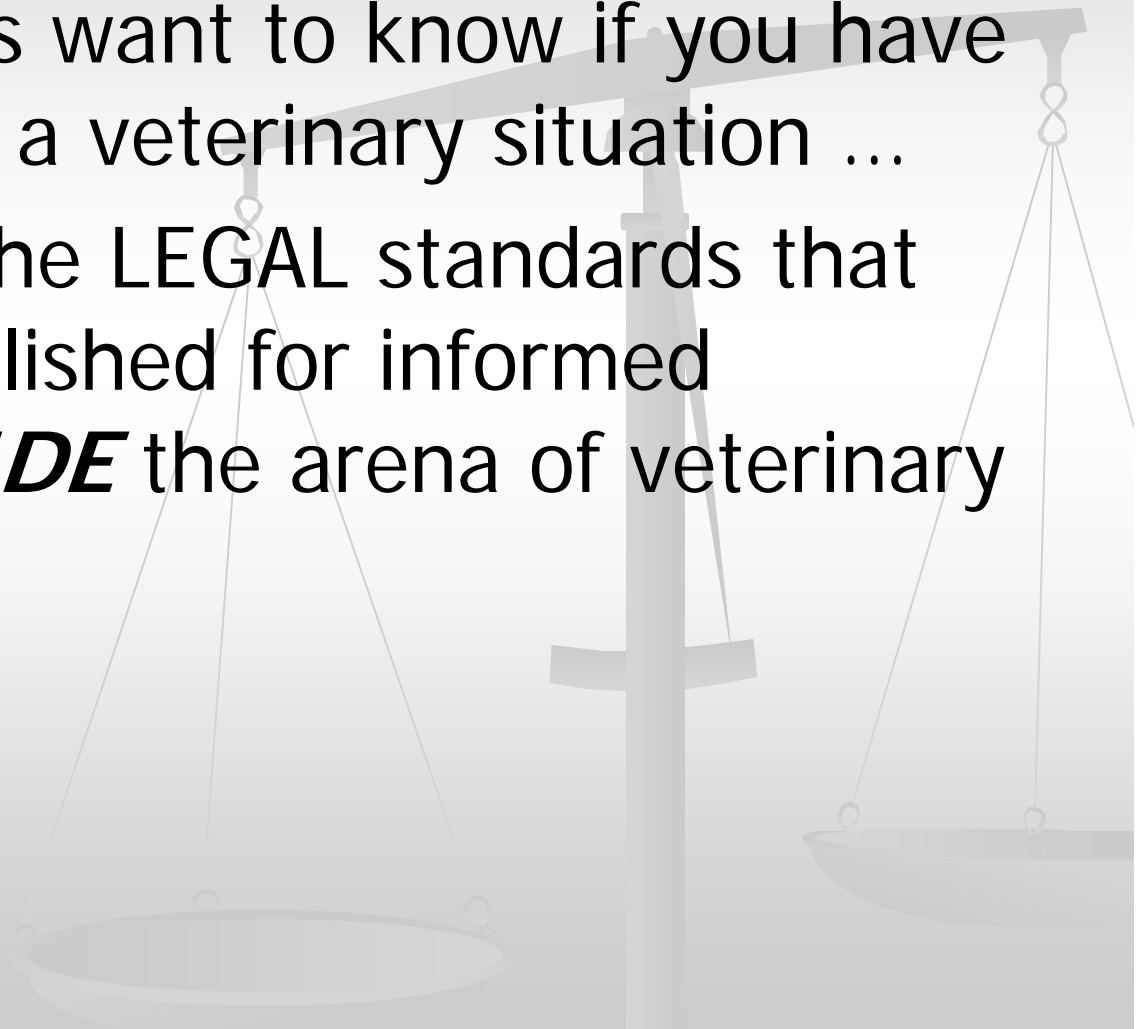
Standards for assessing if informed consent was possible

- Informed consent issues in veterinary medicine are usually dealt with in ways related to the ways in which informed consent has been handled in human medicine



Note what is happening ...

- When the courts want to know if you have done enough in a veterinary situation ...
- They resort to the LEGAL standards that they have established for informed consent ***OUTSIDE*** the arena of veterinary medicine



Some observations ...

- The facts and whether you have given enough information are *always looked at after-the-fact* ...
- ... which means a high standard is applied
- Further, courts already have a developed set of ideas regarding what “informed consent” means generally, and it’s a high standard

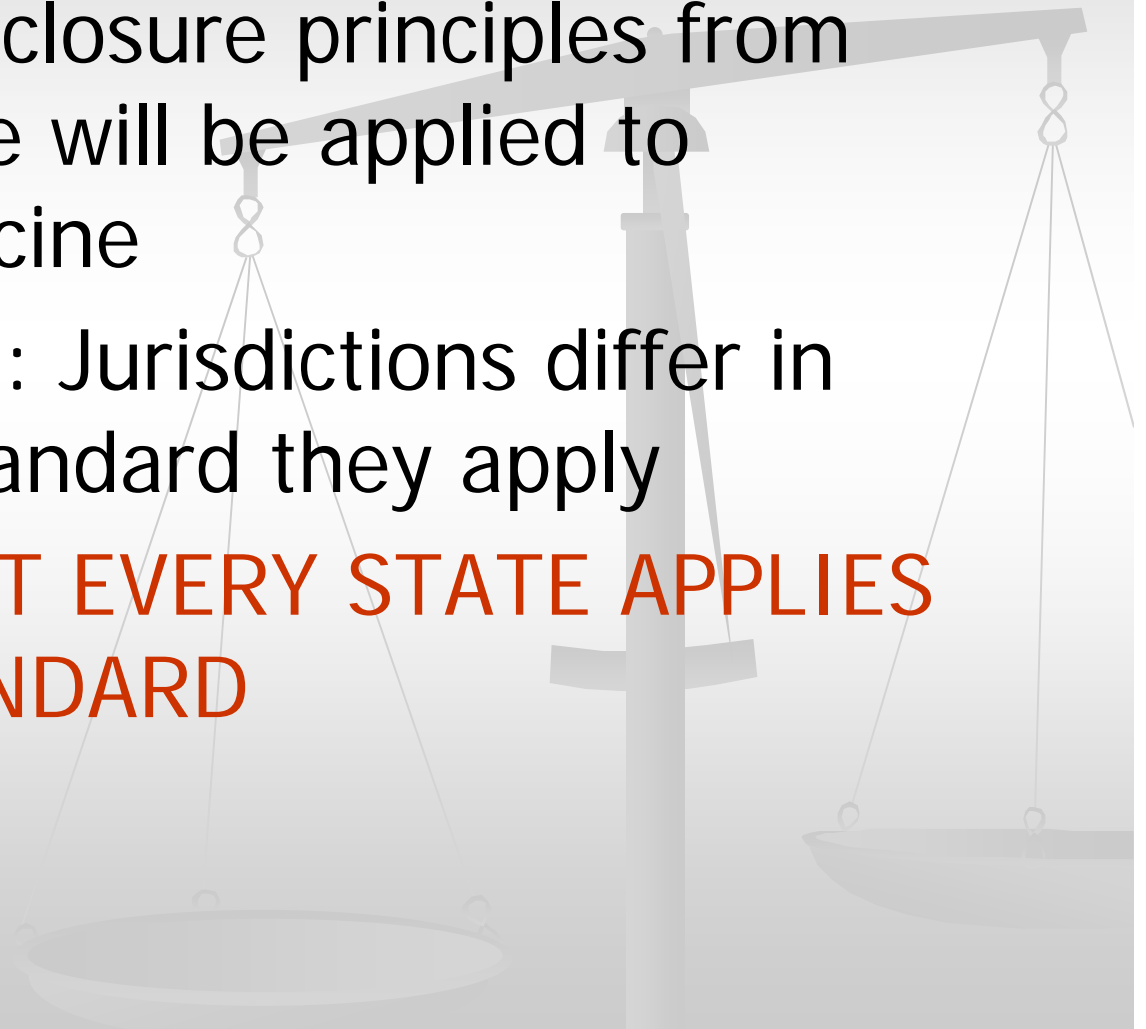


Some observations ...

- Thus, the courts will, quite likely, apply a high standard to your situation
- NOTE: it is theoretically possible that some jurisdiction somewhere will say that veterinarians have a *lower* standard than in human medicine, or even a *higher* standard ...
- Follow the Golden Rule, and read JAVMA!

What standard applies?

- Assume that disclosure principles from human medicine will be applied to veterinary medicine
- COMPLICATION: Jurisdictions differ in which LEGAL standard they apply
- Translation: **NOT EVERY STATE APPLIES THE SAME STANDARD**



What standard applies?



- (1) **Main view**: most jurisdictions use a prevailing standard/reasonable physician view ...
 - ... **physician must disclose what a reasonable practitioner in a similar medical community and of the same school of medical thought would have disclosed regarding the proposed treatment.**
- Only fellow professionals can testify as to what this standard is, so colleagues will be called upon to give “expert” testimony

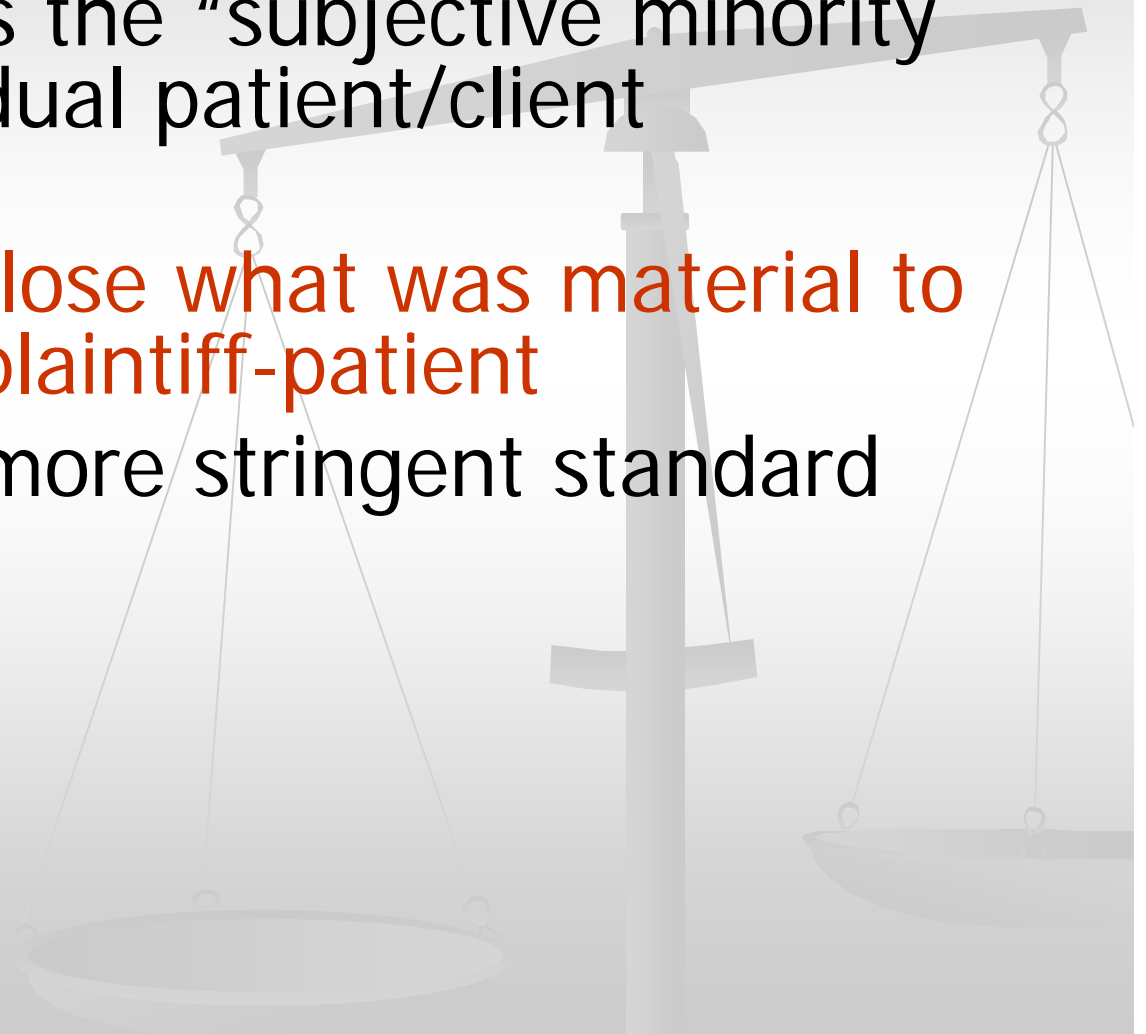
What standard applies



- (2) There is a second, minority standard used ...
- ...“objective view” = “reasonable man view” = “reasonable patient/client standard” (JAVMA 2004: 1437)
- Disclose all risks that would be material to a reasonable, prudent person in the patient’s position
- Allegedly “an objective test”

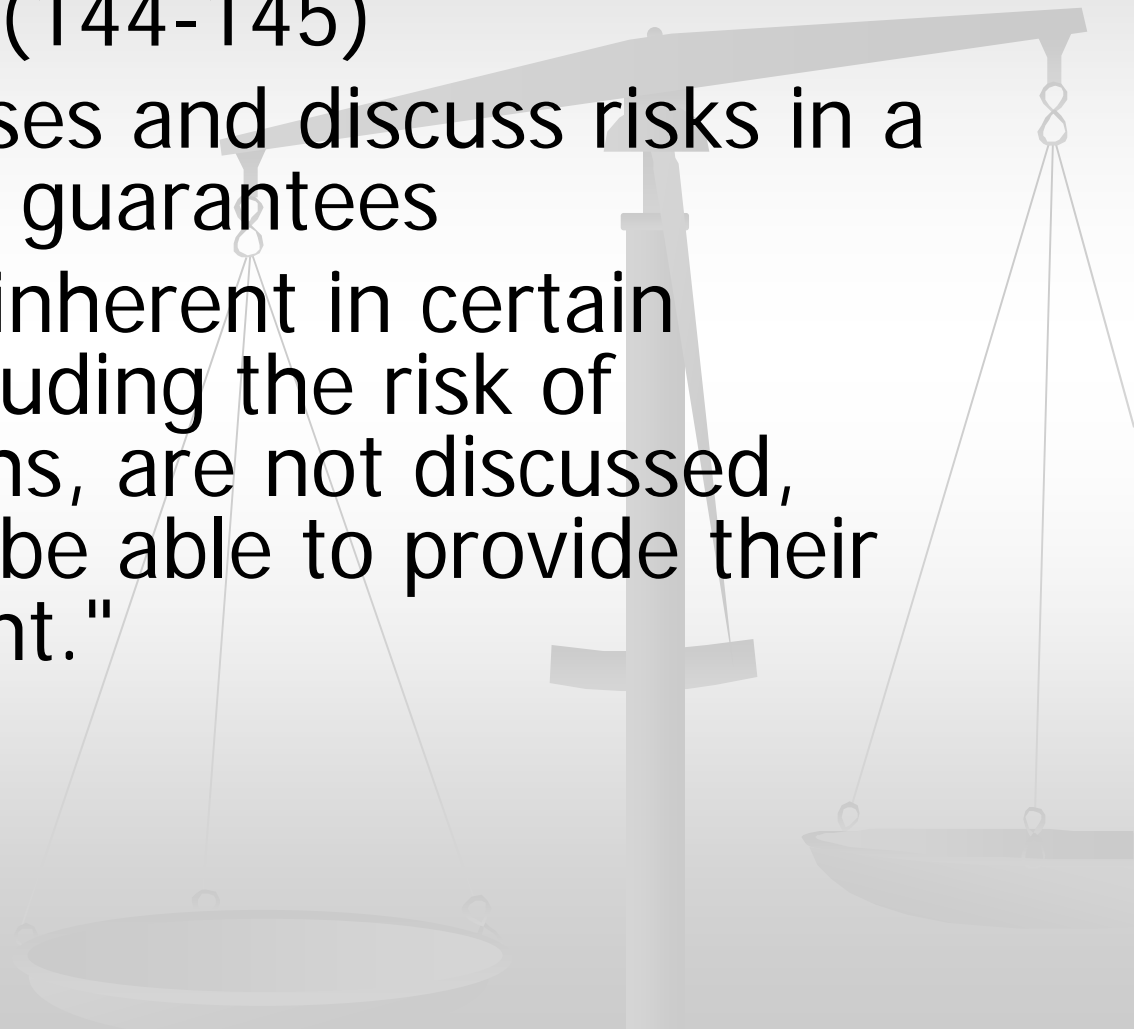
What standard applies

- (3) Third view is the “subjective minority view” or “individual patient/client standard”
- —you must **disclose what was material to *this* particular plaintiff-patient**
- This is a much more stringent standard (Oklahoma)



What standard applies

- Wilson's advice (144-145)
- Temper prognoses and discuss risks in a way that avoids guarantees
- "If the hazards inherent in certain procedures, including the risk of anesthetic deaths, are not discussed, owners will not be able to provide their informed consent."



Possible exceptions

- (JAVMA 2004: 1438) “**presumed** 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.”
- Caution—“I trust you—just do whatever you think is best.”
- Consent can be implied by actions

Major qualifications

- “No disclosure is required if a risk is so remote that it is not material.” (JAVMA 2004: 1438)
- Example ... anaphylactic reactions occurring in animals given penicillin
- “No disclosure is required if the risk is obvious or within common knowledge” (e.g., that injections hurt)

Major qualifications

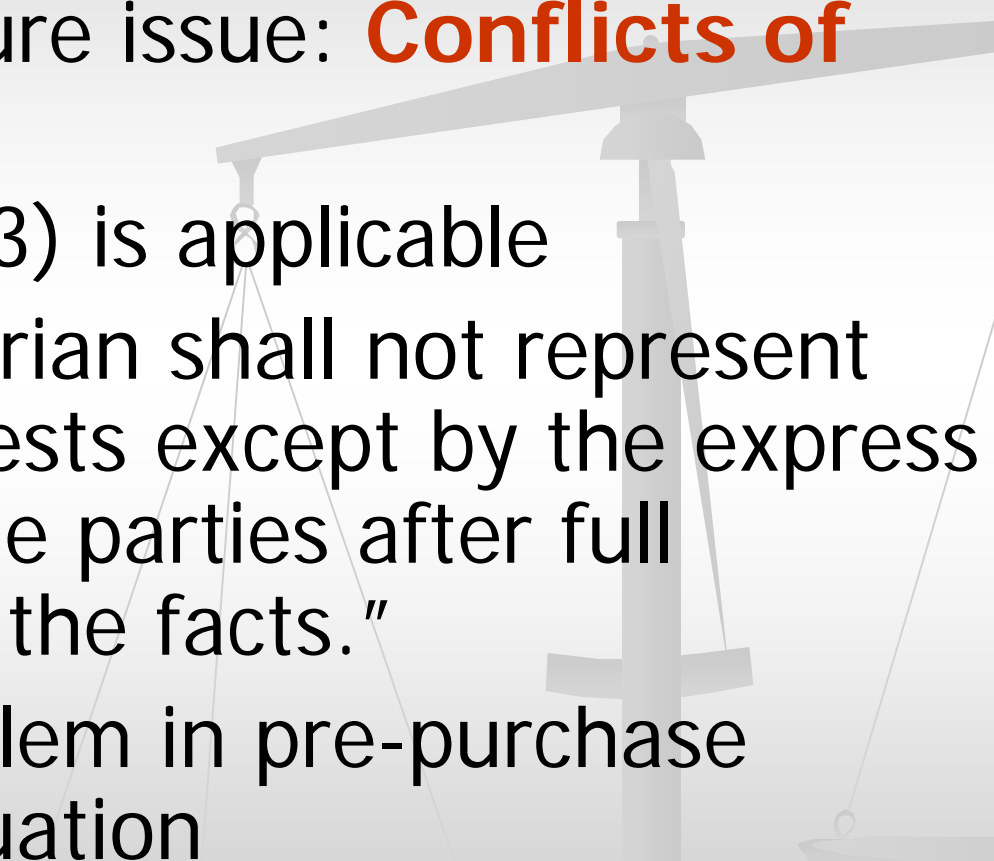
- “No need to disclose risks that are already known to client” (e.g., from formal training)
- “Veterinarian does not need to disclose the risks of treatment if he or she determines that the disclosure of such risks might be harmful to the client.” →
- **Be very careful with *any* of these!**

CAVEAT



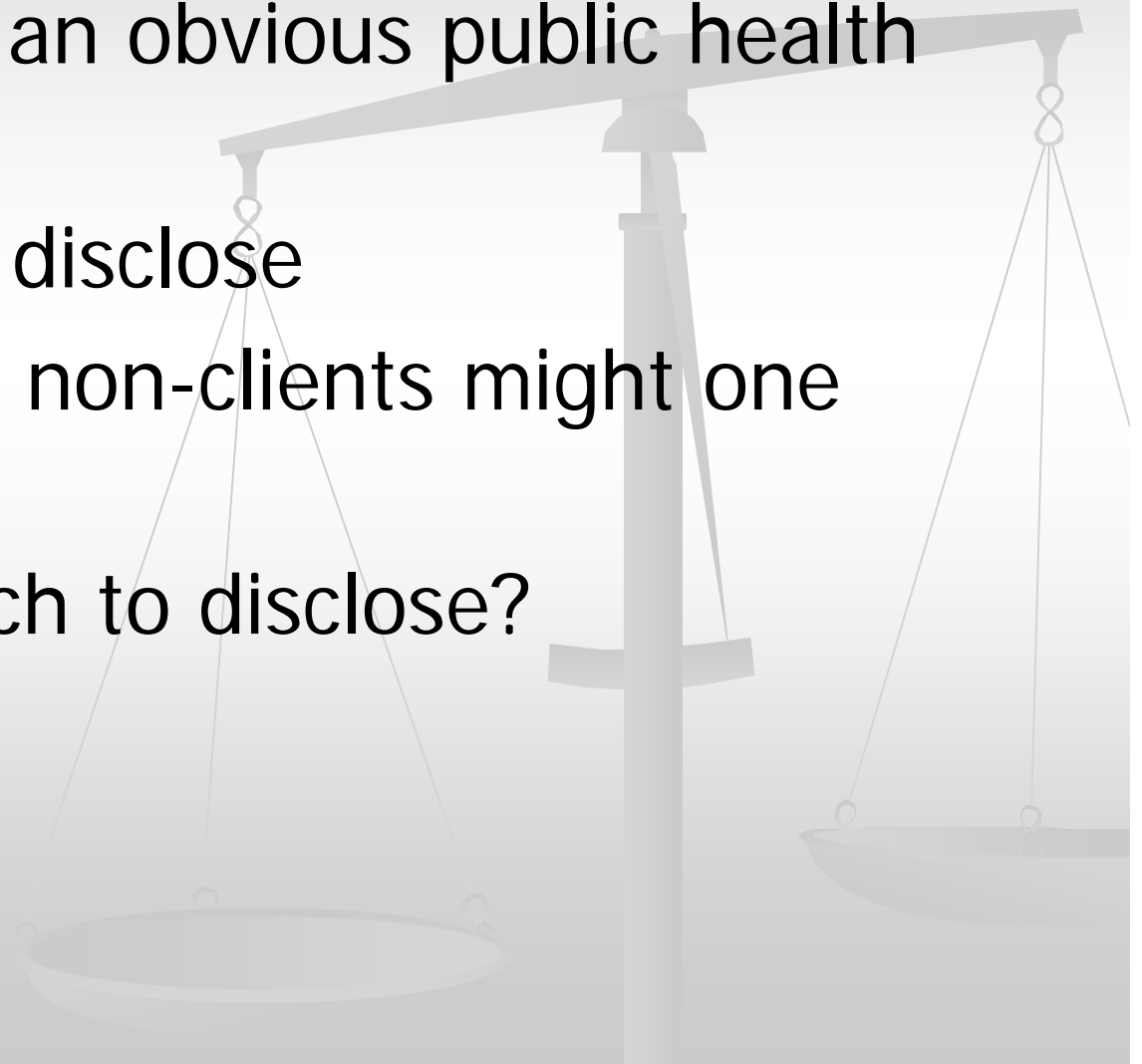
- (JAVMA 2004: 1439) “Even when well-crafted, an informed consent form, standing alone, is often of little value.” →
→
- **“[It] is not the form but the information and the consent that are important.”**

Pre-treatment disclosure

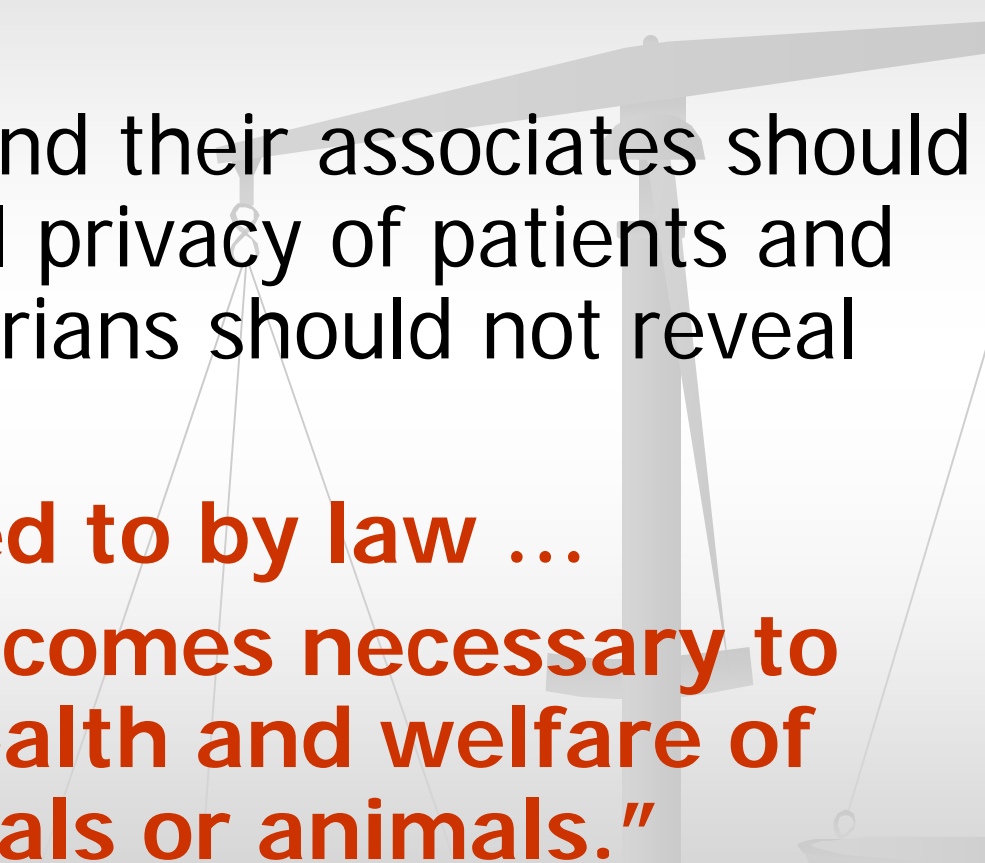
- Another disclosure issue: **Conflicts of Interest**
 - MA Reg 7.01 (13) is applicable
 - “(13) A veterinarian shall not represent conflicting interests except by the express consent of all the parties after full disclosure of all the facts.”
 - A common problem in pre-purchase examination situation
- 

Pre-treatment disclosures

- What if there is an obvious public health risk?
- Issue—when to disclose
- Issue—to which non-clients might one disclose?
- Issue—how much to disclose?

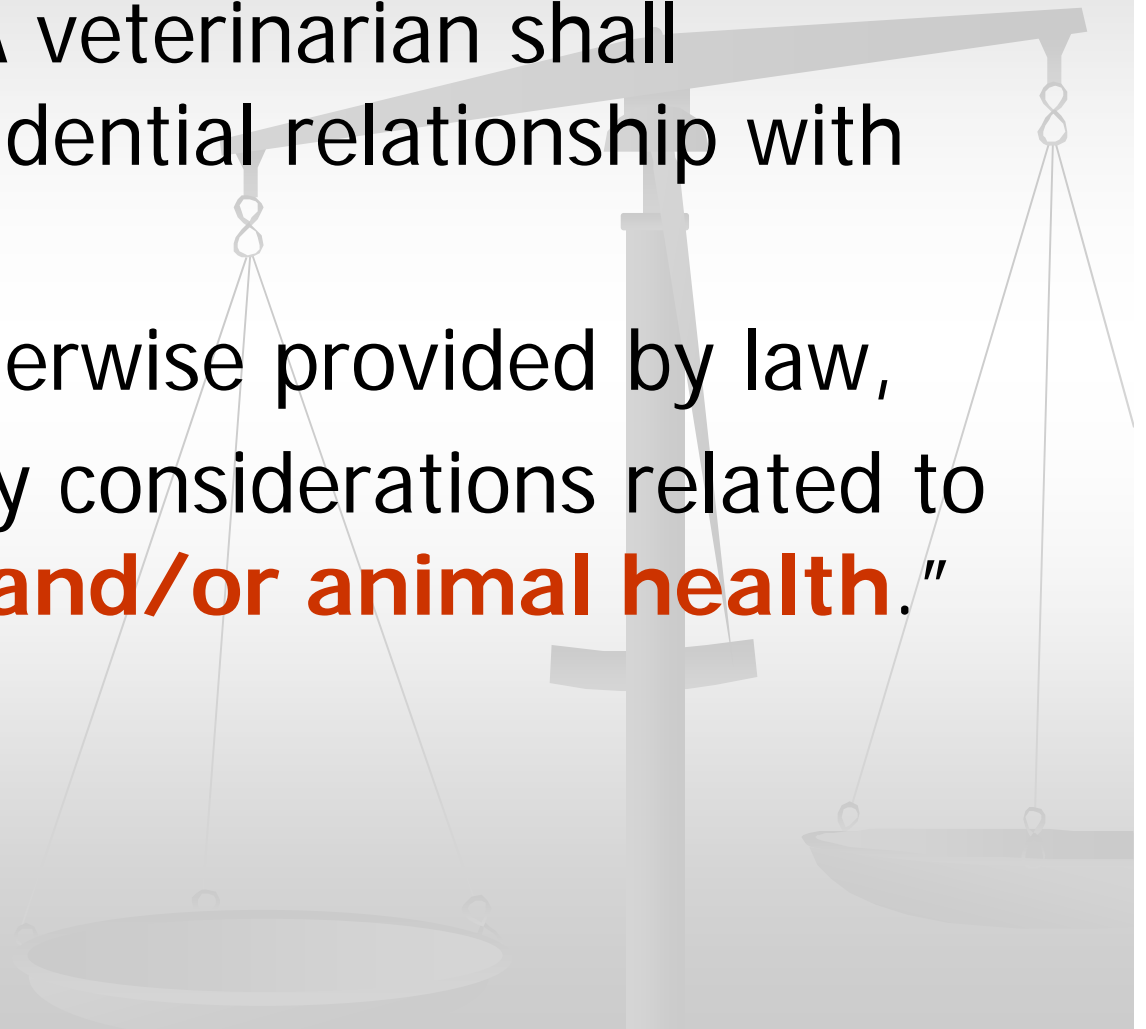


Duty to disclose under professional ethics

- **II L of PVME:**
 - “Veterinarians and their associates should protect personal privacy of patients and clients. Veterinarians should not reveal confidences ...
 - **unless required to by law ...**
 - **or unless it becomes necessary to protect the health and welfare of other individuals or animals.”**
- 

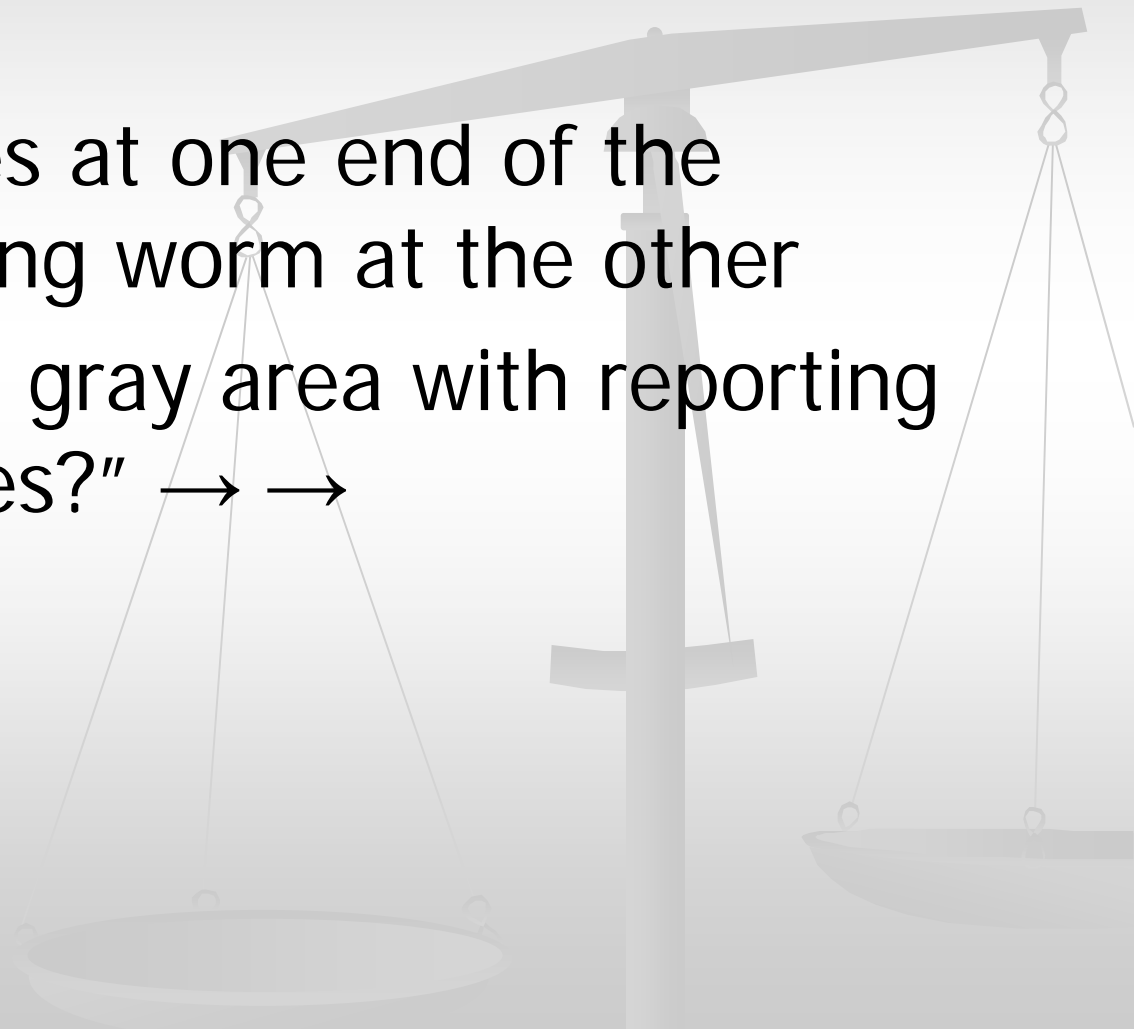
Duty to disclose under law

- MA 7.01 (15) "A veterinarian shall maintain a confidential relationship with his/her clients,
- ... except as otherwise provided by law,
- ... or required by considerations related to **public health and/or animal health.**"



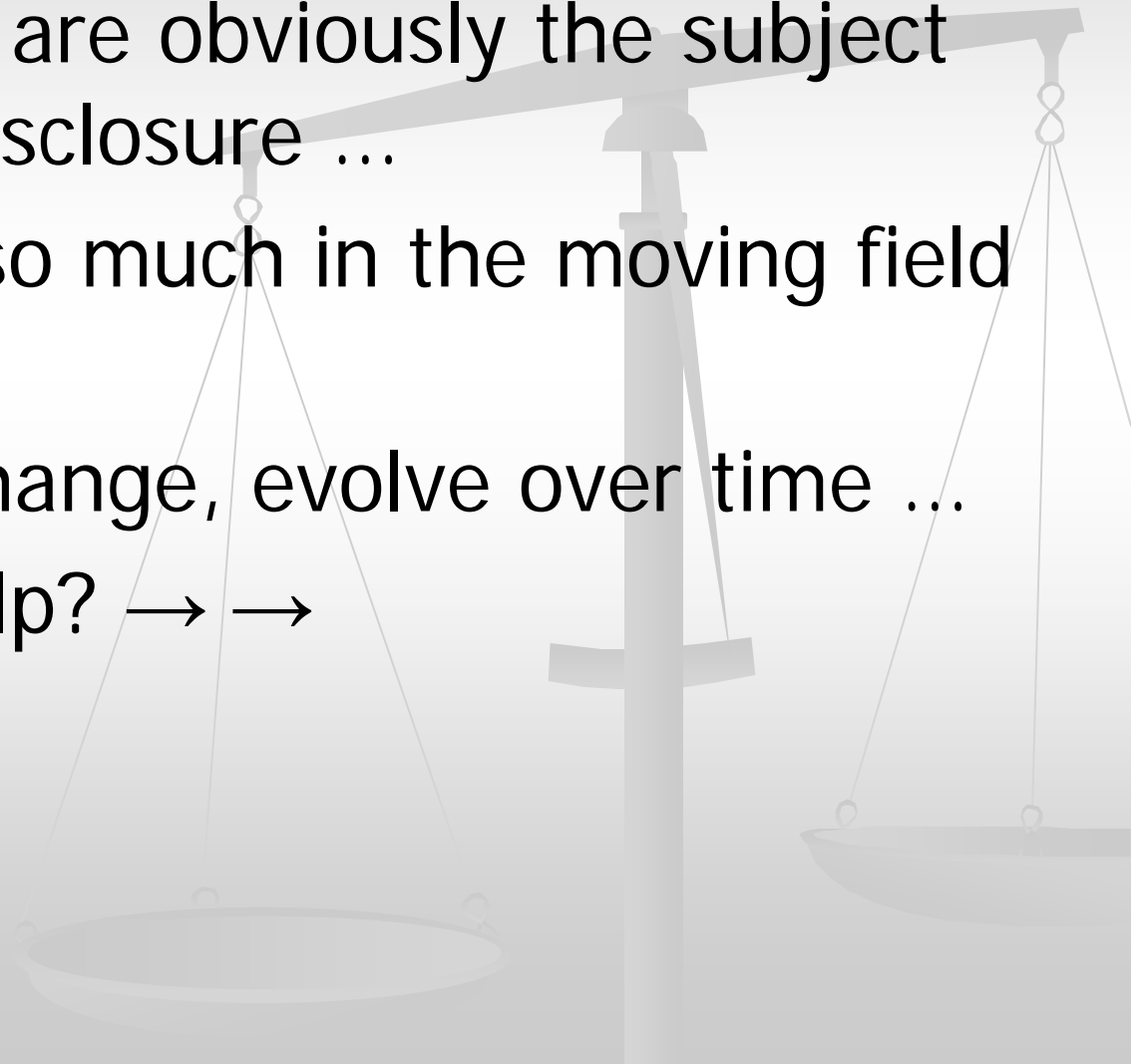
Student comment

- “I imagine rabies at one end of the spectrum and ring worm at the other
- ... but is there a gray area with reporting zoonotic diseases?” → →



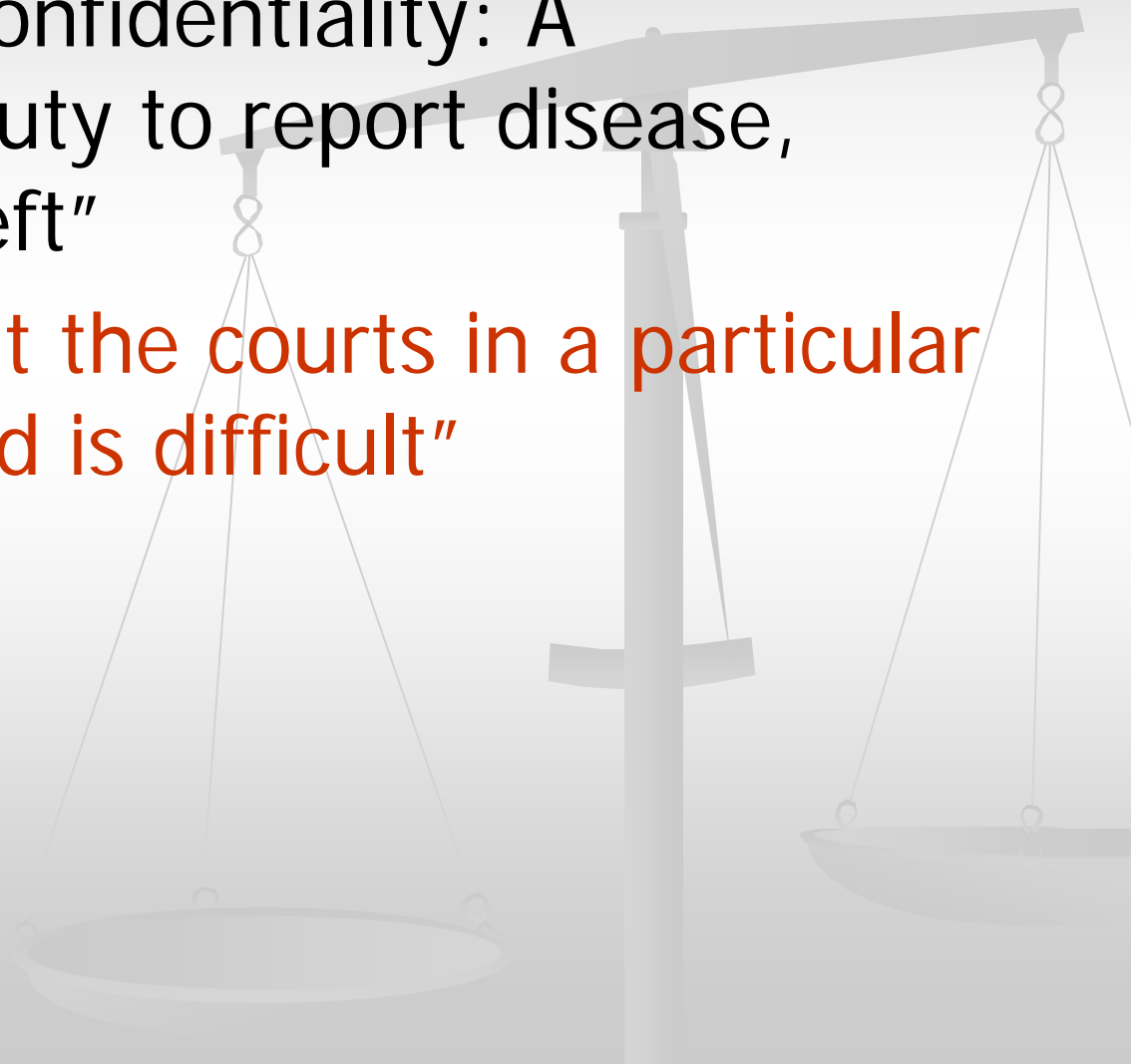
Extent of disclosure?

- Some problems are obviously the subject of mandatory disclosure ...
- ... but, as with so much in the moving field of ethics ...
- ... the list will change, evolve over time ...
- Does JAVMA help? → →



JAVMA Legal Brief, May 1995

- “The limits of confidentiality: A veterinarian’s duty to report disease, cruelty, and theft”
- “Surmising what the courts in a particular state would hold is difficult”



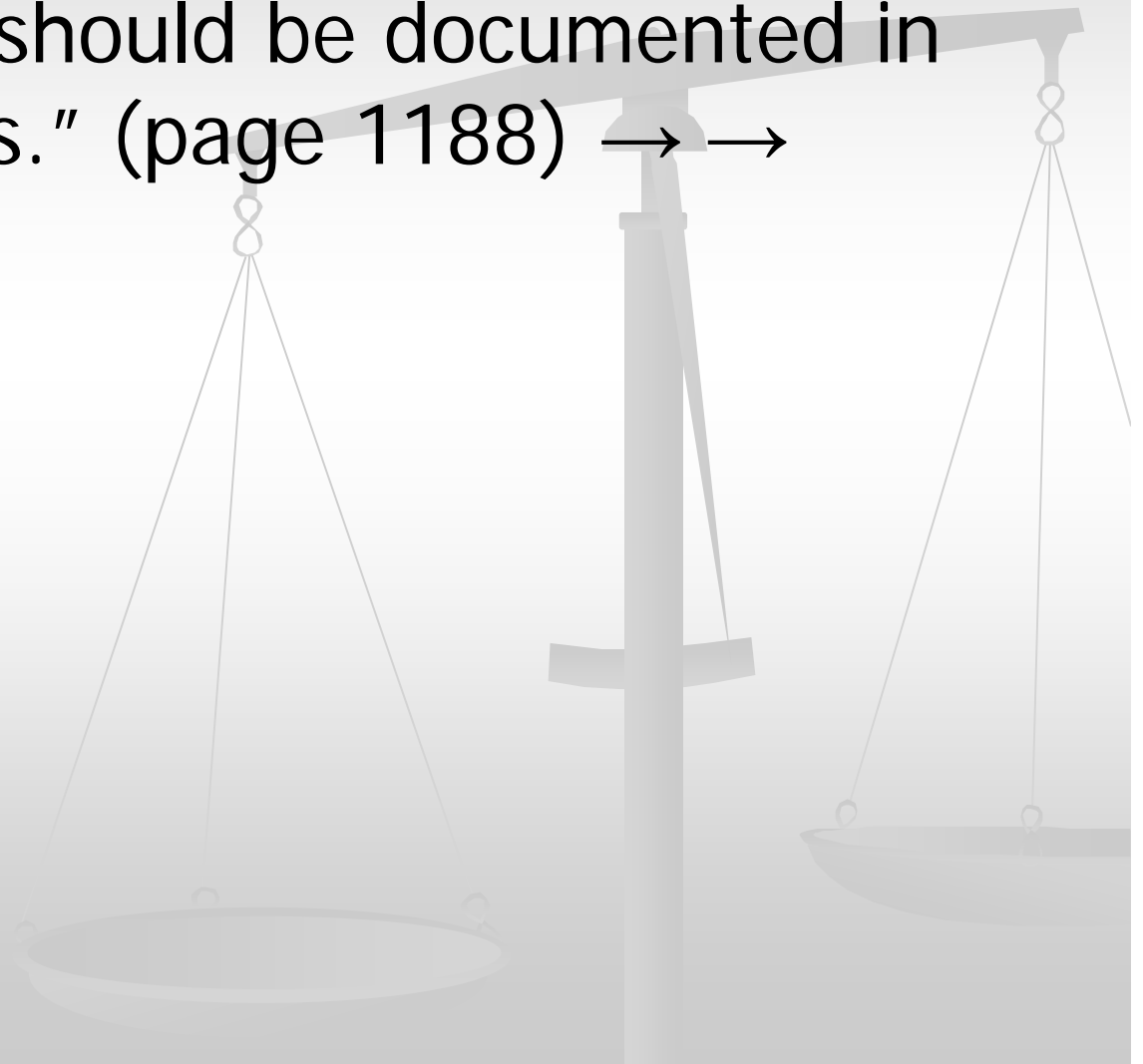
After-the-fact disclosures

- **post-problem disclosures required by law and society**



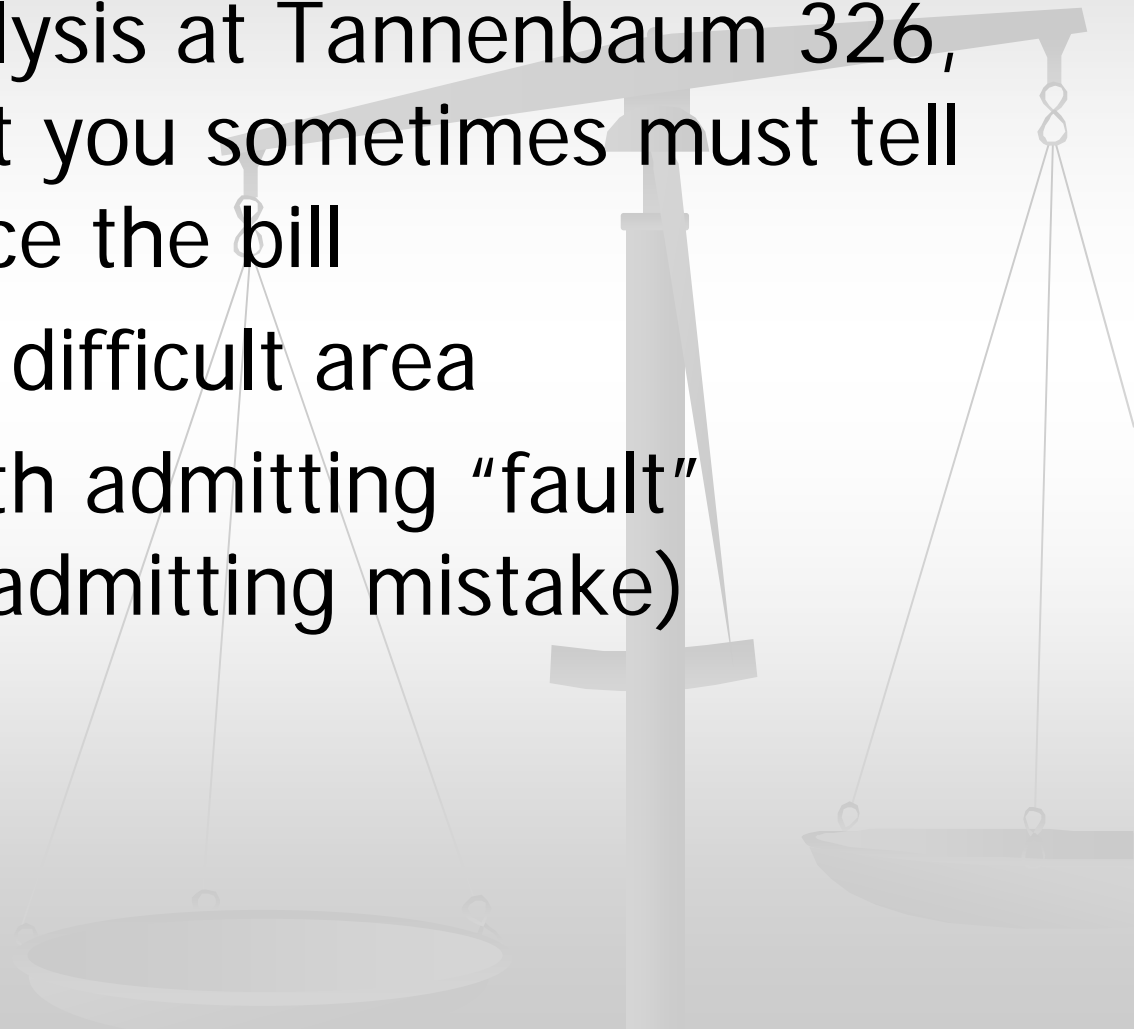
JAVMA, April 15, 2006

- “Medical errors should be documented in patients’ records.” (page 1188) → →



Admitting mistake or fault as a kind of “after the fact” disclosure

- Some good analysis at Tannenbaum 326, who argues that you sometimes must tell or at least reduce the bill
- ... in practice, a difficult area
- ... be careful with admitting “fault” (different from admitting mistake)



“After the fact” disclosure

- The **simple rule** is that you owe some disclosure legally if the mistake is “material” or important in a reasonable person’s eyes
- Golden Rule—would you want to know?
- If so, then your clients may want to know
- **Important option—ask your malpractice insurer or local veterinary medical association what to do**

After-the-fact disclosures regarding animal cruelty

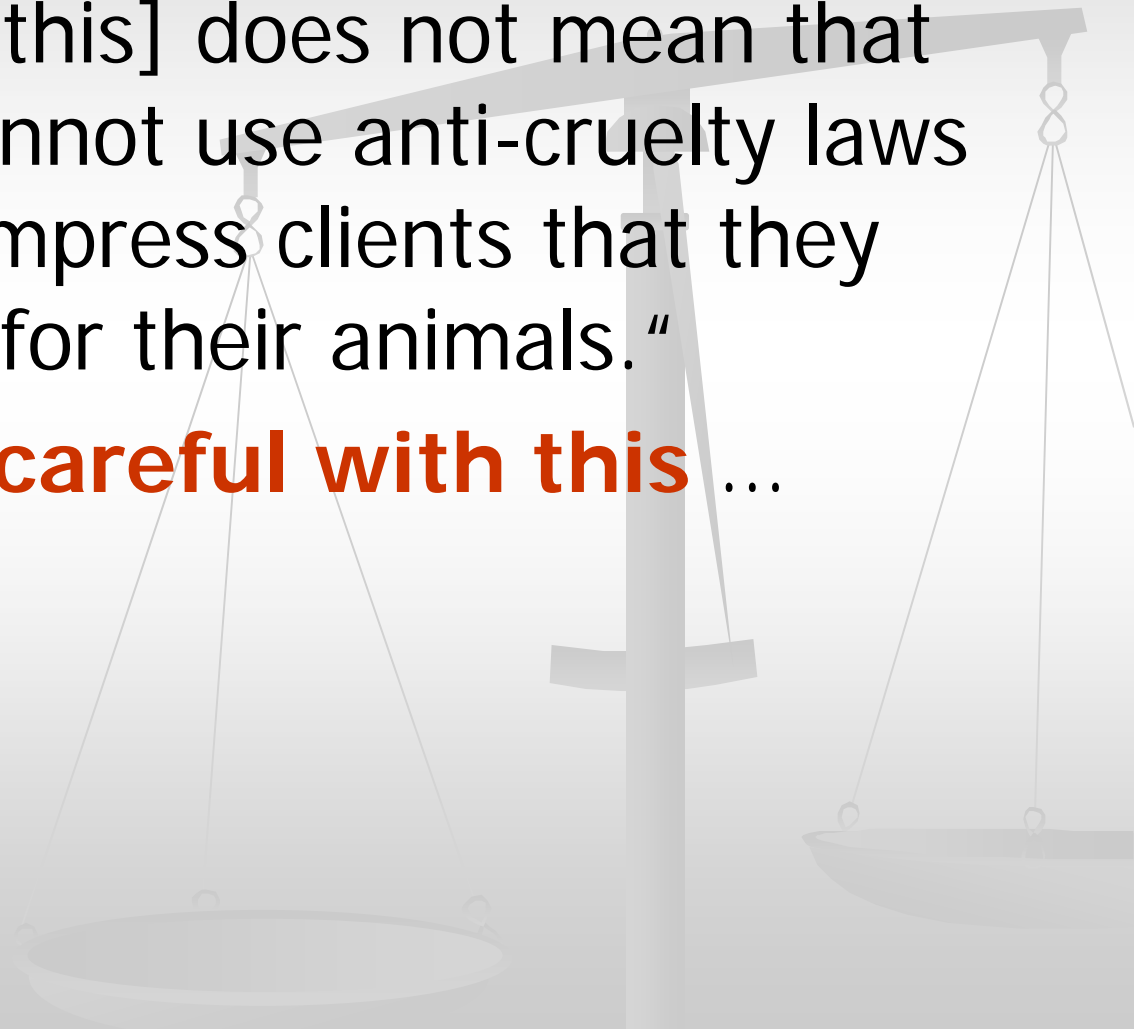
- Suppose after an examination, you suspect a cruelty problem—can you disclose?
- Wilson points out at 64 that "[in] the vast majority of situations, ... state laws cite no legal duty to report suspected animal cruelty cases."
- **BUT THIS IS CHANGING—some states now require reporting**

After-the-fact disclosures regarding animal cruelty

- At least 9 states listed in 2000 with relevant rules—MN & WV required reporting of suspected animal cruelty, with Illinois having a special procedure for reporting to the state
- 6 more states (CA, FL, ID, MD, NH, OR) listed as offering at least partial immunity
- MA section 58B provides immunity *if reported to designated official*
- **The number of states with relevant rules will surely increase**

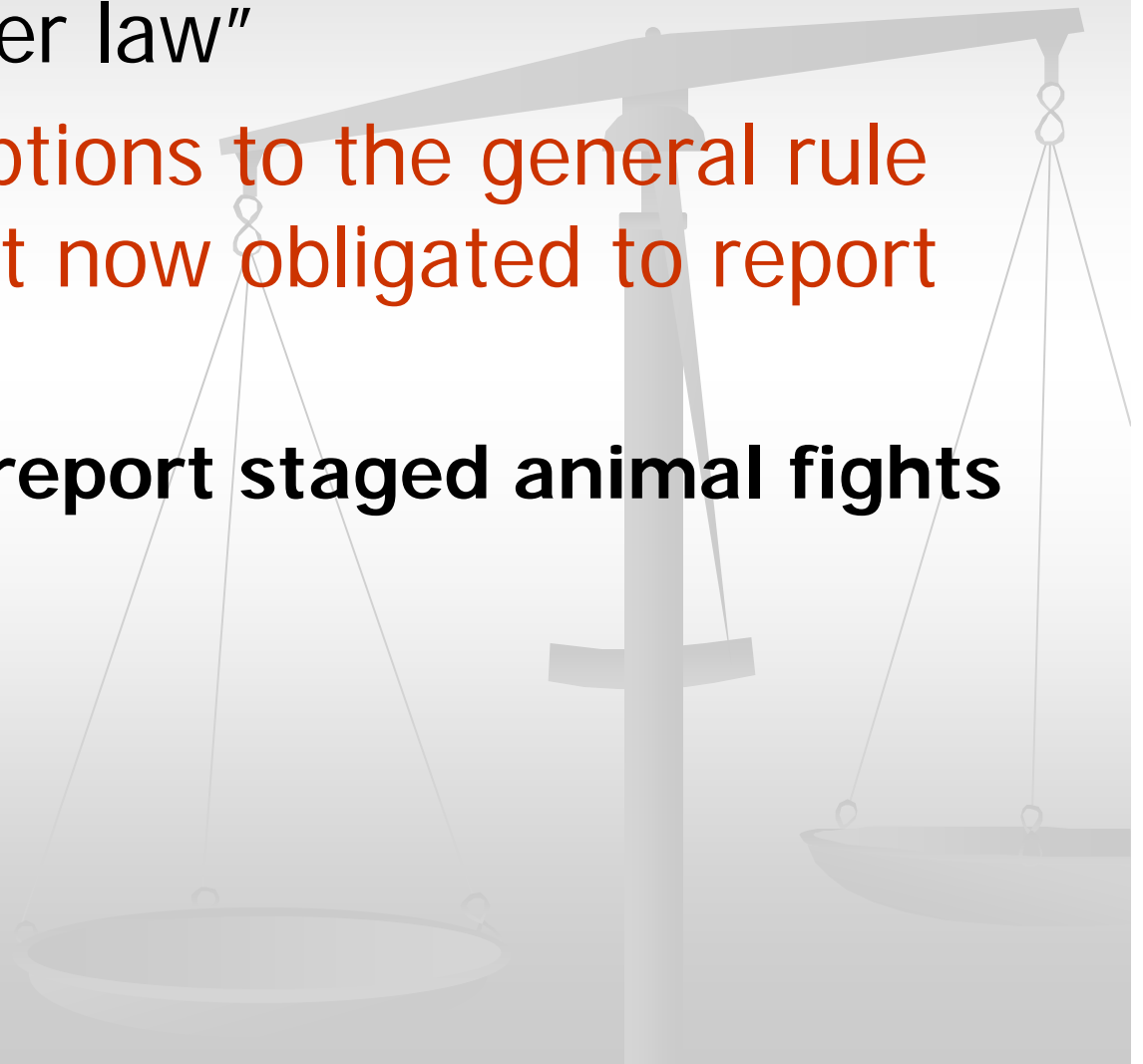
Wilson on animal cruelty

- Wilson notes, “[this] does not mean that veterinarians cannot use anti-cruelty laws as leverage to impress clients that they are responsible for their animals.”
- **Be *extremely* careful with this ...**



Post-treatment disclosure— satisfying the urge for certainty

- More “black letter law”
- Important exceptions to the general rule that vets are not now obligated to report problems:
 - **obligation to report staged animal fights**



After-the-fact disclosures


- E.g., California Business and Professions Code Section 4830.5
- ... requires that you report if you have "reasonable cause to believe that a dog has been injured or killed through participation in a staged fight."
- Dog fighting is illegal in all states
- Cock fighting is widely outlawed as well
- Bull fighting—some exceptions—e.g., California Penal Code Section 597m allows bloodless bullfights in connection with religious celebrations

After-the-fact disclosures—

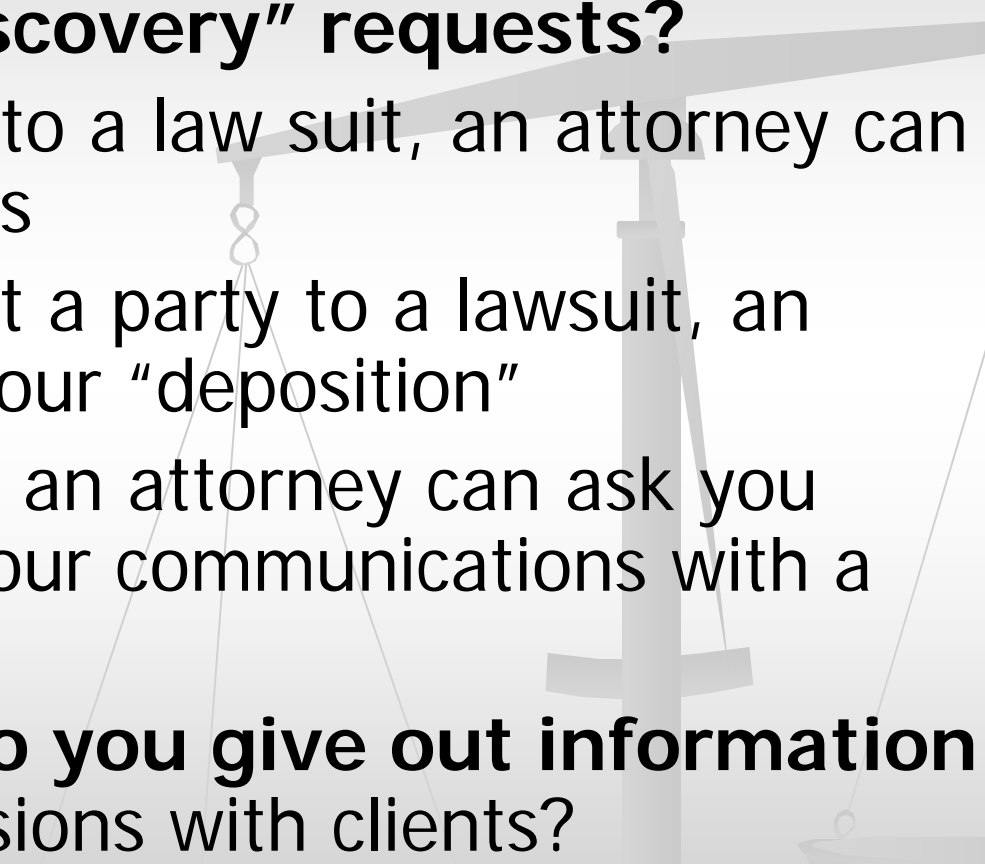
Court orders

- When a court asks you for information about a conversation with your client ...
- **Do you disclose?**
- For example, suppose you receive a subpoena for records?
- ***Some* professionals have a privilege not to disclose in the face of a subpoena.**
- **BUT IN VETERINARY MEDICINE "there is no privilege to withhold information in either civil or criminal cases."**
- **"Black letter law" you should know**

After-the-fact disclosures— Court orders

- Implications of **no privilege protecting veterinarians' communications with their clients?**
 - If you are under oath, and the court has ordered you to testify, you can testify without any problems – **the court has the power to override your ordinary obligations**
 - **NOTE**—you *cannot* simply send information to the court without a subpoena
- 

After-the-fact disclosures— In lawsuits

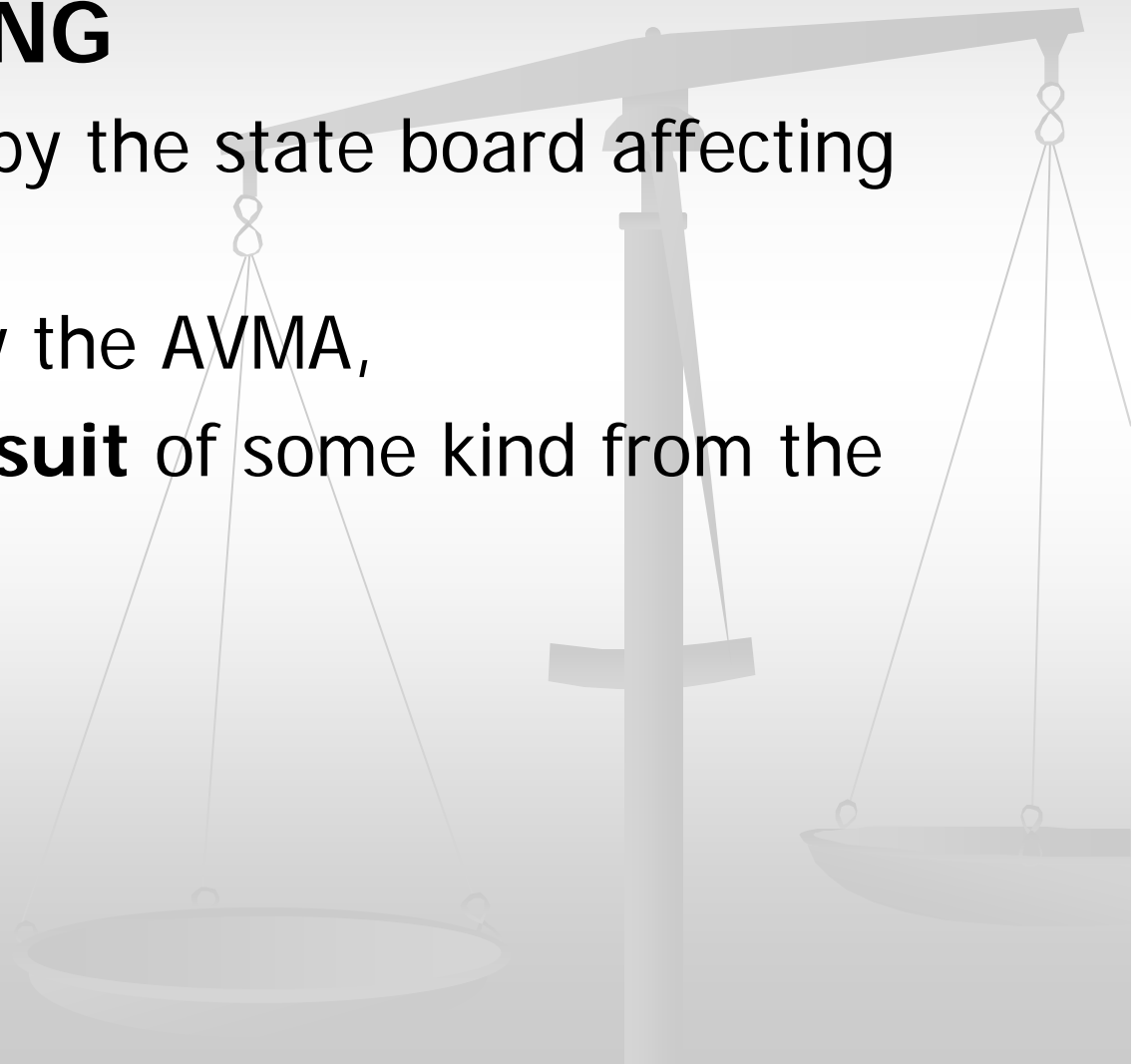
- **What about “Discovery” requests?**
 - If you are a party to a law suit, an attorney can send you questions
 - Even if you are not a party to a lawsuit, an attorney can set your “deposition”
 - In that procedure, an attorney can ask you questions about your communications with a client
 - If this happens, **do you give out information** about your discussions with clients?
- 

After-the-fact disclosures

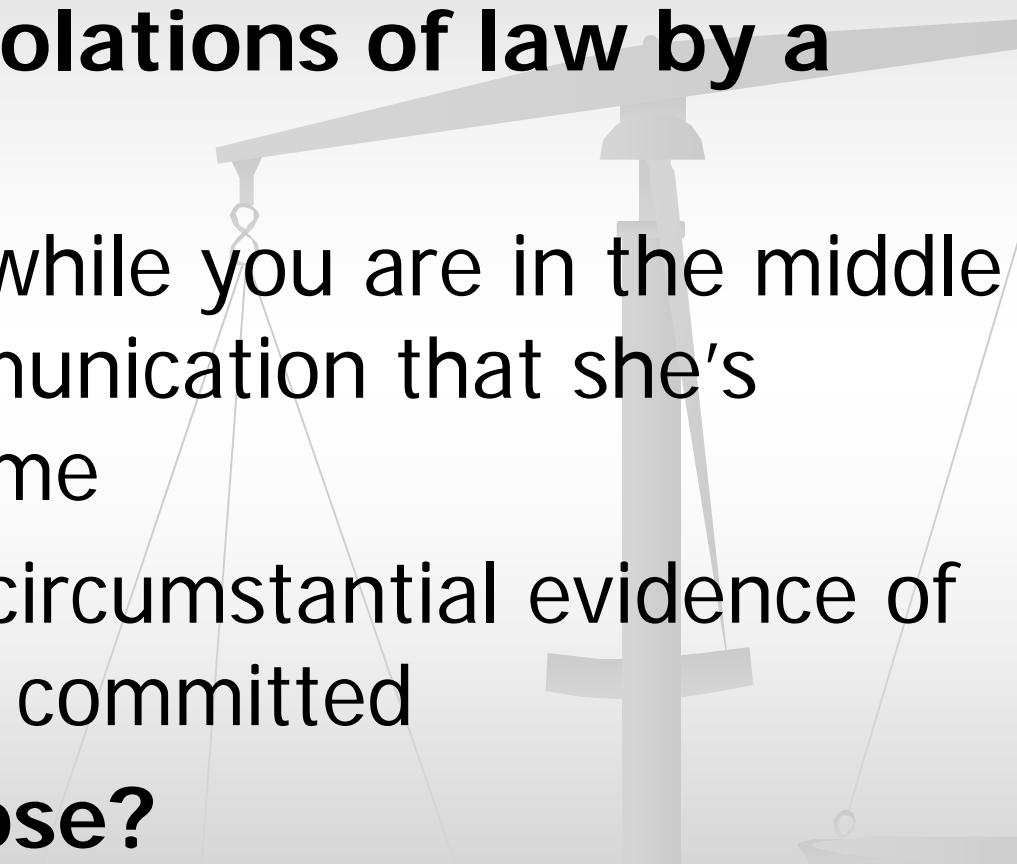
- **IN GENERAL, THE CLIENT IS ENTITLED TO PRIVACY**
- If the client (or her attorney) is the one asking, of course you can give out the requested information (attorney represents the client, and thus speaking to her is like speaking to your client)
- BUT if you **give the information out at a cocktail party**, you are not only making a bad business decision ... → → →

After-the-fact disclosures

- ... **ALSO RISKING**
 - (1) **discipline** by the state board affecting your license
 - (2) discipline by the AVMA,
 - (3) **and a law suit** of some kind from the client.

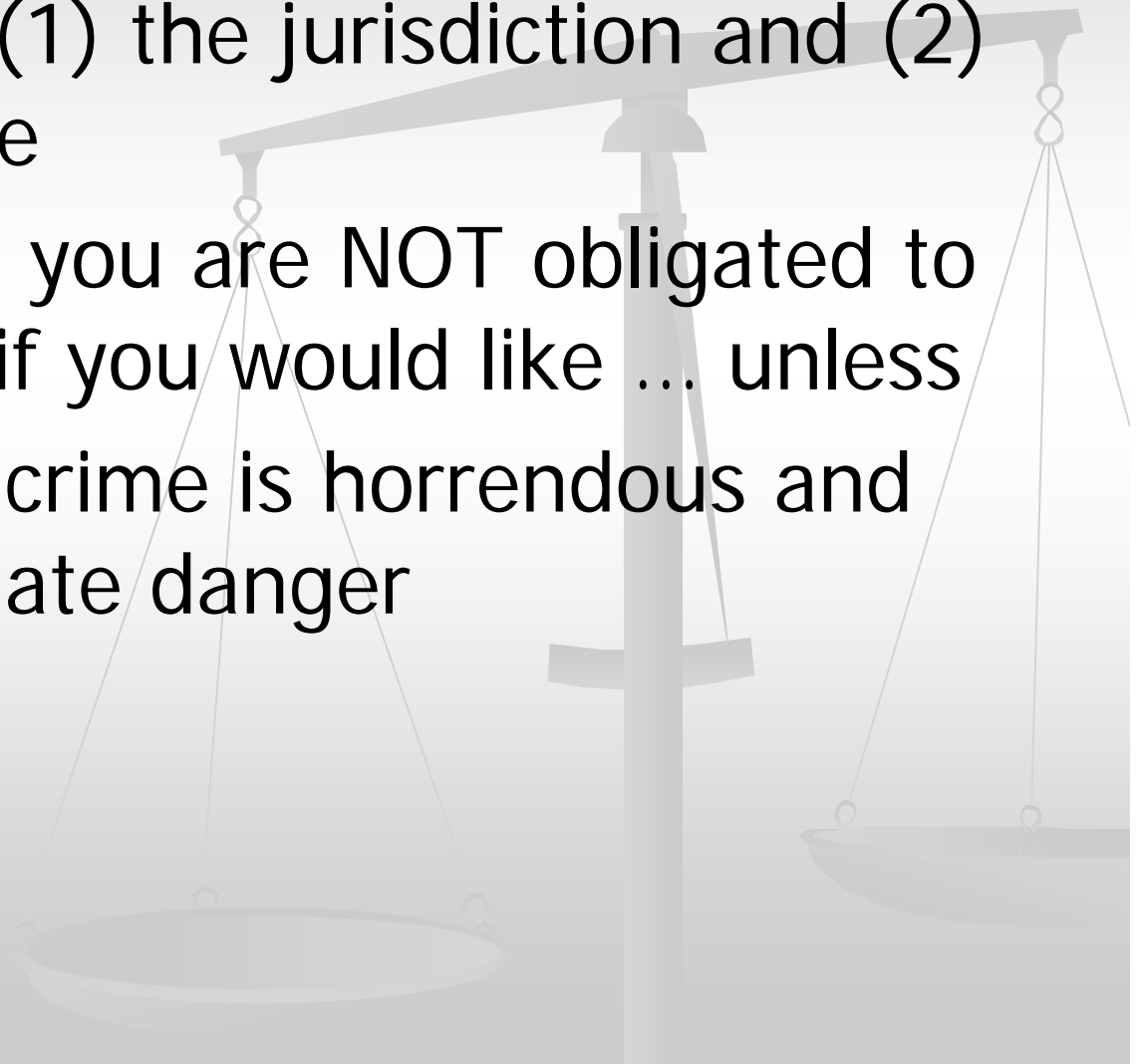


After-the-fact disclosures

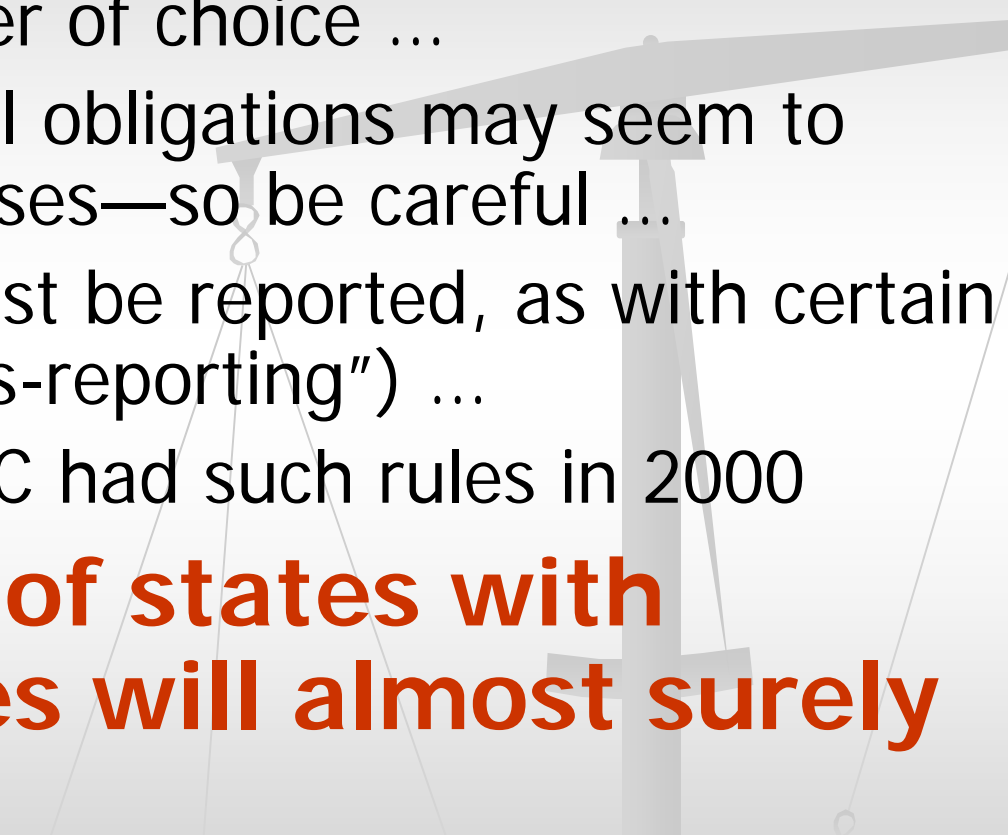
- **What about violations of law by a client?**
 - Client tells you while you are in the middle of a VCPR communication that she's committed a crime
 - ... or gives you circumstantial evidence of a crime she has committed
 - **Can you disclose?**
- 

After-the-fact disclosures

- Will depend on (1) the jurisdiction and (2) the kind of crime
- Almost certainly you are NOT obligated to report, but can if you would like ... unless
- ... unless ... the crime is horrendous and involves immediate danger
- → → →



After-the-fact disclosures

- Very often a matter of choice ...
 - ... legal and ethical obligations may seem to diverge in such cases—so be careful ...
 - Some subjects must be reported, as with certain child abuse (“cross-reporting”) ...
 - CA, CT, FL, OH, DC had such rules in 2000
 - **The number of states with relevant rules will almost surely increase.**
- 

Disclosures required by one's personal ethics

- **How are these to be handled?**



Next Hour

- Confidentiality, Records, etc.

