

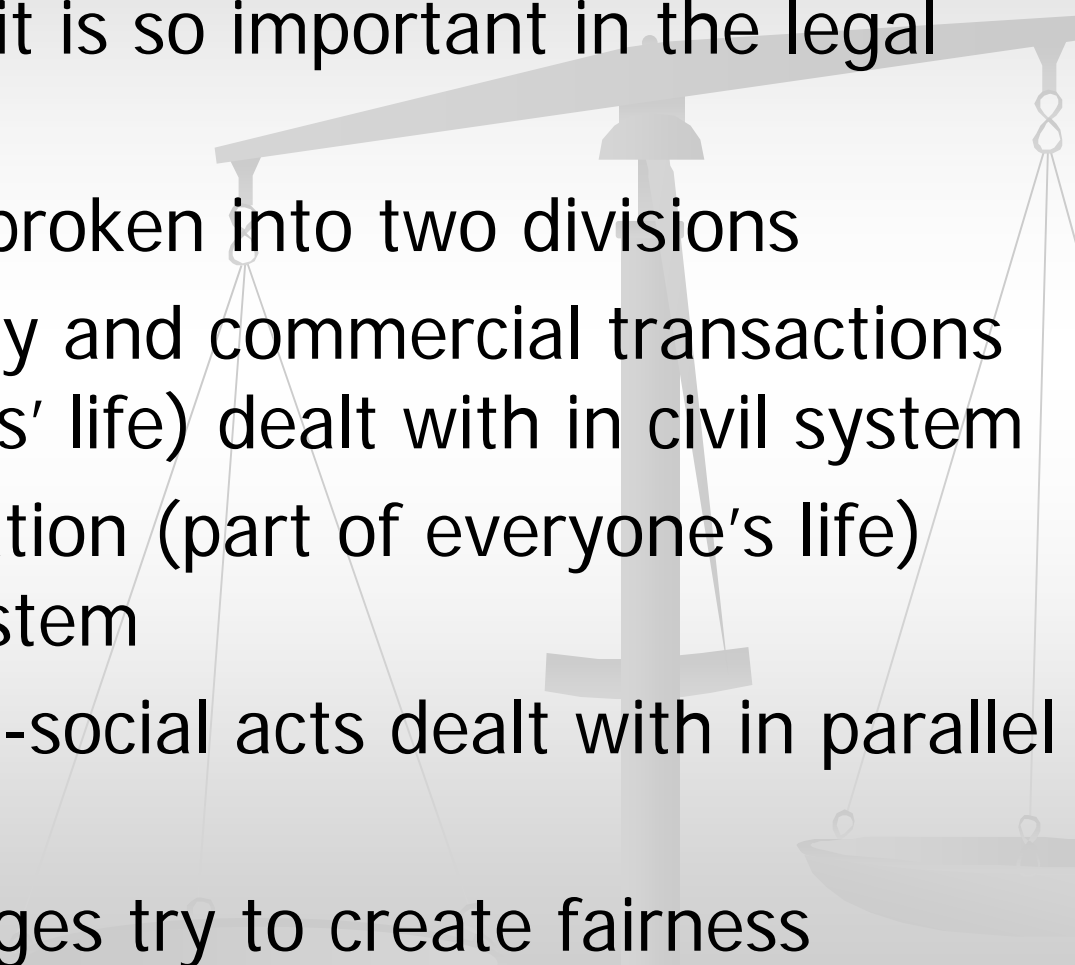
# Law and Veterinary Medicine



Malpractice  
November 30, 2006

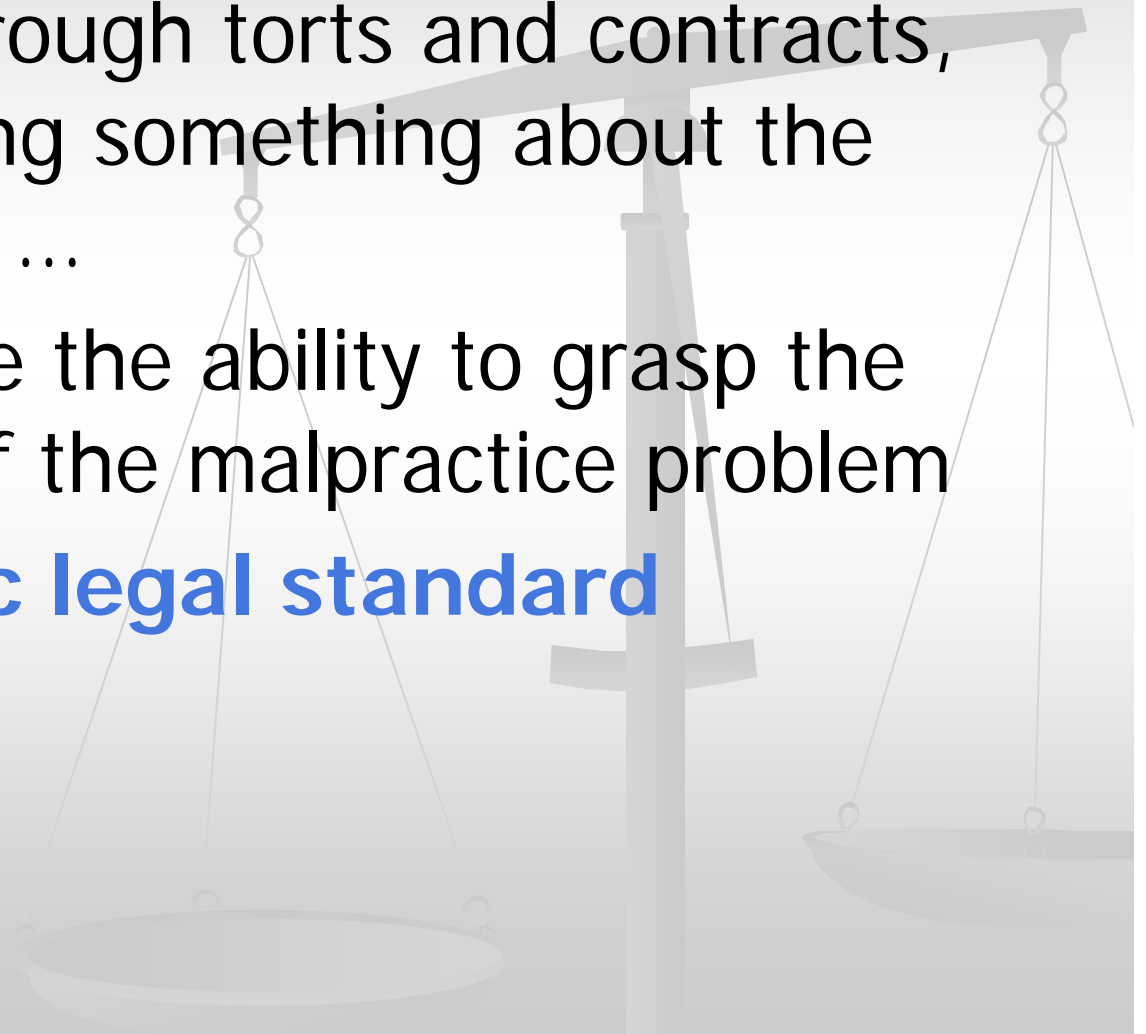
Paul Waldau, D.Phil., J.D.

## ... a little refreshment ...

- Making sure you're clear on the **contract-tort distinction** and why it is so important in the legal system
  - Chart—civil system broken into two divisions
  - **Contracts**—property and commercial transactions (part of veterinarians' life) dealt with in civil system
  - **Torts**—social regulation (part of everyone's life) dealt with in civil system
  - **Crimes**—highly anti-social acts dealt with in parallel criminal system
  - **Equity**—courts, judges try to create fairness
- 

# Grappling with malpractice

- Having been through torts and contracts, and now knowing something about the civil law system ...
- ... you now have the ability to grasp the central points of the malpractice problem
- **Key—the basic legal standard**



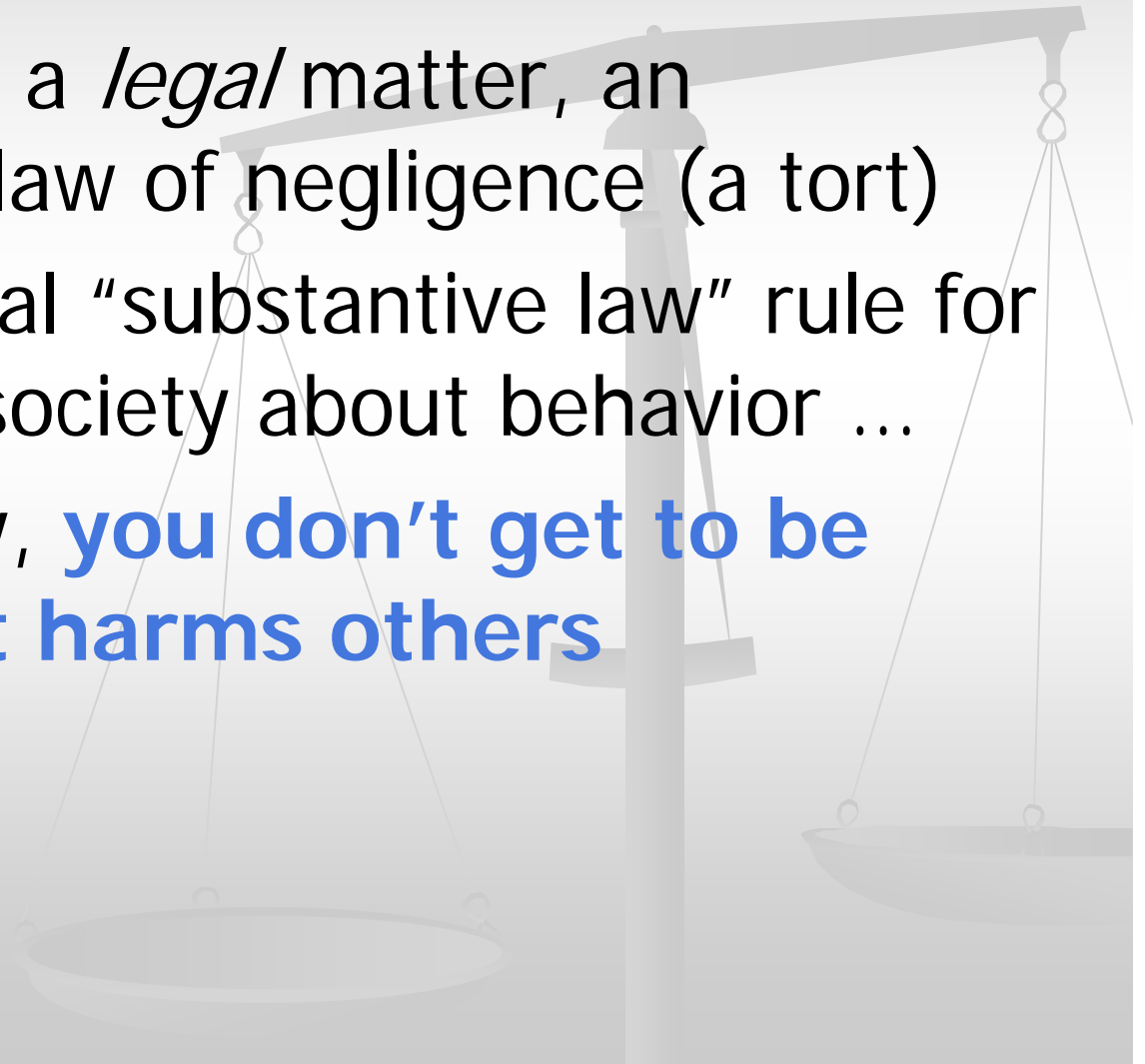
# Minutes paper

- What is the basic standard by which malpractice is measured?
- “A veterinarian *must* exercise the care and diligence ordinarily exercised by skilled veterinarians”

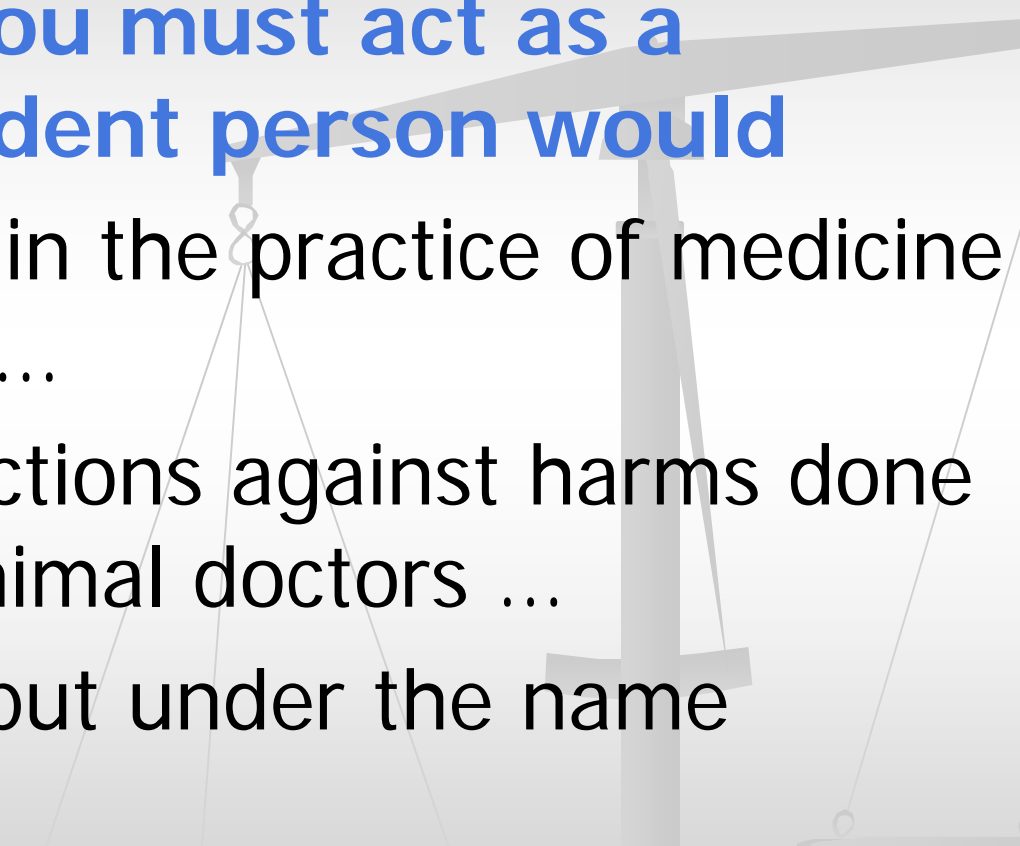


# Malpractice basics—what you should know by end of this lecture

- Malpractice is, as a *legal* matter, an extension of the law of negligence (a tort)
- We have a general “substantive law” rule for everyone in our society about behavior ...
- ... said negatively, **you don't get to be “negligent” if it harms others**

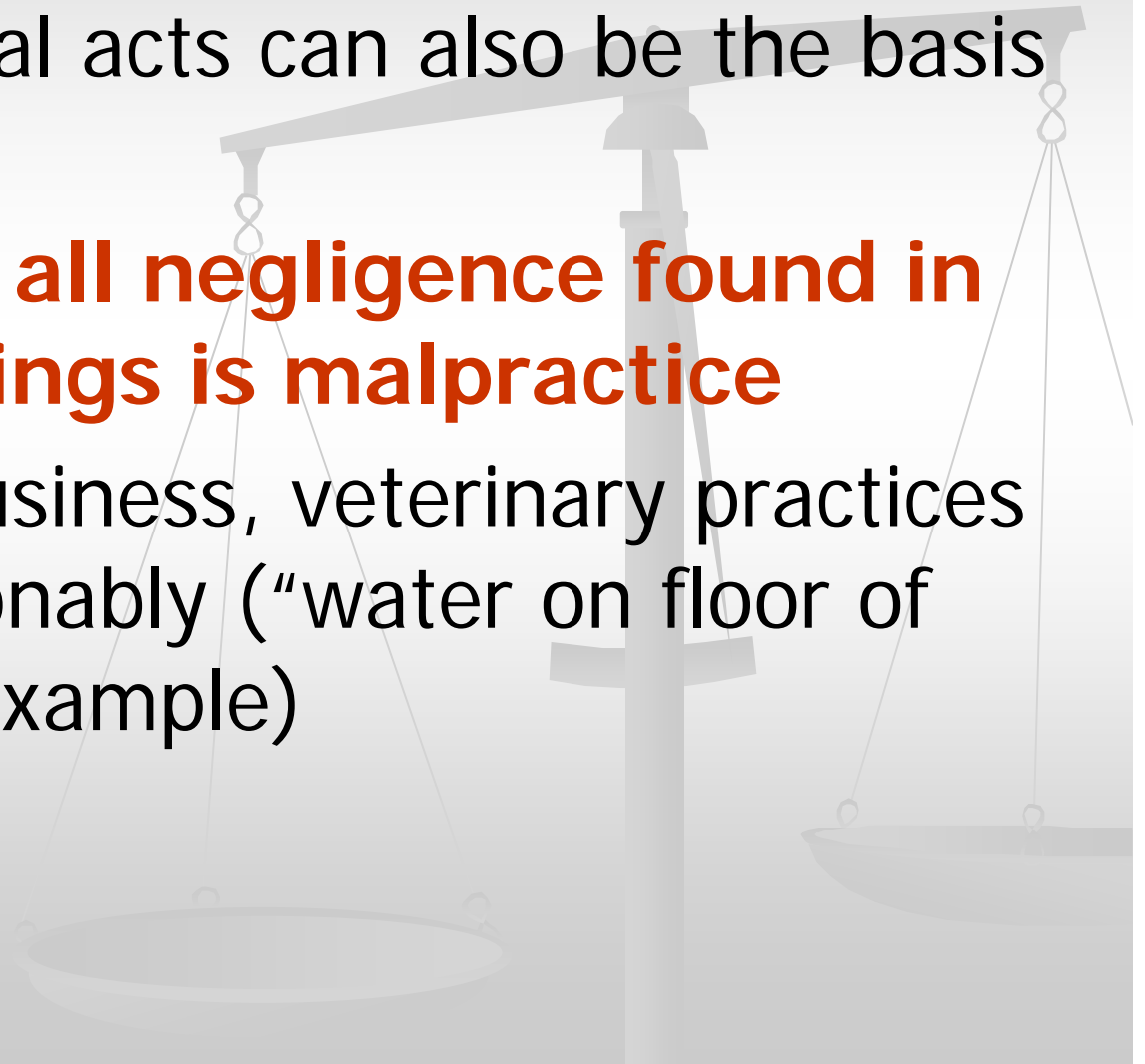


# Malpractice basics

- Said positively, **you must act as a reasonably prudent person would**
  - Since negligence in the practice of medicine can harm others ...
  - ... we have protections against harms done by human and animal doctors ...
  - ... and these we put under the name "malpractice"
- 

# Malpractice basics

- Clearly, intentional acts can also be the basis for malpractice
- Importantly, **not all negligence found in veterinary settings is malpractice**
- Like any other business, veterinary practices have to act reasonably (“water on floor of clinic entrance” example)

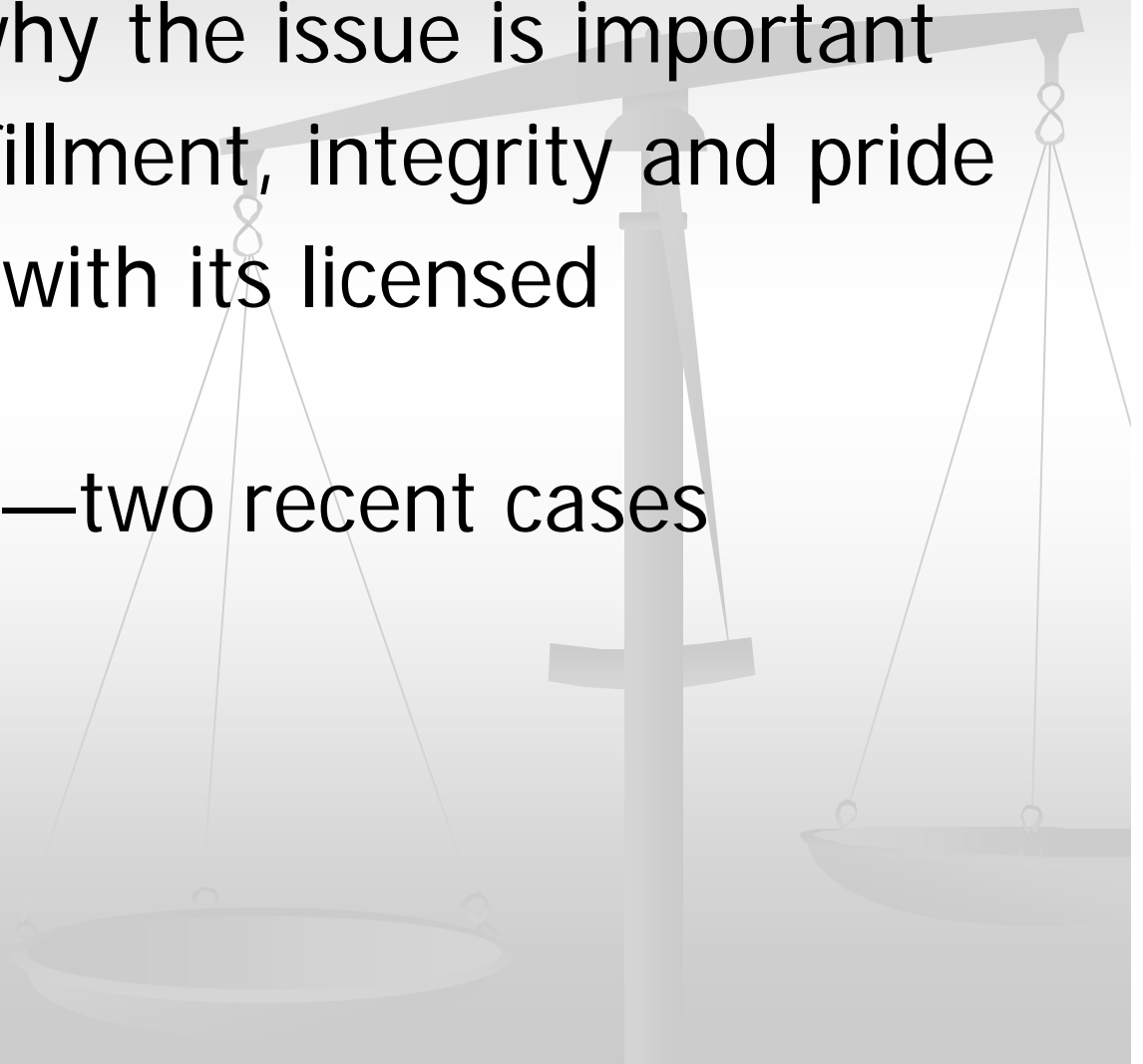


# More to know by end of this lecture

- There must be more than a mere mistake in the practice of veterinary medicine for there to be *legally significant* malpractice
- —damages needed
- “Malpractice” (a tort) isn’t the only basis for suing a veterinarian when a mistake has been made in the practice of veterinary medicine
- —could also sue for breach of contract

# Social basics on malpractice

- Many reasons why the issue is important
- Professional fulfillment, integrity and pride
- State's concern with its licensed professionals
- Public's concern—two recent cases



# California

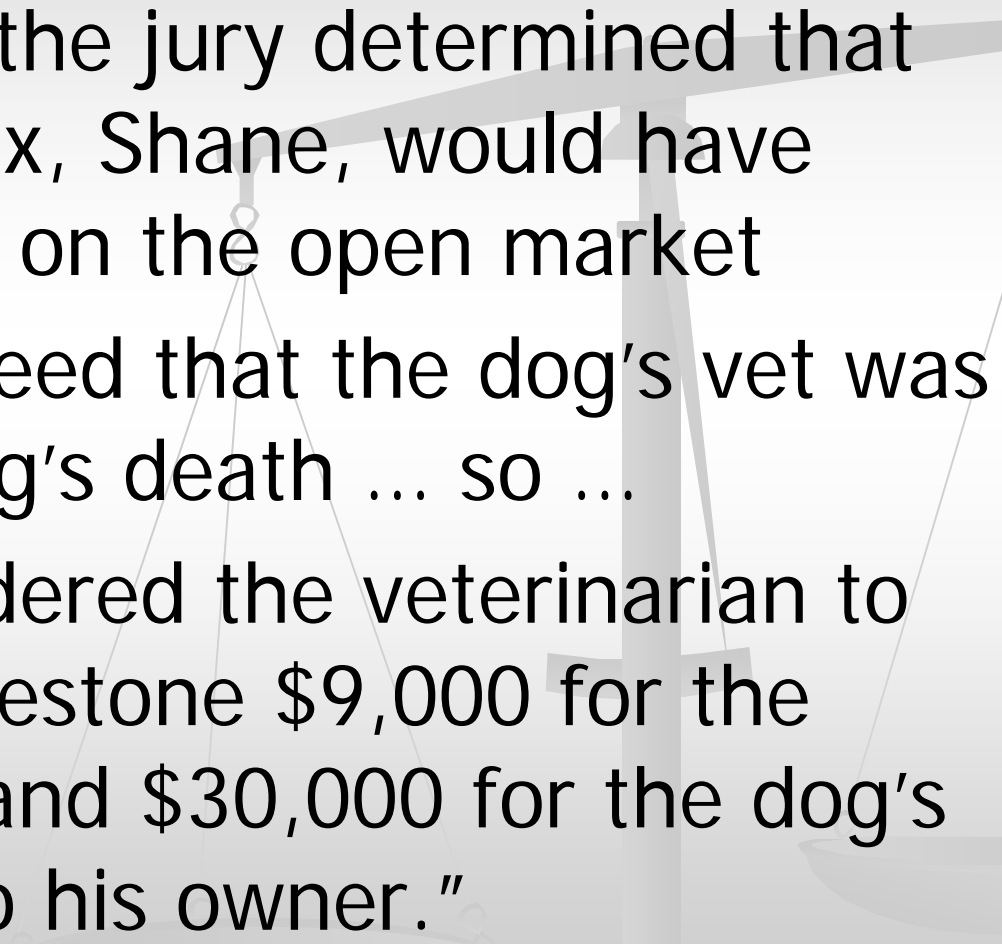
- February 24, 2004, Los Angeles Times
- **“Jury Awards Dog Owner \$39,000 in Malpractice Suit”**



# Ferment theme

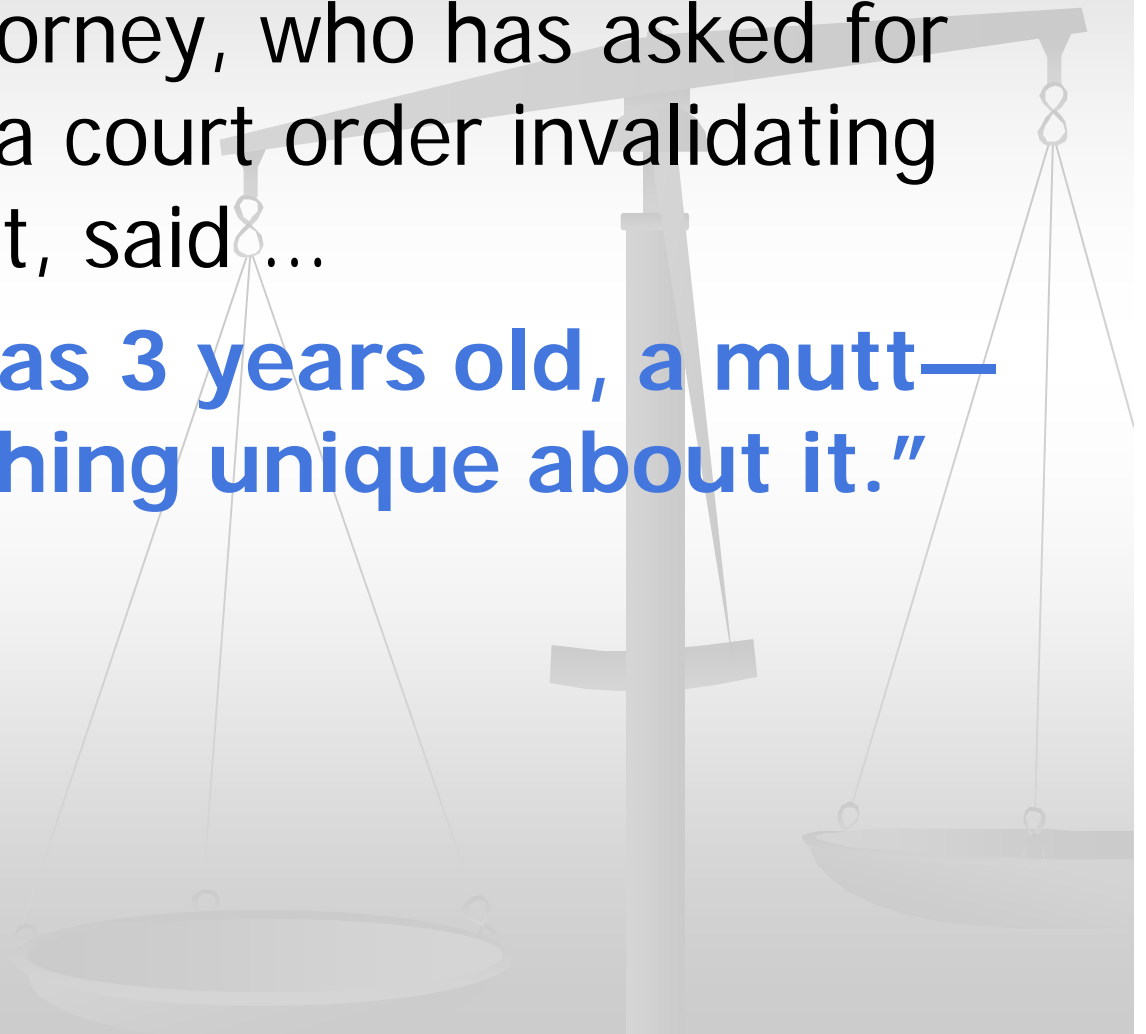
- ... highest amount ever reported awarded by a court in a U. S. dog malpractice case
- In previous cases (e.g., one in which a person was awarded \$20,000), the award was not based on the value of the dog, but on the **“emotional distress” of the guardian** (in other words, what mattered to the court was the suffering of the human)

# Ferment—law, the public's concern

- In the LA case, the jury determined that the Labrador-mix, Shane, would have been worth \$10 on the open market
  - Yet the jury agreed that the dog's vet was liable for the dog's death ... so ...
  - ... so "Jurors ordered the veterinarian to compensate Bluestone \$9,000 for the veterinary bills and \$30,000 for the dog's 'unique' value to his owner."
- 

# Ferment—law, the public's concern

- The defense attorney, who has asked for a new trial and a court order invalidating the jury's verdict, said...
- ... **"The dog was 3 years old, a mutt—there was nothing unique about it."**

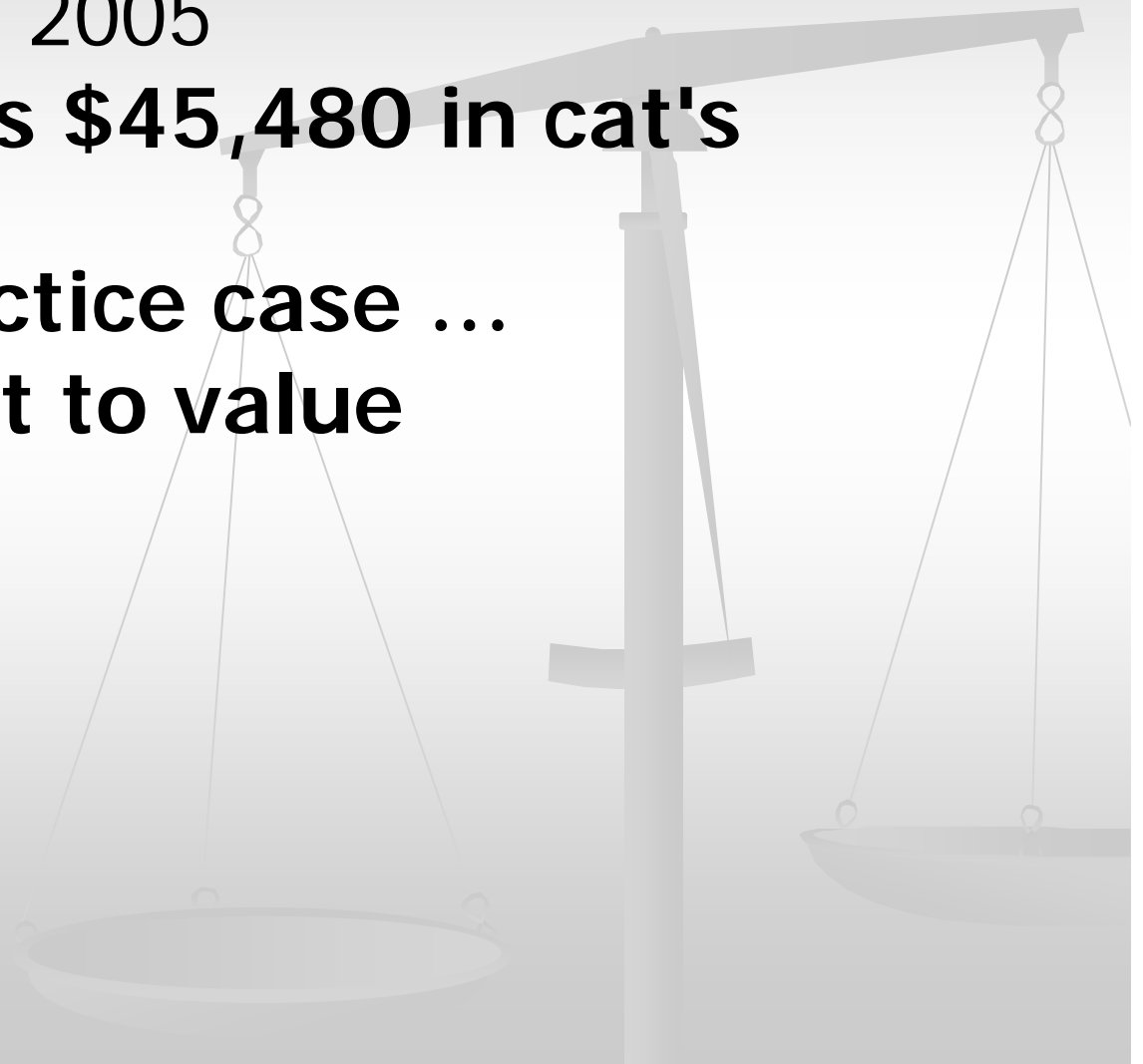


# Implications for malpractice premiums?

- “Noting that placing a high value on the loss of a pet is becoming increasingly common, [plaintiff’s attorney] said that the verdict reflects jurors’ willingness to regard pets as far more than property.”
- Will this make malpractice premiums rise?
- Chris Green, “The Future of Veterinary Malpractice Liability in the Care of Companion Animals”, *Animal Law* 10: 163-250, 2004.

# Washington State

- Monday, May 9, 2005
- **“Judge awards \$45,480 in cat's death”**
- **NOT a malpractice case ...**
- **... but relevant to value**



# Washington State

- **SURVEY: Do you think a pet's life is worth more than \$45,000?**  
43% Yes — the judge made the right decision  
36% No — the amount is too high  
21% Not worth a monetary judgment at all  
Total votes: 3,702
- **NOTE: Unscientific survey**

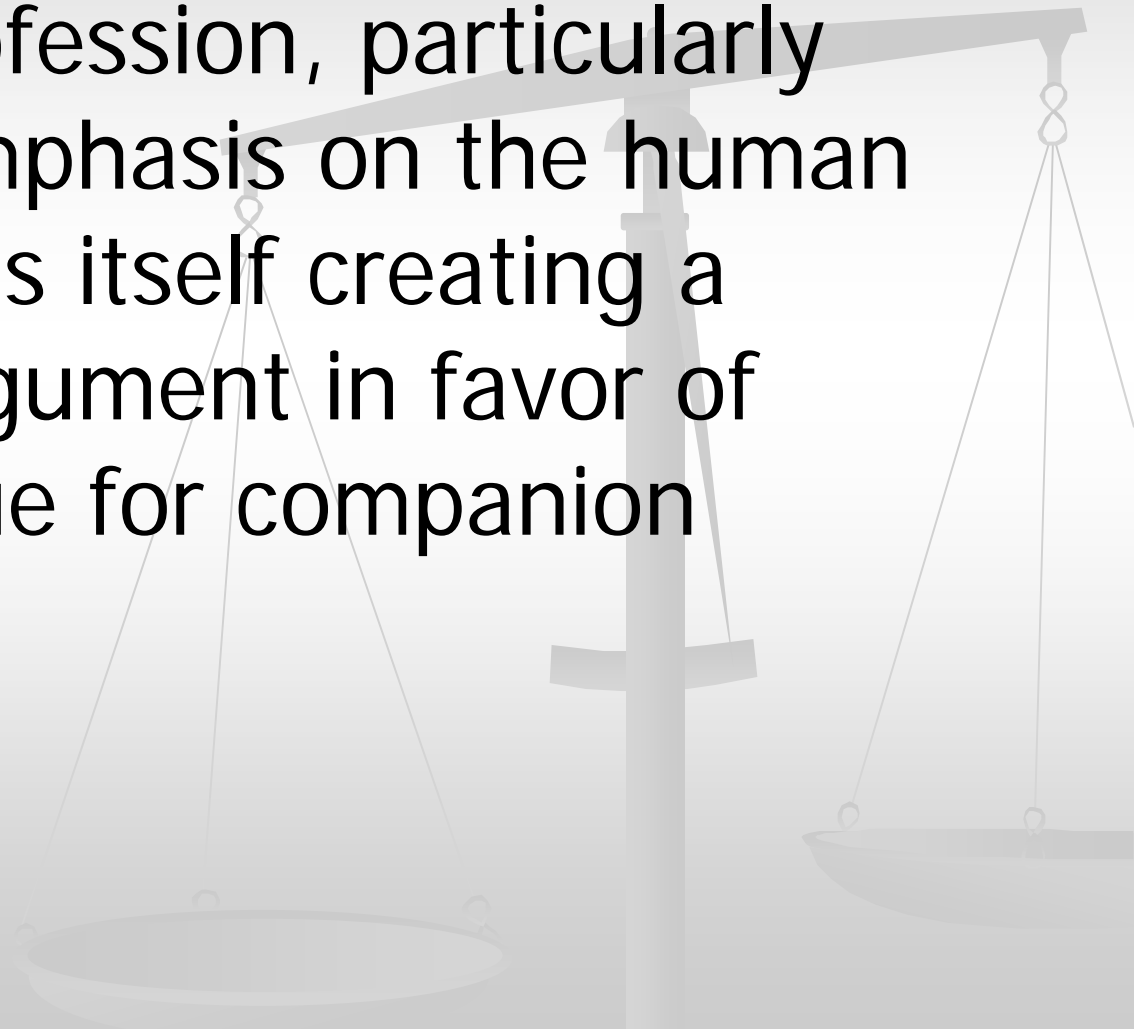
# What/Who is driving us toward greater recovery?

- Is it just greedy attorneys and disgruntled patients?



# Human-animal bond

- Veterinary profession, particularly through its emphasis on the human animal bond, is itself creating a compelling argument in favor of increased value for companion animals ...



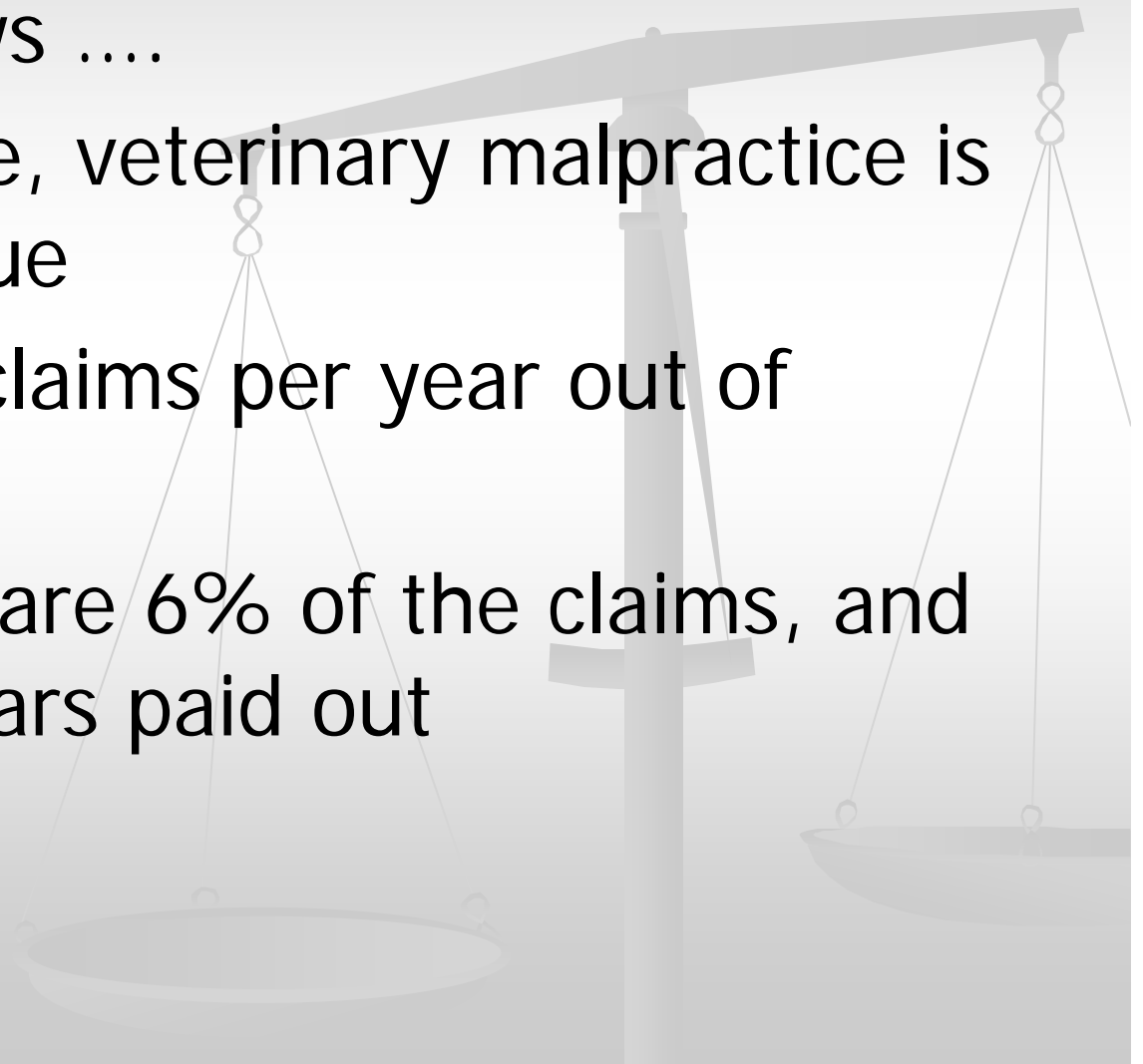
# Be prepared ...

- Be prepared: hot letters, heavy rhetoric from attorneys



# Background

- Some good news ....
- ... numbers-wise, veterinary malpractice is *NOT* a huge issue
- PLIT has 2600 claims per year out of 43,000 insureds
- Human injuries are 6% of the claims, and 12% of the dollars paid out

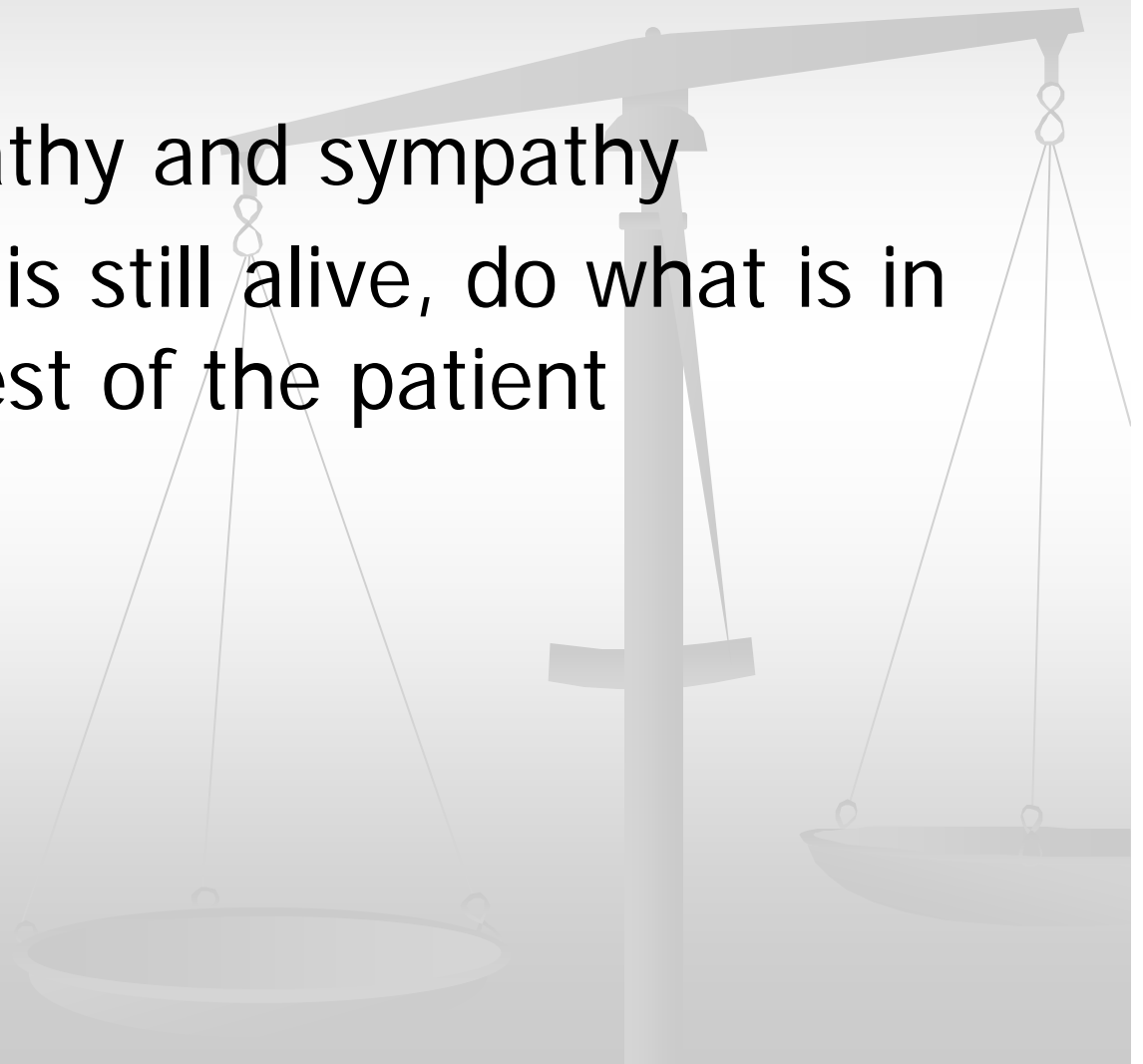


# The basics

- Drs. Linda Ellis of AVMA-PLIT next year will discuss malpractice insurance
- Will emphasize how much **judgment** is involved in practicing veterinary medicine
- *And how important it is to document that good judgment*
- And how important it is to respond well – PLIT's Winter 2006 newsletter → →

# “Three ‘Dos’” when malpractice strikes

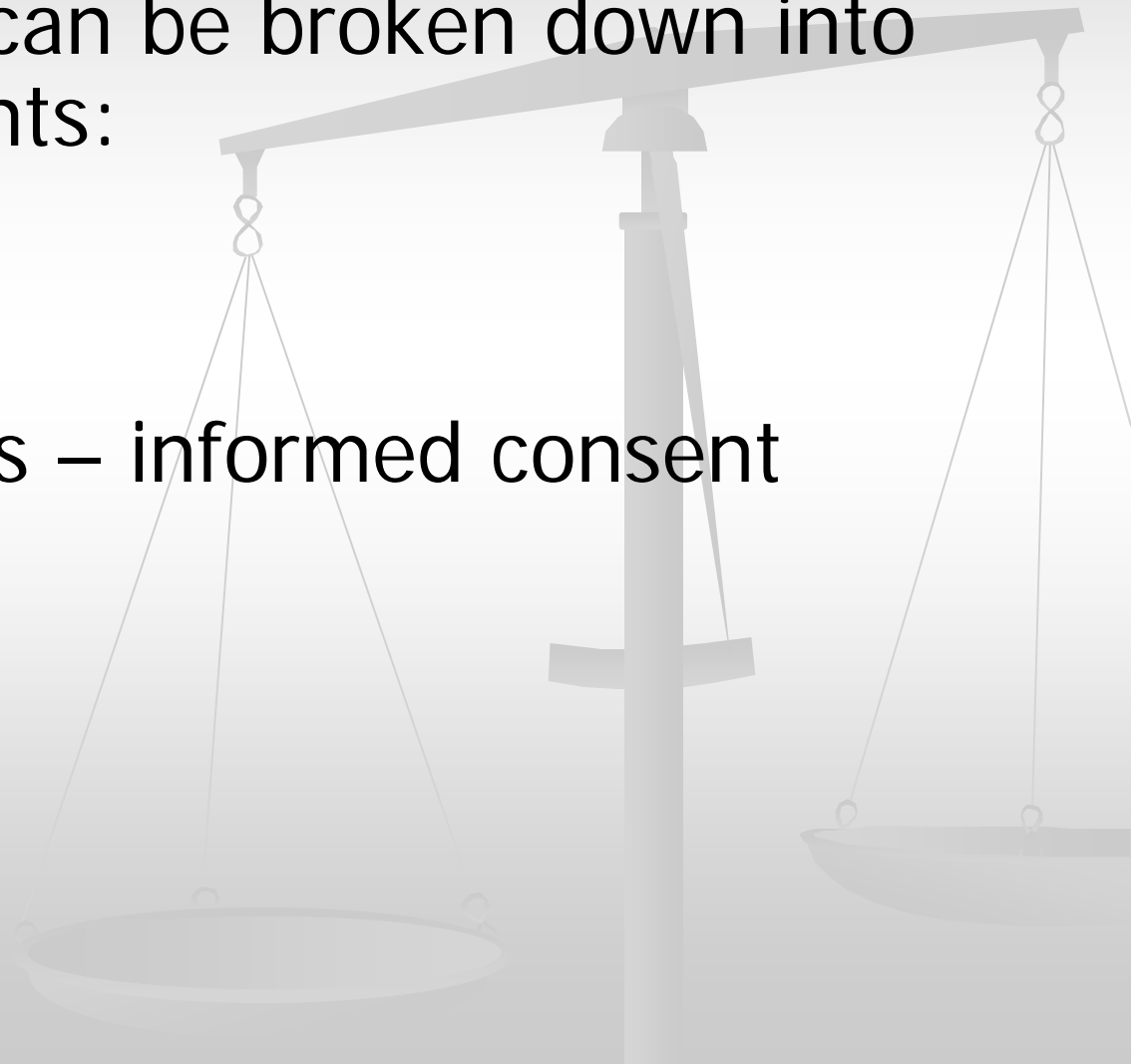
1. Be honest
2. Express empathy and sympathy
3. If the patient is still alive, do what is in the best interest of the patient



# The basics

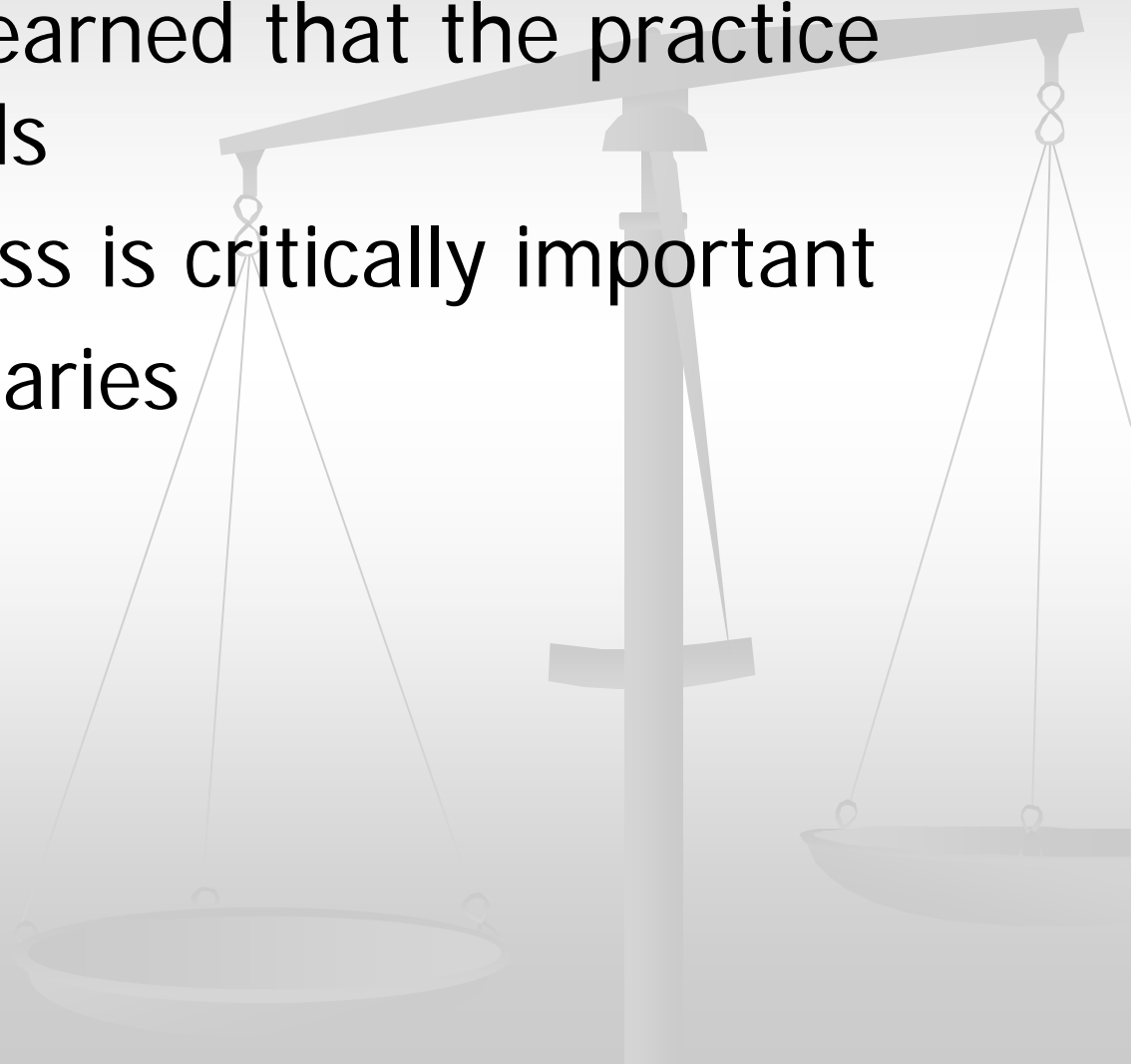
Standard of care can be broken down into these components:

- Exam
- Diagnostics
- Treating Options – informed consent
- Procedures
- Aftercare
- Records



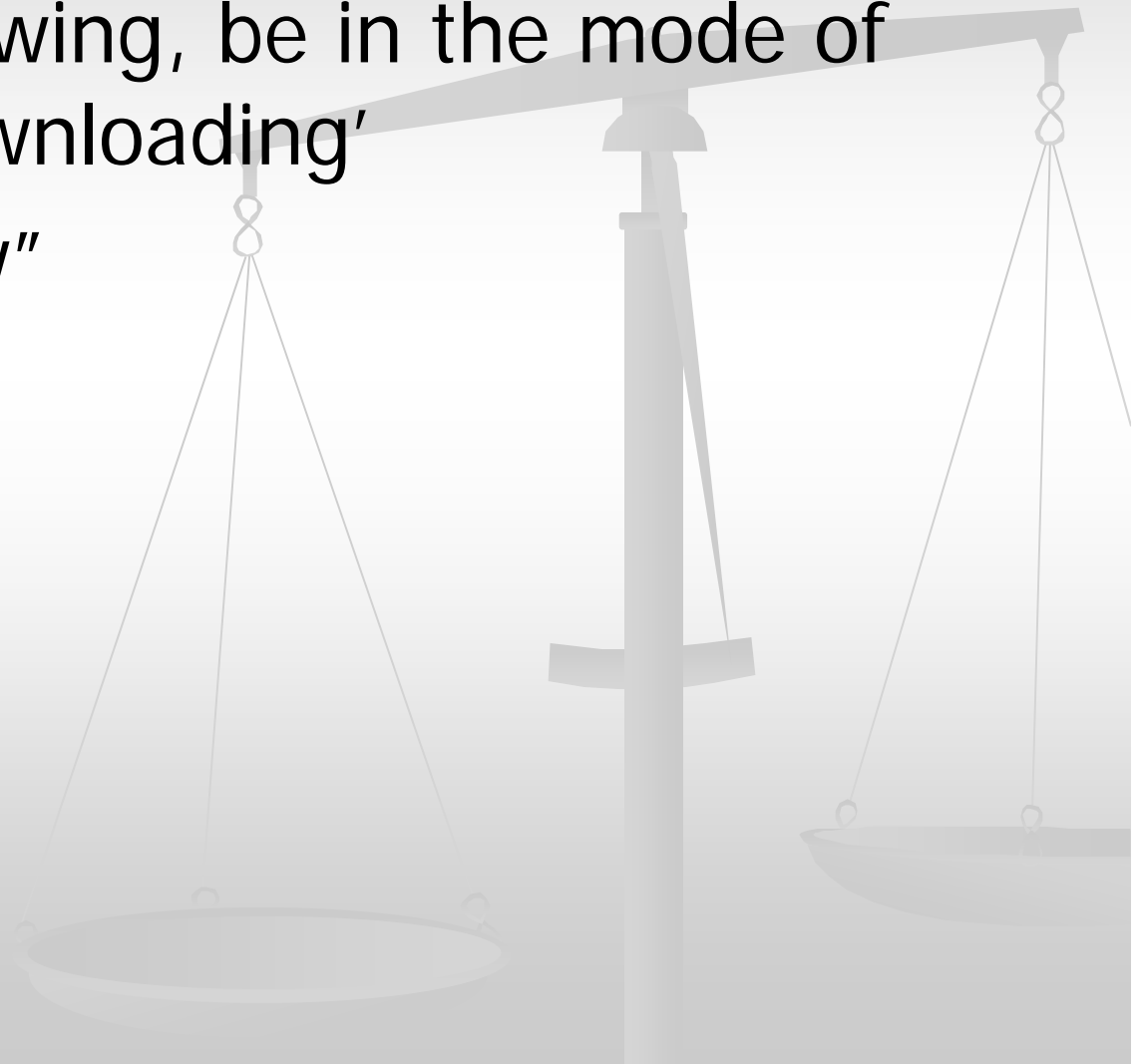
# Access to information

- We've already learned that the practice owns the records
- ***BUT*** client access is critically important
  - copies, summaries



# Satisfying the urge for certainty

- During the following, be in the mode of mental 'fact-downloading'
- "Black letter law"



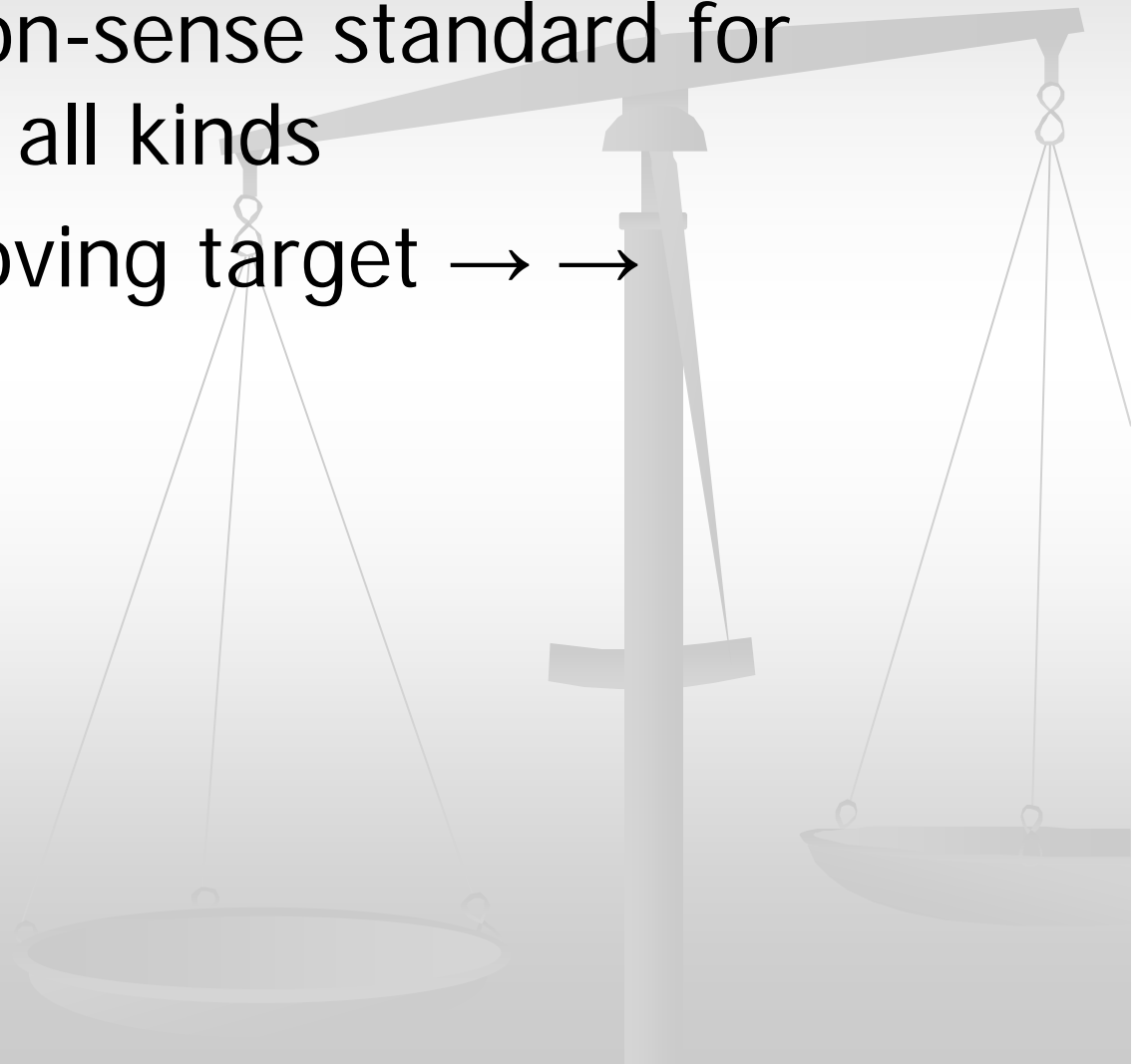
# Malpractice standard

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



# The legal standard

- This is a common-sense standard for professionals of all kinds
- ... and it is a moving target → →

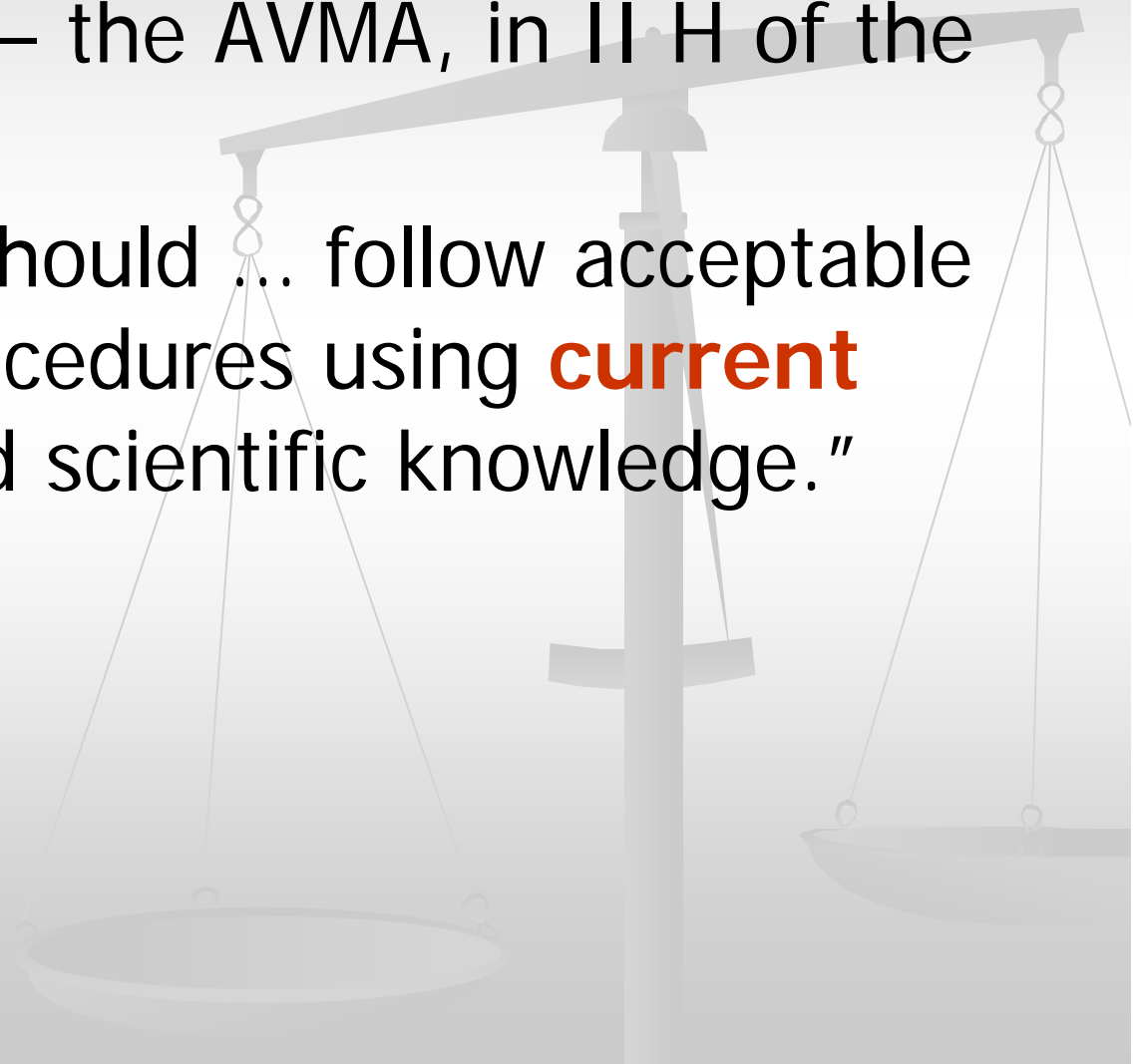


# MA Regs

- MA Reg. 7.01 (4) "A veterinarian's practice shall conform to the **currently** accepted standards in the profession of veterinary medicine."
- Notice that both refer to a standard that is general, *not* specified in *any* detail

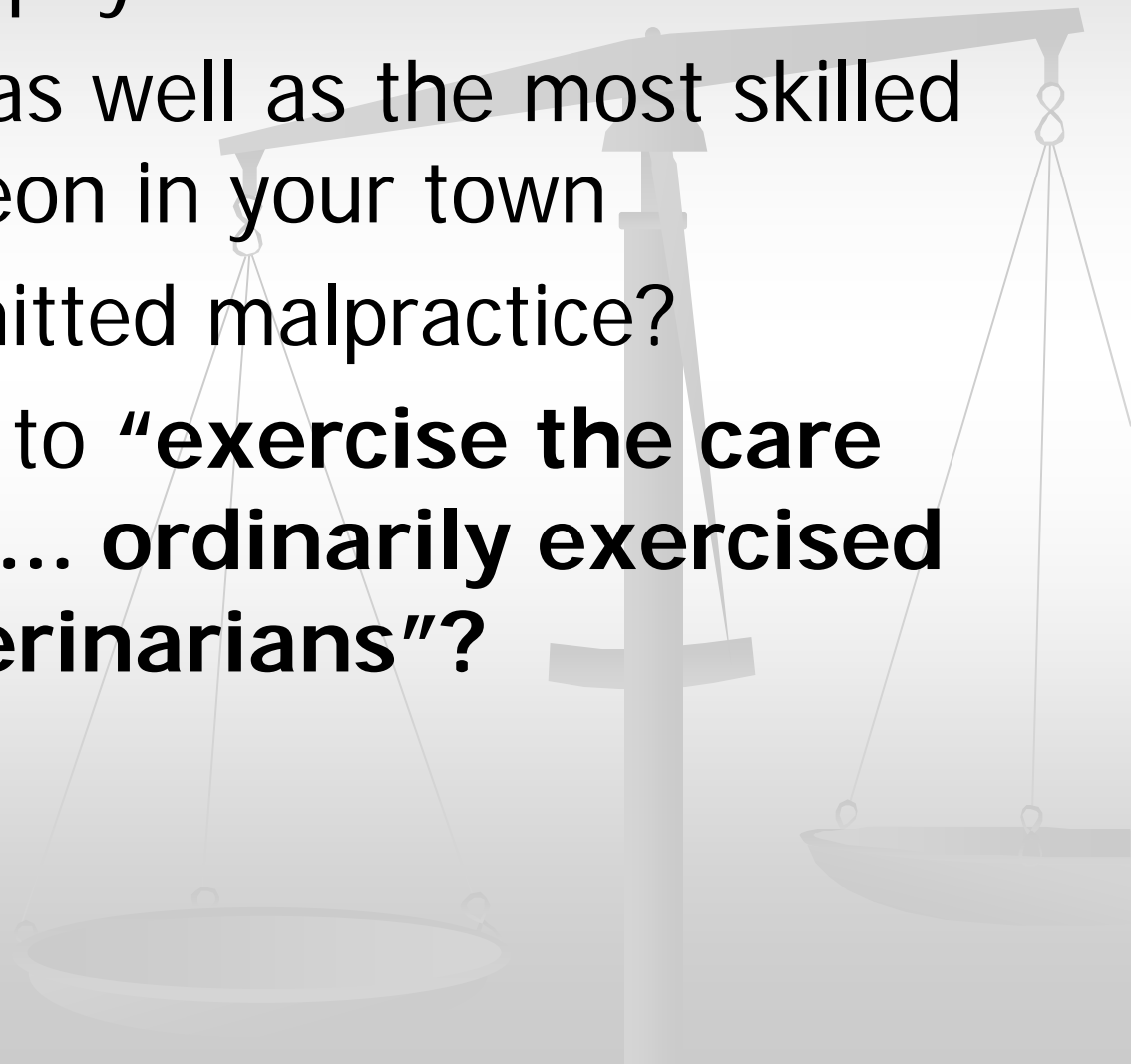
# Discussion/rumination mode

- The ethics side – the AVMA, in II H of the PVME, says
- “Veterinarians should ... follow acceptable professional procedures using **current** professional and scientific knowledge.”



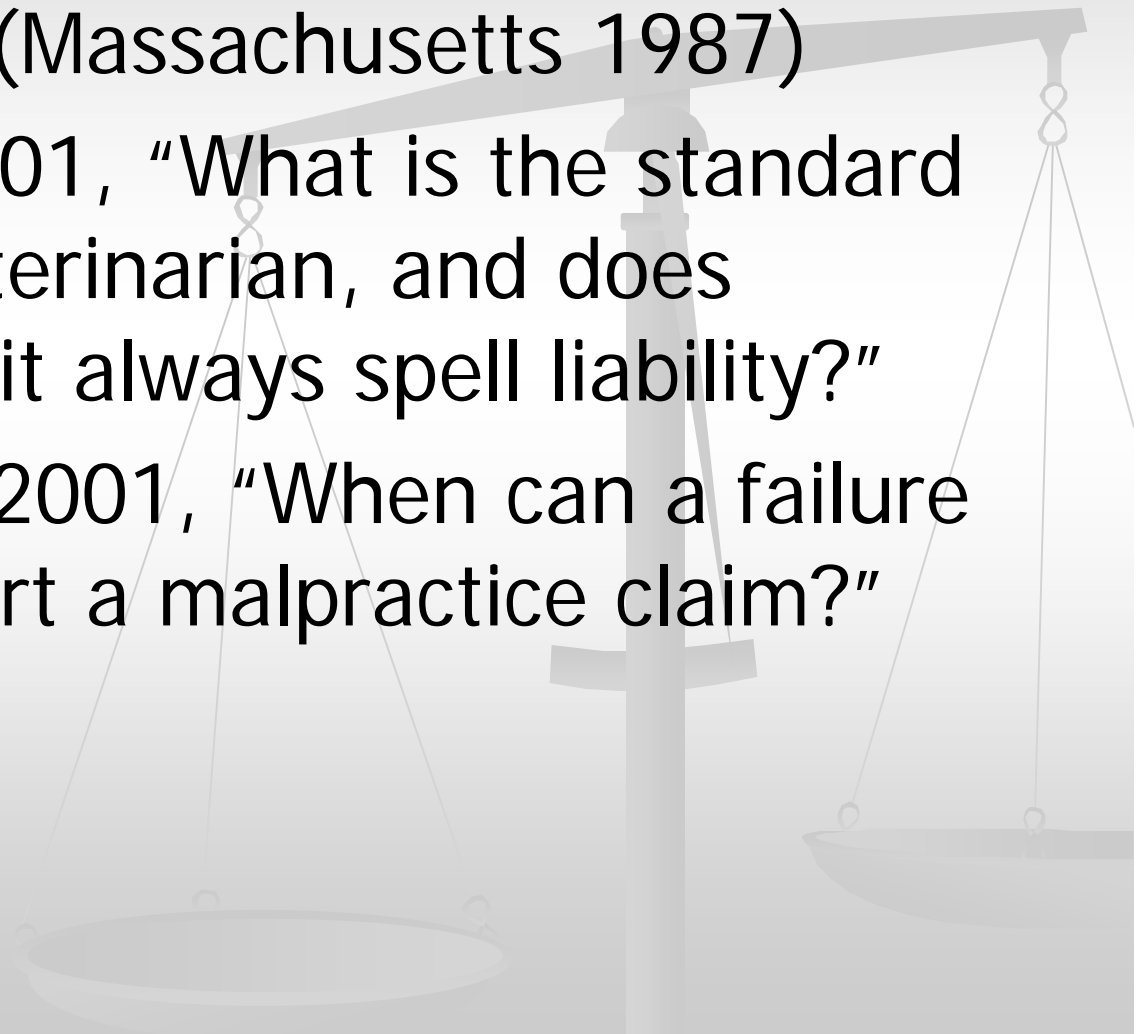
# Consider this hypothetical

- You perform a spay
- You don't do it as well as the most skilled veterinary surgeon in your town
- Have you committed malpractice?
- Have you failed to **“exercise the care and diligence ... ordinarily exercised by skilled veterinarians”**?

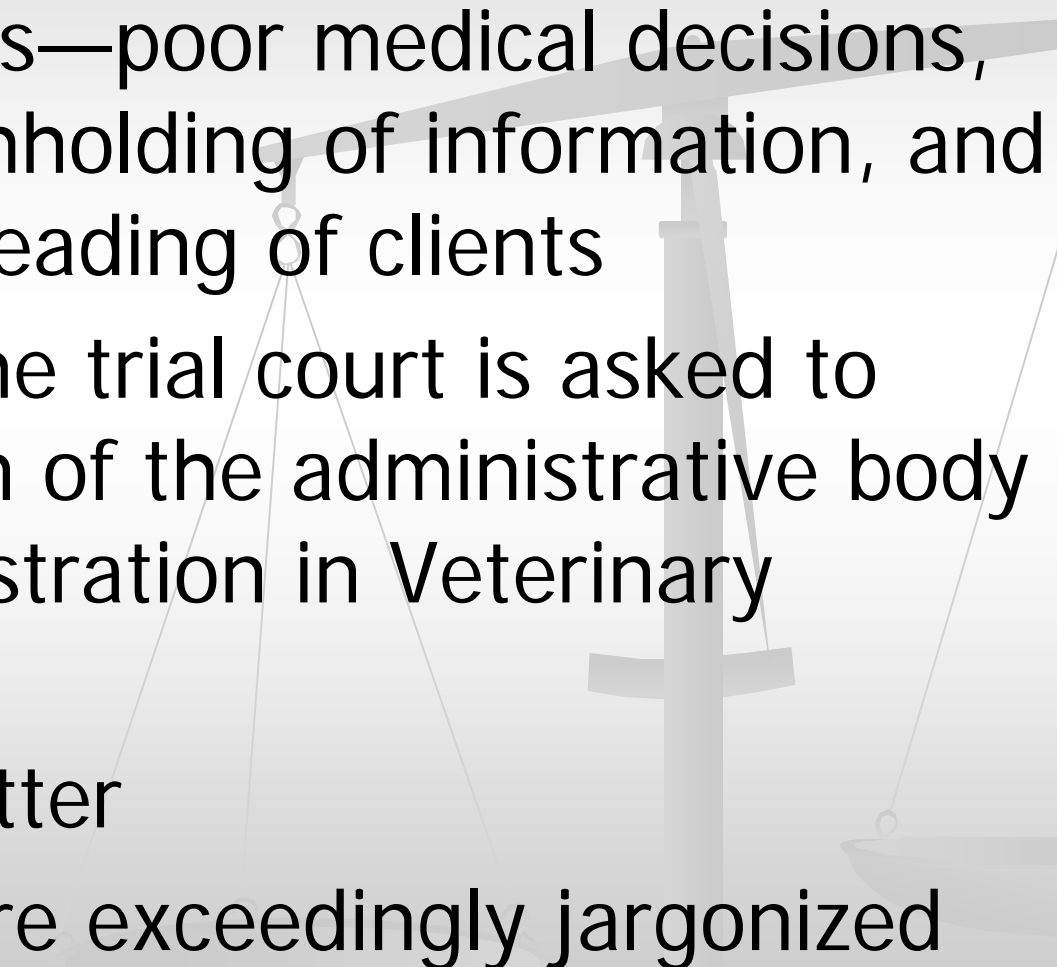


# Readings for this session

- Summary of Basic Malpractice Issues
- Fitzgerald case (Massachusetts 1987)
- JAVMA, April 2001, "What is the standard of care for a veterinarian, and does departure from it always spell liability?"
- JAVMA, May 1, 2001, "When can a failure to inform support a malpractice claim?"



# Fitzgerald case (Massachusetts 1987)

- Nightmare facts—poor medical decisions, intentional withholding of information, and deliberate misleading of clients
  - Description—the trial court is asked to review decision of the administrative body (Board of Registration in Veterinary Medicine)
  - This is civil matter
  - Case reports are exceedingly jargonized
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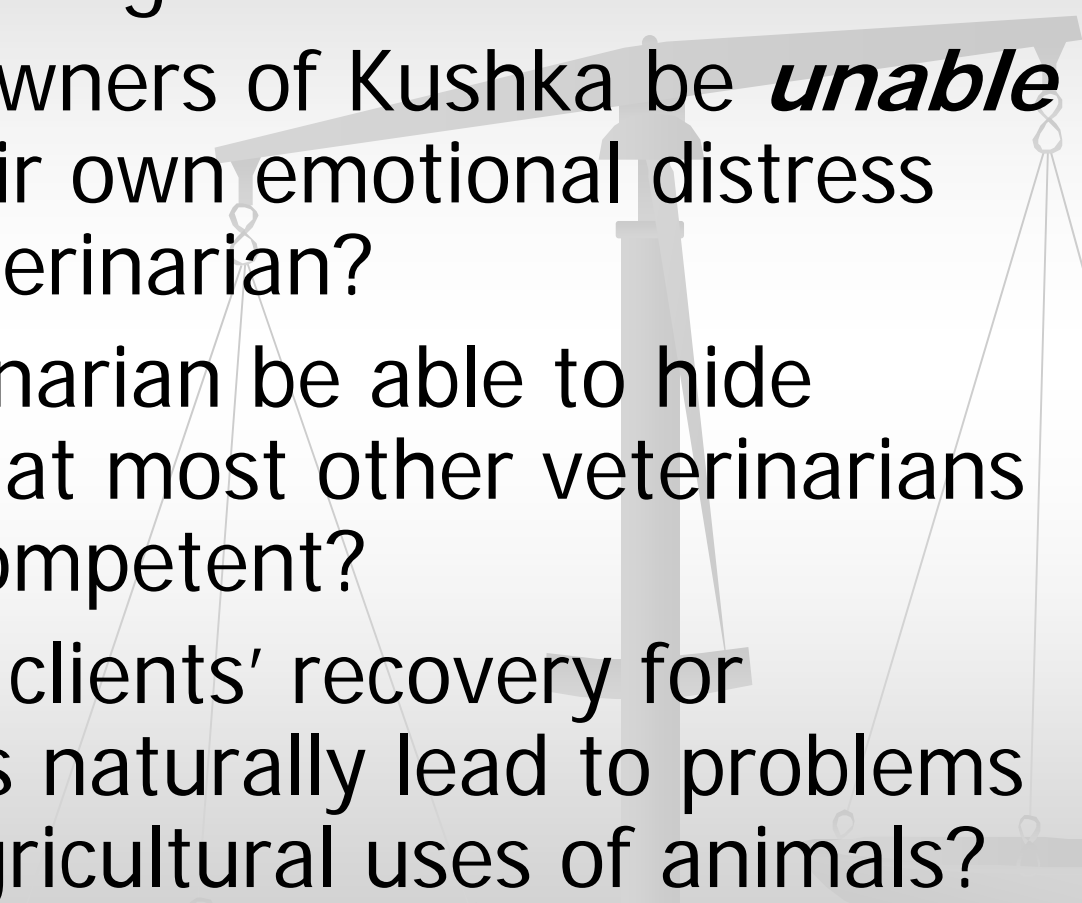
# Fitzgerald case (Massachusetts 1987)

- Trial court holds that “substantial evidence” supported the Board’s decision to suspend Fitzgerald’s license for two years ...
- ... because “conduct reflecting unfavorably on profession of veterinary medicine, malpractice and gross misconduct in practice of veterinary medicine.”

# Earlier PLIT reading (Vaughn)

- “Revision of the age-old legal standards of animal valuation for the sake of companion animals will have unintended consequences that ramify far beyond mere malpractice insurance rates.” →
- → “biomedical research activities, production medicine, the use of sporting animals, animal agriculture at large”

# PLIT's Vaughn

- Consider facts of Fitzgerald case ...
  - Why should the owners of Kushka be *unable* to recover for their own emotional distress caused by the veterinarian?
  - Should this veterinarian be able to hide behind the fact that most other veterinarians are honest and competent?
  - Why would these clients' recovery for emotional distress naturally lead to problems for biomedical, agricultural uses of animals?
- 

# JAVMA article, April 2001

“What is the standard of care for a veterinarian, and does departure from it always spell liability?”

- Local versus national standard discussed
- **Today, the national standard is almost always used**

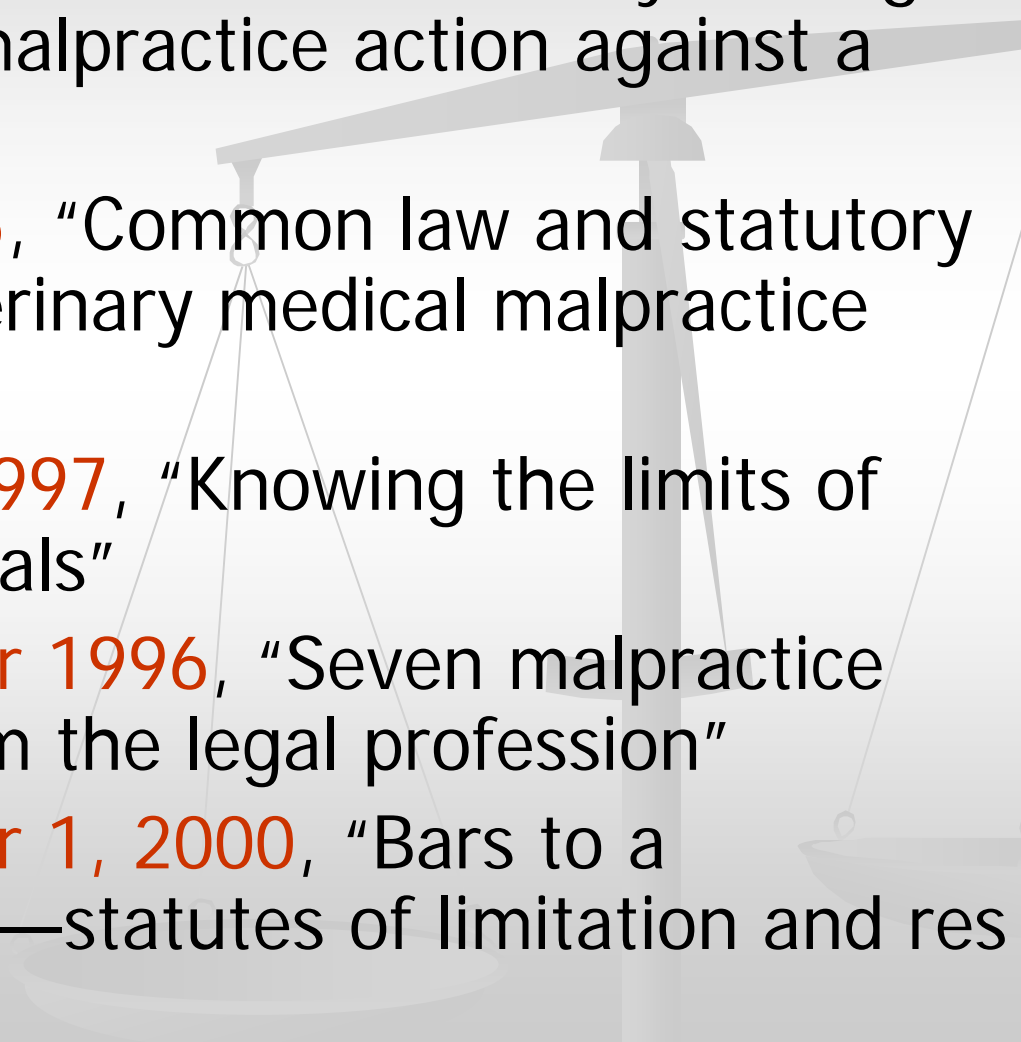


# JAVMA article, May 1, 2001

“When can a failure to inform support a malpractice claim?”

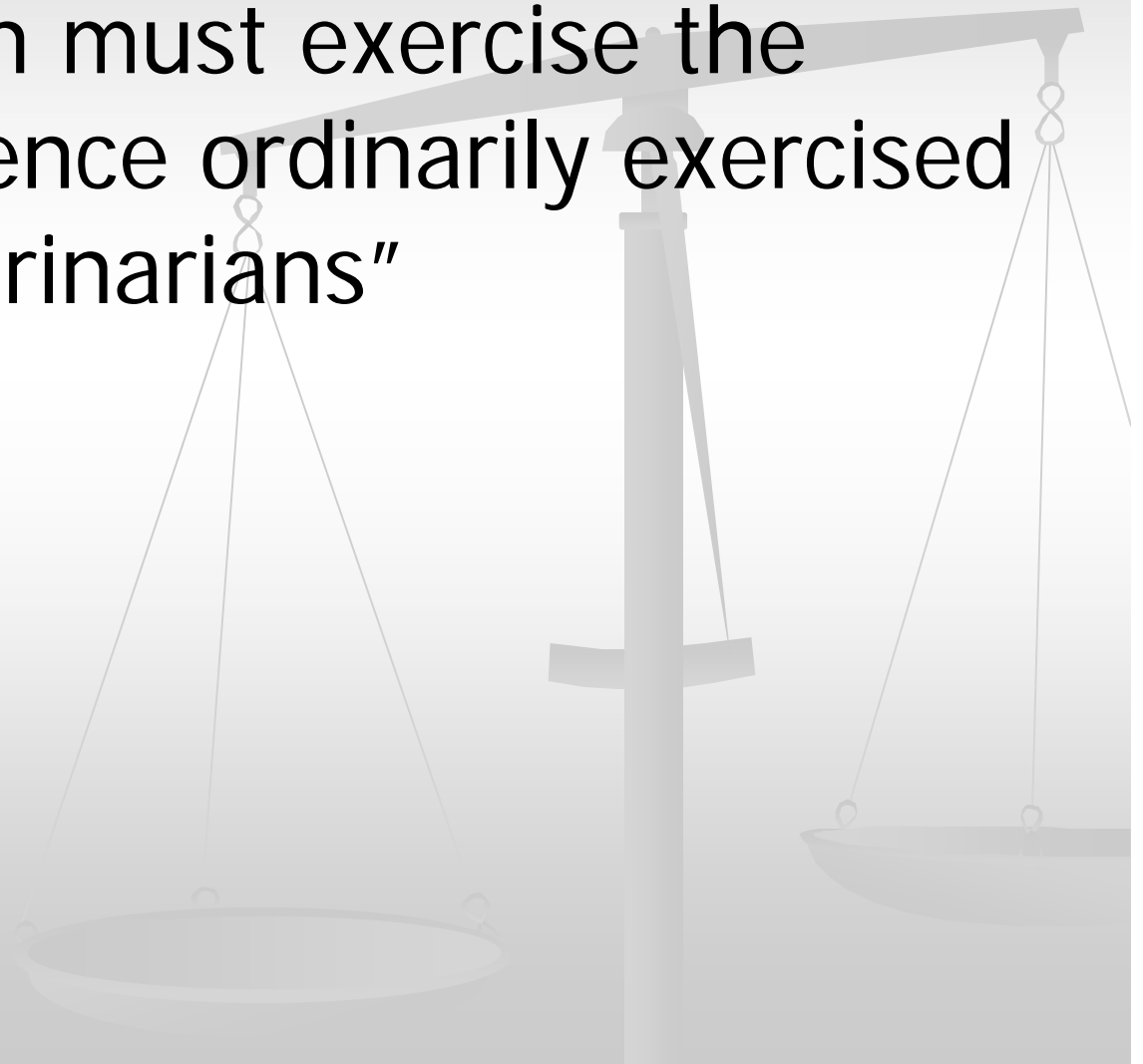
- “Informed consent” is raised as a central issue *in malpractice claims*
- Notes that meeting standard of care is only one issue ... must inform clients as well
- Don't worry about details of this article – the more recent JAVMA articles that we looked at in Session 4 are far more detailed

# Recommended readings

- JAVMA, **February 1999**, “For what may damages be awarded in a malpractice action against a veterinarian?”
  - JAVMA, **June 1995**, “Common law and statutory defenses to a veterinary medical malpractice action”
  - JAVMA, **January 1997**, “Knowing the limits of one’s skills—referrals”
  - JAVMA, **September 1996**, “Seven malpractice traps—a page from the legal profession”
  - JAVMA, **September 1, 2000**, “Bars to a malpractice action—statutes of limitation and res judicata”
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# Summary 1: Know the legal standard

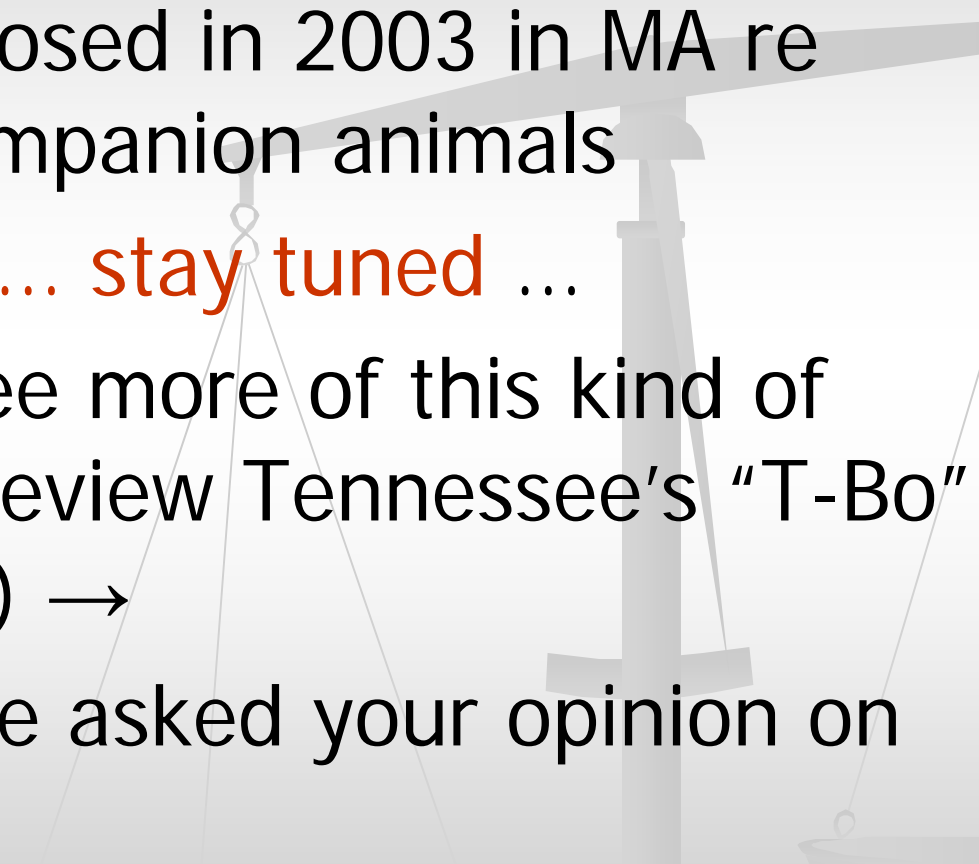
- “A veterinarian must exercise the care and diligence ordinarily exercised by skilled veterinarians”



## Summary 2

- **The standard**—care and diligence ordinarily exercised by skilled veterinarians—**can and will change during your lifetime ...**
- Malpractice, in the eyes of the law, requires **more than a mere mistake—damages needed**
- There are **different kinds of damages** that *might* be awarded by a court
- A malpractice lawsuit is definitely NOT the ONLY LEGAL RECOURSE for an aggrieved client

# FYI

- Legislation proposed in 2003 in MA re damages for companion animals
  - **Not passed but ... stay tuned ...**
  - You will likely see more of this kind of legislation (we review Tennessee's "T-Bo" act in Session 7) →
  - Likely you will be asked your opinion on such changes ...
- 

# See what we are doing in next three sessions

- December 4—
  - First Hour—Wildlife and law
  - Second Hour—Research animals and law
- December 6—
  - First Hour—Farmed animals and law
  - Second Hour—Companion animals and cruelty
- December 8—
  - Controlled substances

