

MEMORANDUM

DATE	September 21, 2020
TO	Multidisciplinary Advisory Committee (MDC)
FROM	Jessica Sieferman, Executive Officer
SUBJECT	Agenda Item 6. Discussion and Potential Recommendation on Proposed Amendments to Section 2035, Article 4, Division 20, Title 16 of the CCR, Duties of Supervising Veterinarian

Background

Business and Professions Code (BPC) section 4836 requires the Board to adopt regulations establishing animal health care tasks and an appropriate degree of supervision required for those tasks that may be performed only by a Registered Veterinary Technician (RVT) or licensed veterinarian. BPC section 4836.1 authorizes an RVT to administer a drug, including but not limited to, a drug that is a controlled substance, under the direct or indirect supervision of a licensed veterinarian when done pursuant to the order, control, and full professional responsibility of a licensed veterinarian. BPC section 4840 authorizes RVTs and veterinary assistants (VAs) to perform animal health care services under the supervision of a California licensed or authorized veterinarian. BCP section 4840.9 allows licensed and authorized veterinarians to employ RVTs and VAs.

CCR section 2035, subsection (a), makes the supervising veterinarian responsible for determining the competency of the RVT, permit holder, or VA to perform allowable animal health care tasks. CCR section 2035, subsection (b), makes the supervising veterinarian responsible for making all decisions relating to the diagnosis, treatment, management, and future disposition of the animal patient. CCR section 2035, subsection (c), requires the supervising veterinarian to examine the animal patient before delegating any animal health care task to an RVT, permit holder, or VA, and requires the examination to be conducted at such time as good veterinary medical practice requires consistent with the particular delegated animal health care task.

The Board's 2012-2014 Strategic Plan included an action item directing the Board to research "extended duties" for RVTs. The work of researching and recommending possible "extended duties" was delegated by the Board to the Multidisciplinary Advisory Committee (MDC). At the MDC meeting on April 16, 2016, it considered whether the Board's regulations needed to provide for extended animal health care duties that could be performed by RVTs or to restrict some animal health care duties to only be delegated to RVTs, and not to permit holders or VAs.

The MDC discussed whether the regulations should provide a list of duties (e.g., only an RVT could perform a procedure involving placement of a needle or appliance in a blood vessel, body cavity, or epidural space, induce anesthesia, or perform casting and splinting) that a supervising veterinarian could only delegate to an RVT based on the degree of risk. The idea to create a list the specific duties that could only be delegated to an RVT was rejected because generating a list of all restricted duties would be difficult and impractical and imply that any task omitted from the list may be interpreted as a task delegable to an RVT. Instead, the MDC determined that assessment of risk is necessarily based on the specific set of circumstances of the individual animal patient, and it was more prudent to focus on the supervising veterinarian's judgment and the competence of the individual to whom the task is delegated, as this proposal provides.

According to the MDC, proper delegation has been a factor in enforcement cases when delegation by the veterinarian to an RVT or VA who lacks “competence” or was not adequately supervised has led to patient harm. The MDC was unable to identify a method to track enforcement cases where inappropriate delegation to a less than competent RVT or VA has occurred. Instead, the data available to the MDC was categorized under the general heading of “negligence,” “incompetence,” or “aiding and abetting the unlicensed practice of veterinary medicine,” that would typically involve an RVT or VA performing an invasive procedure without adequate supervision. To enhance consumer protection and provide guidance to supervising veterinarians on considerations for delegating health care tasks to RVTs and VAs, at its February 20, 2018 meeting, the MDC discussed amending CCR section 2035 to prohibit a veterinarian from delegating any function or allowable health care task to an RVT or VA that requires extensive clinical skill and judgment and that is beyond the training and demonstrated competency of the RVT or VA.

During its May 23-24, 2018 Board meeting, the Board deliberated on and revised the MDC’s proposal to amend CCR section 2035 and approved the following proposed underlined [amendments](#):

2035. Duties of a Supervising Veterinarian.

(a) The supervising veterinarian shall be responsible for determining the competency of the R.V.T., permit holder or veterinary assistant to perform allowable animal health care tasks.

(b) The supervising veterinarian of an R.V.T., permit holder or veterinary assistant shall make all decisions relating to the diagnosis, treatment, management and future disposition of the animal patient.

(c) The supervising veterinarian shall have examined the animal patient prior to the delegation of any animal health care task to an R.V.T., permit holder or veterinary assistant. The examination of the animal patient shall be conducted at such time as good veterinary medical practice requires consistent with the particular delegated animal health care task.

(d) A supervising veterinarian shall not delegate any allowable animal health care task to an R.V.T., permit holder, or veterinary assistant who does not have the necessary:

- (1) Extensive clinical skill;
- (2) Requisite training; and
- (3) Demonstrated competency.

Business, Consumer Services, and Housing Agency (Agency) Concerns

On February 20, 2020, the rulemaking package was submitted to Agency for review. On May 4, 2020, Agency expressed concerns related to the Administrative Procedures Act’s “clarity” standard, which requires the Office of Administrative Law (OAL) to review each rulemaking proposal for “clarity,” which is defined to mean the rulemaking is written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them. (Gov. Code §§ 11349, subd. (c), 11349, subd. (a)(3).) “Clarity” is further defined by regulation as follows:

In examining a regulation for compliance with the “clarity” requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

(a) A regulation shall be presumed not to comply with the “clarity” standard if any of the

following conditions exists:

- (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
- (2) the language of the regulation conflicts with the agency's description of the effect of the regulation; or
- (3) the regulation uses terms which do not have meanings generally familiar to those "directly affected" by the regulation, and those terms are defined neither in the regulation nor in the governing statute; or
- (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or
- (5) the regulation presents information in a format that is not readily understandable by persons "directly affected;" or
- (6) the regulation does not use citation styles which clearly identify published material cited in the regulation.

(b) Persons shall be presumed to be "directly affected" if they:

- (1) are legally required to comply with the regulation; or
- (2) are legally required to enforce the regulation; or
- (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
- (4) incur from the enforcement of the regulation a detriment that is not common to the public in general. (CCR, tit. 1, § 16.)

Specifically, Agency questioned the provision in proposed CCR section 2035, subsection (d), as to who would determine what is "necessary" and how the determination will be made. In addition, Agency was concerned all three terms, extensive clinical skill, requisite training, and demonstrated competency, are too vague. Agency stated the rulemaking is unclear what "extensive" means and how it would be known when an RVT or VA has the necessary extensive clinical skill. Further, it is unclear who would determine the requisite training and how an RVT or VA would demonstrate competence. To add clarity, Agency recommended the following:

- Remove the term "necessary;"
- Define "extensive clinical skill" and "requisite training;" and,
- Replace "demonstrated competency" with "and, in the professional opinion of the supervising veterinarian, is competent to perform the delegated animal health care task."

In an attempt to address Agency's concerns, Board staff worked with the Legal Affairs Division to further explain in the [Initial Statement of Reasons](#) (ISR) the Board's rationale for the existing proposed language. The ISR, in part, states the following:

[To address Agency's concern with "necessary"]

The MDC and Board employ the more fluid term "necessary" in this regulation instead of the static term "required" to convey that what is needed is determined by the situation, not solely by prerequisites listed in regulation. The term "necessary" also indicates the three criteria are absolutely required, but do not predetermine the outcome. The supervising veterinarian must be satisfied that the individual has sufficient skill within each criteria domain for the task under the circumstances in which the task is contemplated before delegating an animal health care task.

[To address Agency's concern with "requisite training"]

Here, training means how much education the individual has received regarding the

health care task to be performed. Such training could be offered in courses taken through educational institutions or in courses or training manuals offered at the veterinary premises. The level of training required to safely perform the health care task would be determined by the supervising veterinarian as a part of the decision to delegate the task.

[To address Agency's concern with "demonstrated competency"]

In this context, competency means how well the individual can perform the task. Working effectively with animals requires not only clinical skills and training, but also a certain demeanor and approach well-tolerated by animals. Individuals who move too quickly, are easily excitable, or become flustered when encountering setbacks lack the competency needed to perform some animal health care tasks. A supervising veterinarian who has observed how an individual works with similar animals, or has worked on similar tasks with other animals, has valuable information about an individual's overall competency to work with animals that differs from, but is as important as, the more easily quantified clinical skills and training. The level of competency required to safely perform the task would be determined by the supervising veterinarian as a part of the decision to delegate the task.

Despite the revisions to the ISR, Agency still believes their concerns have not been adequately addressed. To prevent further delay, Agency approved the rulemaking for posting on May 27, 2020, with the condition that the Board modify the language and complete an additional 15-day public comment period. The package was submitted to OAL on June 9, 2020 and published on [June 19, 2020](#). The 45-day comment period closed on August 3, 2020.

During the August 13, 2020 meeting, concerns were raised regarding the necessity of the rulemaking package. A California RVT Association (CaRVTA) representative opined the addition of subsection (d) is unnecessary and already covered under subsection (a).

The Board directed the MDC to discuss this matter further and make recommendations to the Board on how to proceed.

Upon further review, Board staff, legal counsel, and the Board's Deputy Attorney General liaison do not believe the rulemaking is necessary for consumer protection. If a licensee delegates animal health care tasks to an RVT, permit holder, or VA that was not properly trained or competent, the Board already has authority to take enforcement action against that licensee pursuant to CCR section 2035, subsection (a).

Requested Action:

After reviewing the materials and discussing the necessity of the rulemaking, please recommend next steps to the Board. If the MDC believes the rulemaking package is unnecessary, please recommend the Board withdraw the rulemaking. If the MDC believes it is necessary for consumer protection, please consider ways to address Agency's concerns and make recommendations to the full Board.