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May 5, 2003

Assembly Committee on Commerce and Labor
Attn: Chairman David Goldwater; Vice Chair Barbara Buckley
Nevada Legislative Building
401 South Carson Street, Suite 4115
Carson City, Nevada 89701

Re: Senate Bill 427

Dear Members of the Committee:

I have been informed that SB 427 which seeks to amend NRS Chapter 638 governing the practice of veterinary medicine has been referred to the Assembly Committee on Commerce and Labor. I am writing to you to urge you not to pass this bill.

By way of brief history, SB 427 was introduced at the urging of the Nevada State Board of Veterinary Medical Examiners in response to two litigated cases: **Sheryl D. Babyak, DVM v. Nevada State Board of Veterinary Medical Examiners**, Eighth Judicial District Court Case Number A411091 and **Bradley Gilman, DVM v. Nevada State Board of Veterinary Medical Examiners**, Nevada Supreme Court Case Number 37974. Enclosed is a copy for the Committee's review of the decision in **Babyak** wherein the District Court found that the Board of Veterinary Medical Examiners had violated Dr. Babyak's due process rights on multiple grounds. The **Gilman** case, which raises the same legal issues, was argued to the Nevada Supreme Court on January 13, 2003 and an opinion is expected to issue shortly.

In its original form, SB 427 sought to authorize the Board of Veterinary Medical Examiners to award itself its own attorney's fees and costs in imposing discipline against veterinarians, and to further allow a Court to award the Board its attorney's fees and costs in the event of an unsuccessful Petition for Judicial Review. The bill introduced at the urging of the Board of Veterinary Medical Examiners further sought to repeal the provisions of NRS 638.145 which require that the Board establish a violation of the veterinary practice act by "satisfactory proof" and to repeal NRS 638.1515 which required proof of proximate causation. Because the Board acknowledged that these changes to legislation were in response to the **Babyak** and **Gilman** cases, I wrote to the Senate Committee on Commerce and Labor with regard to both SB 427 and a broader bill SB 364. (Copies of my March 28, 2003 letter Re: SB 427 and my March 31, 2003 letter Re: SB 364 are enclosed herewith). I also appeared before the Senate Committee

ASSEMBLY COMMERCE & LABOR
DATE: 5/9/03 ROOM: 4100 EXHIBIT E
SUBMITTED BY: ADAM LEVINE

on Commerce and Labor on March 31, 2003 to give testimony regarding the practical implications of the proposed changes. In response, the Senate Committee apparently amended the bill to delete the provisions regarding attorney's fees and costs and to leave intact the proximate cause requirements of NRS 638.1515. With regard to NRS 638.145 which required "satisfactory proof" the amended version of the Senate Bill left the statute in tact, but changed the language "satisfactory proof" to "preponderance of the evidence". This is the version of the bill which has now been referred to this Committee.

I would urge this Committee to kill SB 427 in its amended form because it is still constitutionally deficient on due process grounds.

The Administrative Procedures Act at NRS Chapter 233B provides for a "substantial evidence" standard which is the lowest form of proof recognized by law. However, the Administrative Procedures Act applies to various types of administrative procedures which do not involve professional licensing. In contract, the United States Supreme Court recognized long ago that professional disciplinary cases are "quasi criminal" in nature. **In Re: Ruffalo**, 390 U.S. 591, 88 S.Ct. 1222 (1968). Because a professional license is a property interest protected under the due process clause of the constitution, other state courts have held the higher evidentiary standard of "clear and convincing evidence" must be utilized. See **Johnson v. Board of Governors of Registered Dentists**, 913 P.2d 1339 (Okl. 1996) and **Bottles, M.D. v. Oklahoma State Board of Medical Licensure and Supervision**, 917 P.2d 471 (Okl. 1996).

Permitting a professional licensing board to take action, including revocation, against a professional license based upon a preponderance of the evidence standard likely violates due process. While the Nevada Supreme Court has not yet specifically addressed this issue, it should be noted that our Supreme Court has adopted the clear and convincing evidence standard for professional discipline imposed upon attorneys and judges. See Supreme Court Rule 105(2)(e) and Rule 27 of the Administrative and Procedural Rules for the Nevada Commission on Judicial Discipline. An attorney's constitutional property interest in his law license is no different than the interest of any other professional in their state regulated license. Accordingly, there is no reason that the requirements of due process should be applied any differently to the interest in a veterinary license.

The importance of the due process requirement of utilizing the "clear and convincing evidence" standard in professional disciplinary matters is best illustrated by a comparison of such disciplinary actions to civil court proceedings. The "preponderance of evidence" standard proposed in SB 427 is the same evidentiary standard utilized in a civil lawsuit. However, the

interest at risk in a civil lawsuit is only money. A professional cannot lose their license as a result of an adverse jury verdict.

Moreover, a preponderance of the evidence standard is constitutionally permissible in a civil action because the proceedings are supervised by a professional judge and subject to the formal rules of evidence. Our state's evidentiary code is taken almost verbatim from the Federal Rules of Evidence. The Federal Rules of Evidence, in turn, were designed to ensure the reliability of evidence presented. It is this emphasis on *reliability* within the formal rules of evidence that require, for example, authenticity of documentary evidence to be established by adequate foundation as well as the prohibition upon hearsay testimony.

In contrast, the stakes are much greater in an administrative disciplinary action. Not only is a veterinarian subject to a monetary fine under NRS Chapter 638, he may lose his constitutionally protected property interest in his professional license as well as suffer damage to his constitutionally recognized liberty interest in his professional reputation. Stated another way, the risk of losing one's professional license is significantly greater than the risks associated with an adverse monetary judgment in a civil action because the professional will not only lose the many years and countless dollars invested in the building of their profession, they will further lose the future income which would otherwise be derived from the practice of their professional occupation. However, this greater risk is imposed in an administrative hearing which is not presided over by a professional judge, but by a panel of other veterinarians who have no special training in the law.

Moreover, under the Administrative Procedures Act, the formal rules of evidence do not apply, and professional licensing boards in disciplinary actions are permitted to rely upon inherently *unreliable* evidence such as hearsay. Because the procedures afforded under the Administrative Procedures Act are less than those afforded in a civil court proceeding, and because the decisions of such boards may be based upon evidence which would not meet the reliability requirements imposed under the formal rules of evidence, due process requires that any violations established in such a looser administrative environment be proven by a *higher* evidentiary standard of clear and convincing evidence.

The current version of NRS 638.145 is admittedly less than ideal insofar as it uses the term "satisfactory proof" rather than "clear and convincing evidence". However, in the case of **In Re: Drakulich**, 111 Nev. 1556, 908 P.2d 709 (1995), the Nevada Supreme Court seemed to equate the phrase "satisfactory proof" with the "clear and convincing evidence" standard.

Accordingly, the current version of NRS 638.145 is not unconstitutional on its face because the term "satisfactory proof" is not inconsistent with the "clear and convincing evidence" standard.

However, if SB 427 were enacted so as to change the text of the statute to permit conviction based upon a "preponderance of the evidence" standard, NRS 638.145 would likely become unconstitutional on its face. For this reason, I would urge the Committee to take no action on SB 427 so that the provisions of NRS 638.145 may be amended in the next legislative session to properly include the words "clear and convincing evidence".

I understand that the Committee is holding a hearing on SB 427 on May 9, 2003. I look forward to appearing and testifying my professional schedule permitting.

Very truly yours,

LAW OFFICE OF DANIEL MARKS

ADAM LEVINE

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March 31, 2003

VIA FEDERAL EXPRESS

Senate Committee on Commerce and Labor
Attn: Senator Townsend, Chairman
401 South Carson Street
Carson City, Nevada 89701

Re: Senate Bill 364

Dear Committee Members:

At the hearing on Senate Bill 427 (Veterinary Practice Act modifications) on Monday, March 31, 2003 the Committee Members brought to my attention the existence of Senate Bill 364 which proposes to make various changes to provisions relating to investigations and proceedings for disciplinary action by all professional regulatory bodies. Senate Bill 364 contains the same language used in Senate Bill 427 to authorize regulatory agencies to award themselves their own attorney's fees and costs from any disciplinary hearings.

The same due process concerns which I raised in connection with Senate Bill 427 would likewise apply to the same statutory language in Senate Bill 364.

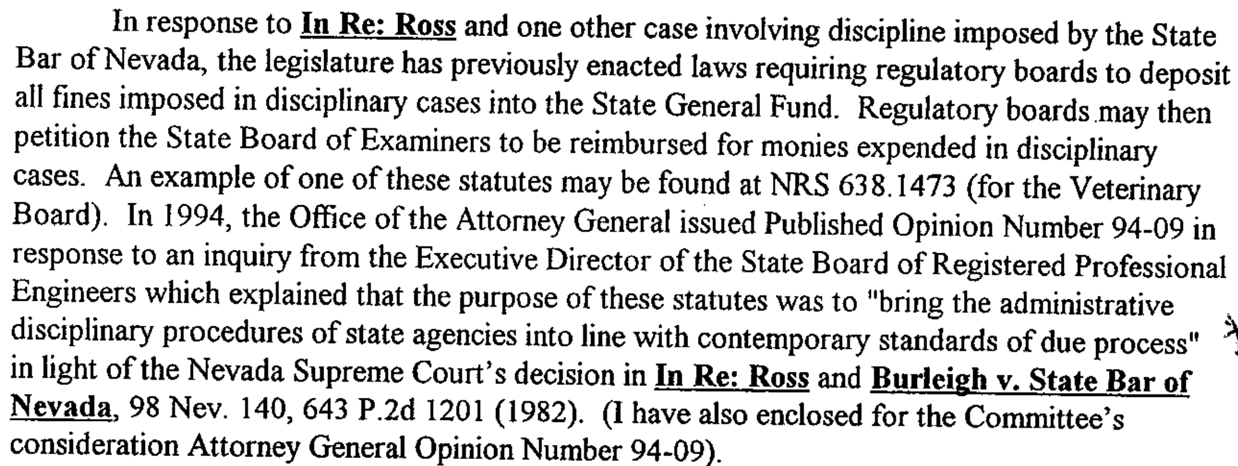
There are two primary ways a statute may be challenged on constitutional grounds. A statute may be constitutional as written, but applied by a regulatory board in an unconstitutional manner. Alternatively, a statute may be unconstitutional on its face -- which means that it is unconstitutional regardless of how it is applied under the facts of a particular case. The constitutional deficiencies of the proposed language regarding attorney's fees and costs in Senate Bill 364 helps to illustrate the distinction. Language used in currently existing statutes usually state that a board may "require the licensee to pay all costs incurred by the board in taking disciplinary action against the licensee." (See for example NRS 638.1471(10)). This is an example of a statute which would not be unconstitutional on its face because there is no reference to the costs of the due process hearing itself which is mandated under the Fourteenth Amendment to the United States Constitution and Nevada's counterpart at Article 1 § 8. There will usually be some costs relating to an investigation before a due process hearing which could constitutionally be assessed against a licensee who is disciplined.

I contrast, the proposed language in Section 2 of Senate Bill 364 expressly states that a regulatory board may recover "attorney's fees and costs incurred by the regulatory body related to the disciplinary proceedings, including, without limitation, ... and the costs of the hearing at which the person was **found to have committed the violation**". This is an example of statutory language which a Court would likely find unconstitutional on its face.

I have enclosed a copy of the California Supreme Court's recent decision in **California Teacher's Association v. State**, 975 P.2d 622 (1999) which was referenced in my earlier letter addressing Senate Bill 427. This opinion details the fundamental importance of the Due Process Clause requirement of a fair and impartial hearing, and further finds that any statute which authorizes an administrative agency to recover the costs of the very hearing required under the Due Process Clause is facially invalid because it acts to deter persons from exercising their constitutional right for fear of being assessed ruinous financial penalties. As I indicated in my comments to the Committee in connection with Senate Bill 427, this issue was raised to the Nevada Supreme Court in **Gilman v. Nevada State Board of Veterinary Medical Examiners**, which was argued on January 13, 2003.

Another thing the Committee may wish to consider is the fact that there is no statutory definition of "costs" which may be imposed by regulatory bodies. The closest statute would be NRS 18.005 which identifies recoverable costs in civil litigation. In the **Babyak** and **Gilman** cases before the Veterinary Board which were the subject of comments in connection with Senate Bill 427, I provided the Committee with copies of "costs" charged by the Veterinary Board which include hotel rooms, air travel and most egregiously, restaurant bills from some of Las Vegas' finer dining establishments. I would request that these same bills be made part of the record by the Committee in its consideration of Senate Bill 364. Because at least one regulatory body would have this Committee and the public believe that its members do not eat unless they are actively engaged in disciplinary proceedings.

The proposed language regarding fees and costs in Senate Bill 364 creates another potential due process violation which is separate and distinct from the issue of the cost of the due process hearing itself. Twenty years ago, in the case of **In Re: Ross**, 99 Nev. 1, 656 P.2d 832 (1983) the Nevada Supreme Court held that it was unconstitutional for an administrative board with executive responsibility over its own finances to impose financial penalties such as costs because this creates a temptation for the regulatory body to convict in order to recoup their own expenses. I have enclosed a copy of the opinion for the Committee's review.



In response to **In Re: Ross** and one other case involving discipline imposed by the State Bar of Nevada, the legislature has previously enacted laws requiring regulatory boards to deposit all fines imposed in disciplinary cases into the State General Fund. Regulatory boards may then petition the State Board of Examiners to be reimbursed for monies expended in disciplinary cases. An example of one of these statutes may be found at NRS 638.1473 (for the Veterinary Board). In 1994, the Office of the Attorney General issued Published Opinion Number 94-09 in response to an inquiry from the Executive Director of the State Board of Registered Professional Engineers which explained that the purpose of these statutes was to "bring the administrative disciplinary procedures of state agencies into line with contemporary standards of due process" in light of the Nevada Supreme Court's decision in **In Re: Ross** and **Burleigh v. State Bar of Nevada**, 98 Nev. 140, 643 P.2d 1201 (1982). (I have also enclosed for the Committee's consideration Attorney General Opinion Number 94-09).

In the case of **Gilman v. Nevada State Board of Veterinary Medical Examiners**, (which was discussed with the Committee on March 31, 2003 in connection with Senate Bill 427) the Board of Veterinary Medical Examiners attempted an "end run" around NRS 638.1473 by claiming the statute only required that "fines" be deposited with the State General Fund, whereas they were seeking to impose "costs" totaling $18,093.00 against the veterinarian. This issue is among the issues pending before the Nevada Supreme Court in **Gilman**. Judging from the fact that the justices directed counsel to argue this particular issue, it is likely that any forthcoming opinion authored by the Court will focus on this particular due process violation.

One final issue that the Committee may wish to consider at its hearings on Senate Bill 364 is the absence of any language identifying the quantum of proof that a regulatory body must establish before imposing professional discipline. The United States Supreme Court recognized long ago that disciplinary proceedings are "quasi criminal" in nature. **In Re: Ruffalo**, 390 U.S. 591, 88 S.Ct. 1222 (1968). The Administrative Procedures Act at NRS Chapter 233B provides for a "substantial evidence" standard which is the lowest form of proof recognized by law. However, the Administrative Procedures Act applies to various types of administrative procedures which do not involve professional licensing. Because a professional license is a property interest protected under the due process clause of the constitution, other state courts have held the higher evidentiary standard of "clear and convincing evidence" must be utilized. See **Johnson v. Board of Governors of Registered Dentists**, 913 P.2d 1339 (Okl. 1996) and **Bottles, M.D. v. Oklahoma State Board of Medical Licensure and Supervision**, 917 P.2d 471 (Okl. 1996). The Nevada Supreme Court has adopted the clear and convincing evidence

standard for professional discipline imposed upon attorneys by the State Bar of Nevada. If the Committee is going to consider making any changes to provisions relating to the imposition of professional discipline by regulatory boards, the Committee may want to consider adopting the clear and convincing evidence standard for all such regulatory bodies.

I look forward to discussing the issues in further detail before the Committee on Wednesday.

Very truly yours,

LAW OFFICE OF DANIEL MARKS

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March 28, 2003

VIA FACSIMILE 775-684-6500
Original Will Not Follow

Senate Committee on Commerce and Labor
Attn: Senator Townsend, Chairman
401 South Carson Street
Carson City, Nevada 89701

Re: Senate Bill 427 under consideration at 7:00 a.m. on March 31, 2003

Dear Committee Members:

On Friday, March 28, 2003 I became aware of S.B. 427. Please be advised that the changes in this legislation have been proposed by the Board of Veterinary Medical Examiners in whole or in part as a result of two Court cases which I was involved in: **Sheryl D. Babyak, DVM v. Nevada State Board of Veterinary Medical Examiners**, Eighth Judicial District Court Case Number A411091 and **Bradley Gilman, DVM v. Nevada State Board of Veterinary Medical Examiners**, Nevada Supreme Court Case Number 37974. I have enclosed a copy of the District Court's Final Decision in the **Babyak** case. The Nevada Supreme Court heard oral argument in the **Gilman** case on January 13, 2003 and a decision is pending.

Many of the proposed changes contained within S.B. 427 are either bad public policy, or are unconstitutional on their face. Some of the provisions contained within the bill are current the subject of the pending decision from the Nevada Supreme Court in the **Gilman** matter.

Section 1 of S.B. 427 would authorize the Board of Veterinary Medical Examiners to recover all of their costs and attorney's fees relating to any professional discipline imposed -- including the hearing which the due process clause of the constitution requires the Board to give to a veterinarian. This is unconstitutional on its face. I would direct the Committee's attention to the recent California Supreme Court decision in **California Teachers Association v. State**, 975 P.2d 622 (1999) and the decision of the United States Court of Appeals for the Tenth Circuit in **Rankin v. Independent School District No. I-3**, 876 F.2d 838 (10th Cir. 1989). Both cases emphatically hold that due process is violated where a state requires a person to pay the costs of

any hearing in which they seek to defend their constitutionally protected liberty or property interests. It has long been established that an interest in a professional license is a protected property interest within the meaning of the due process clause. The Nevada Supreme Court is currently considering this issue in **Gilman**.

For the same reasons, the bill's proposal to allow the Board to collect its attorney's fees in the event of an unsuccessful Petition for Judicial Review is constitutionally suspect. The proposed statutory language would chill the right of access to the courts. It is notable that nowhere in the Administrative Procedures Act, NRS Chapter 233B, has the legislature imposed such an attorney's fees provision. Perhaps the Veterinary Board can explain why it should be permitted to recovery attorney's fees, but the other administrative agencies should not?

Section 6 of S.B. 427 seeks to keep confidential the records and information relating to an investigation by the Board unless disciplinary action is imposed or the person who is the subject of the investigation requests the record to be made public. The committee should be aware that the Board of Veterinary Medical Examiners has a long standing practice of refusing to provide the veterinarian under investigation the statutory Statement of Findings required under NRS 638.1429. The board should not be permitted to consider a secret Statement of Findings, and fail to release this information to the veterinarian under investigation unless the veterinarian consents to public disclosure.

Section 15 of S.B. 427 seeks to amend NRS 638.1515 to remove the requirements of proximate causation. In other words, the Board wishes to have the power to impose professional discipline for a veterinarian's treatment of an animal even where there is no proof that the veterinarian's conduct or treatment caused any actual harm. This is just bad public policy and runs contrary to centuries of Anglo-American jurisprudence.

S.B. 427 further proposes to repeal NRS 638.145 which requires the Board have "satisfactory proof" of a violation before taking disciplinary action. Presumably, the Board wishes to lower its burden of proof to the "substantial evidence" standard, which is the lowest evidentiary standard recognized by law. Such a change will be constitutionally deficient. Other State Supreme Courts have recognized that the higher "clear and convincing evidence" standard must be applied before disciplinary action is taken against a professional license. The clear and convincing evidence standard is the standard utilized by the Nevada Supreme Court for discipline against attorneys. If any changes are made to this statute, it should be to substitute the words "clear and convincing evidence" for the words "satisfactory proof".

An understanding of the **Gilman** and **Babyak** cases will reveal the reasons why the Veterinary Board is pushing the proposed statutory changes. In **Babyak**, the Board attempted to pressure the veterinarian into settling and paying the Board $5,000.00 for its attorney's fees despite the absence of any statutory authorization for the Board to collect such fees. In a letter the Board threatened to charge the veterinarian $15,000.00 if she insisted upon exercising her constitutional right to a hearing. The veterinarian persevered and at the hearing clearly established that she was not guilty of the actions charged, and that there was no evidence that her conduct was the proximate cause of the animal's death. The Board decided to convict her anyway and imposed its costs and attorney's fees in excess of $10,000.00. The District Court found among other things that her due process rights had been violated, and that there was no evidence of proximate causation.

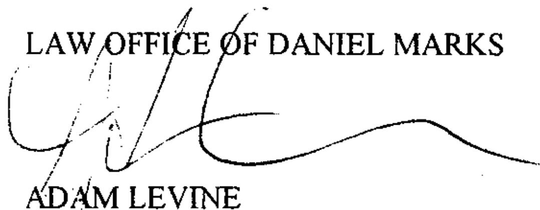
In **Gilman**, the Board again convicted a veterinarian without any evidence that the veterinarian's conduct was the cause of the animal's death. The Board again sought to impose its costs and attorney's fees on the veterinarian. I have enclosed the "cost" breakdown and charge receipts from the **Gilman** case which reveals that among the costs the Board sought to recover were its hotel rooms, travel and meals at some of Las Vegas' finer dining establishments such as Zea Tejas Bar and Grill, Rapscallions Sea Food and Paradise Bistro. As set forth above, the Nevada Supreme Court is currently considering the constitutionality of these same issues.

The cumulative effect of the **Babyak** and **Gilman** cases was that the Board ran more than $40,000.00 over budget for that year. Under the proposed changes in S.B. 427 the Board will be able to charge a veterinarian, and if the veterinarian disagrees with the charges or wishes to assert his innocence (like Dr. Babyak or Dr. Gilman) the Board can: (1) convict the doctor without any "satisfactory proof" of actual injury (proximate causation) to an animal, and (2) charge the veterinarian tens of thousands of dollars (including the Board's meals and lodging). Apart from the constitutional issues identified above, requiring a regulatory board to bear its own attorney's fees and costs in connection with a disciplinary hearing is simply good public policy. A regulatory board has no incentive to negotiate a settlement or a consent decree in good faith if they are secure in the knowledge that if a veterinarian refuses to settle the Board can simply convict under the lowest evidentiary standard without evidence of harm, and recoup all of their expenses incurred in pursuit of the conviction. In contrast, requiring a Board to bear its own such fees and costs as a check and balance against the abuse of state power because it requires a Board to insure that the costs of the disciplinary action it desires to take is commensurate with the severity of the underlying infraction alleged.

I would appreciate the opportunity to provide testimony to the committee in connection with S.B. 427 and will be appearing at the Grant Sawyer Building in Las Vegas at 7:00 a.m. on Monday morning where I understand they have teleconferencing equipment.

Very truly yours,

LAW OFFICE OF DANIEL MARKS



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Encl.