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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

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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".

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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.

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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

A handwritten signature in black ink, appearing to read 'A. Levine', written over the typed name 'ADAM LEVINE'.

ADAM LEVINE

AL/tjm

Encl.