

# Cannabis and Industrial Hemp: Still a Sticky Wicket

By Dan Baxter, Esq.

If you have been closely following the legal landscape attending to the use and discussion of cannabis in a veterinary application, you are familiar with the fact that 2019 provided little clarity on what veterinarians can and cannot do. As practitioners muddled through 2019 with almost no direction as to what was permissible, the hope was that the Veterinary Medical Board's (VMB) end-of-year guidelines would clarify matters, and take us into 2020 with a clear, or at least clearer, road map regarding veterinary rights and obligations. While the VMB produced those guidelines in advance of their required publication date and provided content that draws important distinctions between cannabis and industrial hemp (discussed below), it also left many questions unanswered.

## What Happened in 2019?

On January 1, 2019, Assembly Bill 2215 went into effect. That bill, among other things, placed Business and Professions Code section 4884 onto the books. Section 4884 provides as follows:

- (a) A licensee shall not dispense or administer cannabis or cannabis products to an animal patient.
- (b) Notwithstanding any other law and absent negligence or incompetence, a veterinarian licensed under this chapter shall not be disciplined by the board or have his or her license denied, revoked, or suspended solely for discussing the use of cannabis on an animal for medicinal purposes.
- (c) On or before January 1, 2020, the board shall adopt guidelines for veterinarians to follow when discussing cannabis within the veterinarian-client-patient relationship. These guidelines shall be posted on the board's Internet Web site.

Pending the VMB's adoption of the "guidelines" directed in subdivision (c), veterinarians were generally writing on a blank slate for purposes of determining the permissible parameters of the "discussion" authorized in subdivision (b). For instance, if the statutory authorization to "discuss[] the use of cannabis on an animal for medical purposes" did not include the ability to make recommendations regarding its use (for or against), the discussion authorization was effectively meaningless. All practitioners really knew was that said authorization did not permit a veterinarian to "dispense or administer cannabis or cannabis products," as that conduct is affirmatively prohibited by subdivision (a).

Also newsworthy in 2019 was the introduction of Senate Bill 627 (Galgiani). That bill would repeal the provision prohibiting veterinarians from dispensing or administering cannabis or cannabis products to an animal patient, and would authorize veterinarians to discuss the use of and issue a recommendation for the use of, cannabis for conditions in which it would provide relief. The bill would also allow a primary animal caregiver, on a veterinarian's recommendation, to purchase cannabis products for use on an animal that the caregiver owns. Although the bill was unsuccessful in 2019, it is operating on a two-year time horizon, and will thus be again up for consideration in 2020.

In December, the VMB issued the aforementioned guidelines required under Business and Professions Code section 4884(c): [vmb.ca.gov/forms\\_pubs/cannabis\\_discussion.pdf](http://vmb.ca.gov/forms_pubs/cannabis_discussion.pdf). Those guidelines are closely modeled on those previously issued by the California Medical Board and contain content drawn from existing statutes and regulations, including content relating to the formation of the veterinarian-client-patient relationship (VCPR), recordkeeping requirements, conflicts of interest, and advertising. The recordkeeping-related guidelines stress the importance of providing "advice about potential medical risks of the medical use of cannabis," and urge clinicians to "remind[] the client that cannabis is not being recommended or prescribed by the veterinarian." Hence, under the VMB's guidelines, the bottom line as to cannabis is that as a veterinarian, you can talk about it, but you cannot recommend it, and whatever you talk about, you had better document.

## Industrial Hemp and CBD Oil

The above synthesizes the current state of play relative to the ability of veterinarians to discuss cannabis with clients. However, what is meant by "cannabis" in this context? California's definition of cannabis is set forth in Health & Safety Code section 11018, and does not include industrial hemp. Industrial hemp, in turn, is defined in Section 11018.5, and means "a crop that is limited to types of the plant *Cannabis sativa* L. having no more than 0.3 percent tetrahydrocannabinol (THC) contained in the dried flowering tops, whether growing or not; the seeds of the plant; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin produced therefrom." These provisions, as well as similar federal laws, make clear

that industrial hemp, unlike cannabis, is not a controlled substance, and is thus regulated by the state and federal agricultural departments, as well as the FDA, rather than the DEA.

Why does this matter? The answer is simple: Popular products such as cannabidiol (CBD) oil are generally derived from industrial hemp, as defined above, rather than cannabis. As to industrial hemp, the VMB's guidelines, after listing the relevant regulating entities, read as follows:

[I]f a veterinarian administers, dispenses, furnishes, recommends, or discusses the use of industrial hemp in an animal patient, the veterinarian would not be subject to the statutory provisions regarding cannabis but would be subject to the provisions of the Veterinary Medicine Practice Act applicable to diagnosing, prescribing, or administering a drug, medicine, appliance, application, or treatment of whatever nature for the prevention, cure, or relief of a wound, fracture, bodily injury, or disease of animals. (Bus. & Prof. Code § 4826 (b),(c).) In addition, a veterinarian who manufactures, markets, or sells drugs not approved by the FDA is in violation of federal law. Industrial hemp is not tested or regulated in the same manner as cannabis, so the veterinarian should use caution when administering, dispensing, furnishing, recommending, or discussing industrial hemp and ensure the product to be used is industrial hemp and not cannabis and should only do so after the industrial hemp product has been approved by the FDA for use in animals.

The VMB's closing comment reflects the fact that FDA approval is necessary before industrial hemp may be used in a clinical application. In that regard, under the Federal Food, Drug, and Cosmetic Act (FFDCA), any product used to diagnose, cure, mitigate, treat, or prevent disease in animals is a drug that requires FDA approval.

As of this writing, industrial hemp has not yet received such FDA approval; indeed, the FDA has indicated that the sale

of any CBD or hemp product in food as a (human) dietary supplement is not legal. Accordingly, it is unclear what the FDA's final policy in this area will be and how that policy will look relative to a veterinary application. In the meantime, as noted in the CVMA's recently-issued "Cannabis and Industrial Hemp FAQs" (September 12, 2019, available at [cvma.net/wp-content/uploads/2019/09/Cannabis-and-Industrial-Hemp-FAQ\\_9-13-19.pdf](http://cvma.net/wp-content/uploads/2019/09/Cannabis-and-Industrial-Hemp-FAQ_9-13-19.pdf)), "veterinarians should exercise caution to understand the legal status of any hemp or CBD products utilized for therapeutic purposes."

### So what can you do?

To date, the VMB has not seemed eager to launch aggressive enforcement measures to prohibit veterinary use of cannabis and industrial hemp products. However, the VMB's guidelines do place veterinarians on notice that the VMB is by no means blessing the use of those products. While it is perhaps unlikely that the VMB would independently come after a practitioner for, as an example, displaying or recommending the use of CBD oil, it is not beyond possibility for a veterinarian to be cited for such conduct in the context of another VMB-related procedure, such as a complaint-driven investigation or even a site inspection. At this point, the VMB's intentions regarding whether and how to enforce prohibitions on cannabis and industrial hemp are simply not clear. Short of the VMB's issuance of a more detailed position statement, only time and experience will tell.

While we wait to see what happens with SB 627 in 2020, the current bottom line is that if a veterinarian is going to prescribe, furnish, or recommend any substance for use on an animal, including CBD oil, it should be FDA-approved for such use. Unless and until that occurs, veterinarians who engage in such conduct leave themselves open to VMB citation, including for unprofessional conduct under Business and Professions Code section 4883(g). Veterinarians should also be wary of industry representatives claiming that CBD oil and like products may permissibly be used, sold, displayed, et cetera, in a clinical setting. ■



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Mr. Baxter joined Wilke Fleury LLP in 1999 and has been a partner since 2007. His practice focuses on business litigation and trial work, as well as civil writs and appeals. He also provides general counsel to clients ranging from non-profit organizations and small business to publicly-traded corporations. Mr. Baxter has represented the CVMA in various matters over the years, and has assisted in the CVMA's efforts to prevent municipal interference with the practice of veterinary medicine. He is part of the CVMA's Legal Services Program, a program designed to assist CVMA members with workplace safety, legal issues, and laws and regulations that affect the veterinary profession.