

How to Avoid Problems During and After Pre-Purchase Examinations

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Whether the veterinarian is a prospective owner, trainer, agent, or veterinarian, the pre-purchase examination process is where a lot of things can go wrong which can cause a multitude of problems, and accusations, later. This exposure is true whether the examination is for a purchase, a lease with a purchase option, or only for lease. This paper provides an outline of common ethics concerns and proposes best practices for the practitioner. Authors' addresses: Equine Law Group, LLC, 12008 South Shore Boulevard, Suite 105, Wellington, FL 33414 (Chapman); Yellowstone Equine Hospital, 356 West Yellowstone Avenue, Cody, WY 82414 (Vlahos); e-mail: ascsq1@cs.com. *Corresponding author. © 2020 AAEP.

1. Ethics Concerns

With respect to pre-purchase and pre-lease examinations, ethical concerns for the veterinary practitioner fall into several categories of concerns. Not all of these concerns involve lapses, acts, or omissions by the veterinarian, but all of them implicate the veterinarian's role as an agent having a duty to the client of the veterinarian. The general categories of ethical concern, which are further discussed below, include the following:

- Failure to identify the client.
- Existence of a conflict of interest by relationship, ownership, fee structure, or agency.
- Full disclosure of known *and* potential conflicts.
- Full disclosure of pre-existing conditions and treatments.
- Reasonable investigation of pre-existing conditions and treatments.
- Proper recordkeeping of the examination process.

- Consistency between invoicing and examination report.

This article therefore discusses the ethical considerations when working with prospective purchasers and lessors during pre-purchase and pre-lease examinations, the exposure from the perspective of the examining veterinarians, and then suggests best practices from the various perspectives of whomever the veterinarian might represent in the purchase or lease transaction examination.

2. Identify for Whom the Veterinarian Is Working

Knowledge of the identity of the client, the principal for whom the veterinarian is examining the horse, is very important. Often, the intermediaries in the purchase or lease transaction have economic and noneconomic interests at stake in the completion of the transaction, which may cause the information in the examination to be conveyed to the prospective purchaser or lessee in a biased manner. If the veterinarian does not directly communicate findings

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and report to the person or entity for whom the veterinarian is the agent, then the veterinarian can have no confidence that the examination findings have been accurately conveyed. For the veterinarian, this is problematic, because if there is a dispute later between purchaser and seller relating to a pre-existing condition or treatment and whether the condition or treatment was properly disclosed, the veterinarian may find the accused seller misrepresenting the information conveyed to the veterinarian or his or her findings conveyed to the purchaser.

The practitioner, in a pre-purchase or pre-lease examination posture, is working as an agent on behalf of a principle: *someone or some entity*. Because of this special relationship, the veterinarian will have duties to that principal: to provide proper examination and to properly report. Those duties fall into not only the category of malpractice, which is not the subject of discussion here, and into the nature of fiduciary duties, and ethical failings discussed herein.

3. Fiduciary Duties of the Veterinarian

The existence of a special relationship, created by the relative positions of the parties, such as in a veterinarian-client relationship, wherein the veterinarian knows that the client is relying upon the experience and specialized skills and position of the veterinarian to properly conduct, and convey the findings of, a pre-purchase or pre-lease examination. This duty arises from the position in which the parties place each other, whether or not there is a contract for services.^a

The most basic fiduciary duty is the duty of loyalty, which, in the context of pre-purchase examinations, obligates the veterinarian to put the interests of the client first, ahead of the veterinarian's self-interest. That duty of loyalty requires the veterinarian to refrain from exploiting the relationship with the client for the veterinarian's personal benefit, meaning for benefit beyond being paid to conduct the pre-purchase examination.^b A fiduciary duty arises expressly by contract when the parties specifically agree to a relationship, such as the attorney-client or agent-principal relationship, that is considered to be a fiduciary relationship.^c By that definition, such duties exist equally in the veterinarian-client relationship.

The client justifiably relies upon the veterinarian, as the agent, to exercise a certain requisite level of skill and diligence in the pre-purchase or pre-lease examination. That duty does not end by clearing conflicts of interest and then examining the horse. Rather, duties extend to properly investigating the prior history of the horse, noting the limits of the investigation and disclosures obtained, and in ensuring the examination report actually arrives in the hands of the client.

Should the practitioner get past the "relationship test," then the next areas of concern for the exam-

ining practitioner relate to what the veterinarian is told and by whom.

Consider that specter of the presence of a pre-existing medical condition of the horse and an owner or owner's agent's failure to disclose that medical history has the potential to directly affect the prospective purchaser's ability to make an informed decision whether to lease and ultimately purchase the horse. It is customary in the equine industry to have a horse evaluated extensively by a licensed equine veterinarian prior to purchase (hereinafter referred to a pre-purchase examination [PPE]). It is also customary for a potential lessee to have a less extensive evaluation of a horse at the time a lease commences, only to have their veterinarian perform a more extensive radiographic, ultrasound, and endoscopic evaluation prior to any eventual purchase.

However, the scope and extent of PPE imaging and diagnostic testing is often premised upon the previous medical history of the horse as provided by the seller, lessor, or their agent. Consider that if the selling or leasing party is not forthcoming to the examining veterinarian, then the scope of the examination will be curtailed. This places the examining veterinarian, in a difficult position, opining as to the present health of the horse, while potentially not having been fully informed of the pre-existing conditions or prior treatments of the horse.

When this delta between present examination to past, relevant information is compared against the ethical consideration that the single most important goal of the examining veterinarian is to provide the buyer or lessee with information as to the health and soundness of the prospective horse, then the potential for misleading information being construed from the pre-purchase or pre-lease examination is great.

Prospective purchasers and lessors rely upon the veterinarians to provide adequate information so that those parties may make an informed decision to proceed or decline the purchase or lease. Consider, however, upon whom the veterinarian relies. At the time of the examination, the examining veterinarian relies extensively, if not exclusively, on the medical history and related information as provided by the seller or lessor at the time of the examination.

The failure to disclose the pre-existing conditions of a horse denies the client of the examining veterinarian the opportunity to make an informed decision to lease the horse, and may subsequently place the purchaser or lessor, as well as the horse, at risk of serious injury. Consider that the American Association of Equine Practitioners (AAEP) *Guidelines for Reporting Pre-purchase Examinations* contains two material statements:

- "...It is the buyer's responsibility to determine if the horse is suitable..."; and
- "...It remains the sole responsibility of the veterinarian to determine the extent and depth of each examination."^b

In some cases, given the extent of the chronic disease, condition, or off-label medication use present in a horse at the time of the examination, had the history been disclosed, a reasonable equine veterinarian would not find such a horse healthy for the intended purpose then or at any time in the future. Therein lies several ethical pitfalls for the veterinarian. The AAEP *Position on Sale Disclosure* provides guidance that:

- “AAEP supports the position that when a horse is sold, any known invasive surgery, disease, injury, or congenital defect which is not apparent, should be disclosed to the intended buyer by the owner and/or agent.”
- “The AAEP supports disclosure of ownership by single or multiple owners of a horse at the time of offering for sale.”^c

4. Conflicts of Interest and Self Dealing

Conflicts of interest arise when the practitioner has some relationship, interest, or inherent bias that is affected by the examination of the horse. An equity interest in the horse or business that owns the horse is a clear example. More nuanced is a present business relationship with the seller of the horse. A personal, intimate relationship with the seller or one of the selling entity’s principals presents another form of ethics conflict. Most commonly, a conflict arises when a business relationship of the practitioner with the seller exists. Any of these relationships should cause the practitioner to either clear the conflicts through written disclosure and acceptance by the client, or (and appropriate in most circumstances of conflict) decline engagement for the pre-purchase or pre-lease examination.

The veterinarian’s duties to identify and clear or avoid conflicts of interest are part of what was previously described herein as “fiduciary duties.” Such duties are not always considered by examining veterinarians, although the ethical guidelines of the AAEP promote their existence and observance.^f

5. Concerns from the Perspective of the Prospective Purchaser or Lessee

If the veterinarian is examining a horse as the veterinarian for a client intending to purchase or lease a horse, there are key considerations to keep in mind:

- What disclosures as to the health and soundness history has the client of the veterinarian and the veterinarian received from the seller or lessor or their agents?
- What disclosures as to the health and soundness history has the client of the veterinarian and the veterinarian received from the client’s own agents?
- What disclosures have been made from the seller or lessor or their agents to the client of the veterinarian or the veterinarian as to the

regular course of treatment, maintenance, medication, medicine, training, and shoeing for the horse?

- How have any of those disclosures been transmitted, such as in writing or orally?
- Is the examining veterinarian (or the practice), someone (or an entity) who has little or no financial or business relationship to the seller or lessor or their agents?
- Has the examining veterinarian disclosed to the client any relationship that does exist between the veterinarian and the seller, lessor, or their agents?
- Who recommended the veterinarian as the veterinarian for the examination?
- What is the understanding as to by whom the veterinarian is employed? The actual purchaser/lessor or their agent? Someone else?
- Has the veterinarian confirmed who is the client and how so?
- Has the veterinarian been informed by the seller/lessor and their agent, as well as the client’s agent of the intended purpose of the horse which the veterinarian is examining?
- Has the veterinarian been told whether the horse is being considered for competition at a particular level of a particular discipline, for investment, resale, or for use and retirement?
- Who is directing the veterinarian as to the scope and extent of the examination (i.e., number and location of radiographs)?
- Did the veterinarian provide a written examination directly to the client?
- Did the veterinarian do so before the client approved the purchase or lease and closed the transaction?
- If the veterinarian is then asked to execute an insurance health certificate for the new owner or lessee, what statements will the veterinarian be required to make to the insurance company? (To wit: the veterinarian’s certificate often makes statements in answer questions as to past history or conditions of the horse).
- Upon whose information did the veterinarian rely when executing that insurance certificate? (Note that knowingly providing false information to an insurance company could negate coverage or form the basis for a claim against the veterinarian by the client of the veterinarian or the insurance company).

Clients have certain legal rights to full disclosure. Florida, Kentucky, and California in particular have laws that specifically address horse sales, while other states follow their consumer protection laws.^g

Without proper disclosure to the veterinarian, of the prior conditions, health, and treatment of the horse, the veterinarian cannot render an opinion upon which the client can use to make an informed decision whether at all to

purchase, lease with an option, or lease. Further, the client cannot insist upon removal of disclaimers, or the inclusion of exceptions or pre-conditions in the transaction to account for any pre-existing conditions of the horse.

The veterinarian really is traveling in the dark without guidance if not informed of what has been going on with the horse and what the program is to keep the horse healthy and sound. Further, the veterinarian may not appreciate the complex business and financial relationships amongst all of the parties to the transaction that might affect the accuracy or level of detail that flows to the veterinarian as the veterinarian makes decisions. The veterinarian should also save texts, emails, scans, photos, and attachments related to the examination and discussions of the findings thereof. The veterinarian should preserve what the veterinarian was informed concerning the history of the horse and about the pre-purchase examination or pre-lease examination.

6. Concerns for Agents

Agents in equine transactions are those who represent a principal, usually for commission or other compensation. If the veterinarian is being compensated by anyone in an equine purchase or lease transaction, it is likely the veterinarian is an agent. If others are speaking to the veterinarian on behalf of the buyer or seller, then they are agents. Often, whether the veterinarian was an agent, and for which party or parties, becomes an issue. If the veterinarian is working for, or being compensated by, multiple parties to a transaction, then the veterinarian is considered a “dual agent.” Some states, for example Florida, require disclosure of a veterinarian’s agency, dual agency, commission, and require consent of the buyer and seller or lessor and lessee.^h

Because these general principals apply to agents, as an agent of the purchaser or lessee, the veterinarian may have his or her own perspective on the above set of bullet-point concerns, which the veterinarian should consider during the pre-purchase examination or pre-lease examination process. As an agent, the veterinarian should be mindful and take care to note where information is coming from, how it is relayed, and how the veterinarian discloses it to the agent’s principal. It is not infrequent that in a purchase or lease dispute, someone says, “I told the agent,” or “the agent did not tell me.”

If the veterinarian is the prospective buyer’s agent, the veterinarian should insist on copies of all of the seller’s or lessor’s veterinary records, or the contacts to obtain them. The veterinarian should then obtain those records and be sure they are given to the pre-purchase veterinarian. The veterinarian must obtain a written pre-purchase examination from the veterinarian and send that, along with the records, to the prospective buyer, the principal.

If the veterinarian is the seller or lessor’s agent, the veterinarian should be sure to disclose any knowledge about the horse and make it clear, and document the transmission of information and provide or offer access to the veterinary records. Remember the examining veterinarian, is relying upon these representations while examining the horse, so accuracy is important. Further, the veterinarian may find the representations are included in a later insurance certificate, so be accurate to avoid any misadventure in an insurance coverage dispute later.

The point is, as the veterinarian conducting the examination goes about the role in a purchase or lease transaction, whether speaking to the other side of the transaction, be it other agents or principals, or communicating with the pre-purchase veterinarian, or communicating with their own principal, the veterinarian should keep a documented record of what is being said, by whom and when. The veterinarian should also save texts, emails, scans, photos, and attachments. That documentation may be useful later.

7. Best Practices for Pre-Purchase and Pre-Lease Examining Veterinarians

With the above concerns in mind, there are some best practices the examining veterinarian might consider undertaking the following practices:

- Note in written records and written pre-purchase examination report who exactly was present at the pre-purchase examination.
- Note as well who defined the scope of the examination.
- Find out and note the intended purpose of the purchase or lease.
- Note what was disclosed about the past health and soundness history of the horse and from whom each of the disclosures was made.
- Obtain the contact information of the principal (the prospective buyer or lessee) for whom the veterinarian are actually working and send that principal a copy of the written pre-purchase examination report.
- Prepare a written pre-purchase examination report contemporaneously or immediately after with the examination.
- Avoid subjective opinion in any report. The report should consist of clinical observations, from which the buyer can draw conclusions.
- Avoid the same when interpreting radiographs.
- The veterinarian should, however, explain findings adequately in the report for a lay person to understand, and in further detail if asked.
- Do not accept an agent’s word that the agent will send the report to the principal. The examining veterinarian will want to do this and retain a copy of that transmittal.

- Note in written records any subsequent conversations the veterinarian has with the prospective buyer or lessee should the veterinarian have occasion to speak with them.
- Do not let the agent retain the veterinarian as the agent's veterinarian for the examination—the veterinarian is working for the prospective buyer or lessee and any reports and billing and report distribution should reflect that agency.

Experience has shown that a large part of equine transaction disputes concern allegations of non-disclosure of prior health or soundness issues. When the fingers start pointing, the veterinarian does not want to be accused of not informing someone of something. Conversely, to avoid accusation, the veterinarian should be able to dive into the records and demonstrate who told the veterinarian what, or did not disclose, during the pre-purchase examination or pre-lease examination process. The veterinarian should also be able to definitely articulate for whom the veterinarian was working at the time of the examination. An ounce of prevention to understand and record matters at the time of the examination is worth a pound of cure to try and recreate from memory and intention what happened at a pre-purchase examination or pre-lease examination in the past.

With those thoughts in mind, the next time a pre-purchase or pre-lease examination is on the horizon, take a moment to stop and go through standard practices and adjust them so that they become best practices.

Acknowledgments

Declaration of Ethics

The Authors have adhered to the Principles of Veterinary Medical Ethics of the AVMA.

Conflict of Interest

The Authors have no conflicts of interest.

Footnotes

^aSee *Watkins v. NCNB Nat. Bank of Florida, N.A.*, 622 So.2d 1063, 1065 (Fla. 3d DCA 1993) (quoting *Bankest Imports, nc. v. Isca Corp.*, 717 F.Supp. 1537, 1541 (S.D.Fla. 1989) (“To establish a fiduciary relationship, a party must allege some degree of dependency on one side and some degree of undertaking on the other side to advise, counsel, and protect the weaker party”). “A fiduciary relationship is based on trust and confidence between the parties where ‘confidence is reposed by one party and a trust accepted by the other.’” *Taylor Woodrow Homes Fla., Inc. V. 4/46-A Corp.*, 850 So.2d 536, 540 (Fla. 5th DCA 2003) (quoting *Quinn v. Phillips*, 93 Fla. 805, 113 So. 419, 421 (1927)). “A relationship may arise from an express contract or may be implied in law. See *Id.*”

^bAAEP Guidelines for Reporting Pre-Purchase Examinations (2009). <https://aaep.org/guidelines/aaep-ethical-and-professional-guidelines/aaep-position-statements/sale-issues>.

^cAAEP Position On Sale Disclosures (1998). <https://aaep.org/guidelines/aaep-ethical-and-professional-guidelines/aaep-position-statements/sale-issues>.

^dSee, e.g.: Restatement (Third) of Agency §8.01 (2006); see also *Capital Bank v. MVB, Inc.*, 644 So. 2d 515, 520 (Fla. 3d DCA 1994) (“A fiduciary owes to its beneficiary the duty to refrain from self-dealing, the duty of loyalty, the overall duty to not take unfair advantage and to act in the best interest of the other party, and the duty to disclose material facts”).

^eCapital Bank, *supra*, 644 So. 2d at 518.

^fSee, e.g., footnotes c and f herein.

^gSee, e.g.: *Fraud in Horse Sales: Florida's Rule 5H and Unfair and Deceptive Acts by Equine Sellers, Agents, and Others*, The Florida Bar Journal, Volume 92, No. 9, November 2018. <https://www.floridabar.org/the-florida-bar-journal/fraud-in-horse-sales-floridas-rule-5h-and-unfair-and-deceptive-acts-by-equine-sellers-agents-and-others/>.

^h*Id.*, fn e, herein: “Undisclosed agency and compensation arrangements amongst owners, sellers, agents, trainers, sponsors and other ‘facilitators’ are common in the horse world and have normalized unfair and deceptive acts that would not be permitted in other industries. The problem is not limited to Florida, nor, indeed, the United States. In England, secret commissions are known, ironically, as ‘sweeteners.’ Evans, Richard, *Jockey Club Probe Bloodstock ‘Fraud,’* DAILY TELEGRAPH (London), Jan. 27, 2004, Sport, at 1.”