To Scan Or Not To Scan, That Is The Question!
by Gregory M. Dennis, Esq.

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SYNOPSIS: Presently, California veterinarians do not have a legal duty to scan animals for microchips. Further, no such duty should be imposed on veterinarians without careful and detailed consideration of all issues and potential complications that might arise from imposing such an obligation.

California Veterinary Medicine Practice Act and Scanning for Microchips
From 1987 through 1997, it was the position of the California Veterinary Medical Board (VMB) that insertion of a microchip was a surgical procedure and, therefore, could only be performed by a licensed veterinarian. In other words, it was the practice of veterinary medicine thereby affording the VMB with jurisdiction to regulate microchip implantations.

Before 1997, the VMB’s Legal Counsel cautioned the VMB that if it changed its position it “might not have jurisdiction to regulate the process at all.” In October 1997, the VMB changed its position and “concluded that the microchip procedure was not a veterinary treatment over which the VMB had jurisdiction.” Other states have come to the same conclusion or hold it as the practice of veterinary medicine.

On April 3, 2009, in response to an inquiry from the CVMA, the VMB’s staff advised that:

“Since the task of inserting a microchip is not the practice of veterinary medicine, it is not within the jurisdiction of the Board [VMB] to require [California] veterinarians to insert a chip or to scan for one that may have been inserted. Currently, in California, there is no requirement for veterinarians to scan an animal prior to treatment.”

Succinctly, the “Board has no regulations requiring veterinarians to scan client pets for a microchip when they come into the veterinary hospital. Microchipping is not considered the practice of veterinary medicine in California.”

Tellingly, if not confirming the VMB’s position, the words “microchip” and “scan” do not appear in the California Veterinary Medicine Practice Act (Practice Act) or in the companion regulations. Nor, for that matter, are the words “client” or “owner” defined by the Practice Act or the regulations.

With the VMB taking this position the question then arises: are there any other laws besides the Practice Act that impose or might impose an obligation on California veterinarians to scan all animals presented to them for treatment or any other purpose?

There are only two California statutes that specifically require animals to be scanned for a microchip: first, Food & Agriculture Code § 31108(c), which requires shelters, public or private, to scan impounded dogs for microchips and make reasonable efforts to contact the owner; and second, Food & Agriculture Code § 31752(c) which does the same for cats.

16 Code of Regulations § 2032.3, pertaining to the required contents of veterinary records, does not list as necessary information that a California veterinarian has scanned the patient for a microchip. Further, if a microchip is detected, there is no requirement that fact be noted in the records nor that the identification number be recorded. While § 2032.3(a)(3) requires a veterinarian to list the “name or identity of the
animal, herd or flock,” that provision does not require scanning. Also, it is not like the language in either Food & Agriculture Code § 31108(c) or § 31752(c) that specifically requires public or private animal shelters to scan dogs and cats for microchips.

Civil Liability for Failing to Scan?
In an April 3, 2009 e-mail to the CVMA, the VMB stated that:

“The issue of whether there may be civil, criminal or ethical liability for scanning or not scanning to determine ownership is outside the Board’s jurisdiction.”

Veterinarians who are at public or private animal shelters and who fail to scan dogs and cats for microchips run the risk of violating Food & Agriculture Code § 31108(c) and/or § 31752(c) and, thereby, contravening the Practice Act. Reflective of this, in 2006 the Washington State Court of Appeals set aside a trial court’s dismissal and reinstated a lawsuit that alleged, among other things, that animal shelters were failing to scan cats for microchips, resulting in the animals being euthanized rather than returned to their owners.9

What if the Microchip and Client do Not Coincide?
The fact that a microchip reading leads to information that the name obtained is not the same name as the person presenting the animal does not mean the presenter is not then the current or legal owner of the animal. There can be many reasons other than theft or unlawful possession why microchip information and client statements do not match. Animals are abandoned, sold, given away, adopted and, of course, lost. Also, registry information may not have been updated or the person selling or giving away the animal may have forgotten to mention that the animal had a microchip. Further, the new owner may decide not to contact the registry company or pay the fee to transfer the registration.

Veterinarians should not jump to the conclusion that if there is a discrepancy the presenter must, therefore, be in unlawful possession of the animal. If a microchip is detected which the veterinarian does not already know about, he or she or authorized staff should promptly speak with the presenter (client) and ask if they knew about the microchip. If the client did know about the chip and tells the veterinarian or staff member the animal is his/her, the veterinarian should be able to rely upon that statement, particularly if the client signed an admission form or is willing to sign a document identifying herself/himself as the owner or the owner’s authorized agent.

If the client didn’t know of the animal’s microchip, the veterinarian or staff member should provide him/her with written information on how to contact the registry company and encourage the client to do so promptly.

In this second situation, if the client requests the veterinarian to proceed with treatment, the veterinarian may decline to do so until the client contacts the registry company and reports to the veterinarian what he or she learned. Another possibility is that the veterinarian declines to proceed with treatment until the client gives him or her permission to contact the registry company.

No matter what happens, the veterinarian or staff member should document in the patient’s record they have spoken to the client, what the client told the veterinarian or staff, what documents, if any, they gave to the client, the veterinarian’s or staff’s name, and the date and time of the conversation.

In an emergency, the veterinarian should be able to proceed with treatment to stabilize the animal. Again, the veterinarian or staff should appropriately document the patient’s records.

Finally, if the client wants the animal euthanized and does not want to contact the registry company or permit the veterinarian to contact the company, then the veterinarian might want to decline until she or he is allowed to contact the registry entity, particularly if the animal is healthy. Putting down an animal in such a situation might lead to a legal claim of “conversion”10 or “trespass to chattels” which tends to be an
intentional, rather than a negligent, tort and therefore is not likely to be covered by malpractice insurance.

**The AVMA and Microchip Scanning**

In November 2005, the AVMA’s Executive Board approved a policy entitled *The Objectives and Key Elements Needed for Effective Electronic Identification of Companion Animals, Bird, and Equids.* Since then there have been three revisions, most recently in April 2009.

The AVMA’s electronic identification policy declares that:

“Scanning animals for microchips is necessary for the identification system to be effective. Therefore, every companion animal, bird, and equid presented to a veterinarian should be scanned, whenever possible, for the presence of a microchip.”

Also:

“The veterinarian, or designated staff, should scan the animal and note in the patient’s medical record if a microchip is present, and if so, record the microchip number in the patient’s medical record.”

Continuing:

“This routine scanning for a microchip not only aids in the positive identification of an animal, but also provides the opportunity to assess if the microchip is still functioning properly and located appropriately, as well as reminding owners to keep their microchip database contact information current.”

It is the AVMA’s view that:

“If a microchip implant is detected, the veterinarian, or designated staff, should inform the client of this fact, provide the client with contact information for the microchip database company, and encourage the client to contact that company. The veterinarian should document in the patient’s medical record that he or she spoke to the client about these matters. The veterinarian is not expected to investigate nor resolve ownership disputes over an animal, nor should a veterinarian be held liable for relying on a client’s claim of ownership following scanning.”

However, the AVMA’s electronic identification policy cautions that if the information derived through the microchip is different from the information provided by the presenter, then:

“In those circumstances that raise suspicion that the presenting person may not actually be the lawful owner of the animal, a veterinarian should ask for documentation of ownership, such as governmental registration, bill of sale, adoption documents, or microchip documentation. The detection of a microchip implant of which the client is unaware may raise suspicion but should not be considered, in and of itself, sufficient evidence that the client is not the lawful owner. In such a case, a veterinarian may proceed with treatment.

Documentation of ownership should be required when a client requests that a veterinarian remove a microchip. Where the veterinarian has cause to believe that ownership of the animal is unclear, the veterinarian should postpone treatment until evidence of ownership is presented unless, in the judgment of the veterinarian, the treatment is necessary to maintain the health of the animal, to preserve its life, or protect
Other Countries and Microchip Scanning
The debate over whether a veterinarian has or should have a duty to scan any animal that he or she sees for treatment is not limited to the United States. For instance, in 2005 while dismissing charges against a British veterinarian who had euthanized an elderly stray cat which was found to have a microchip postmortem, the Royal College of Veterinary Surgeons (RCVS) advised the veterinarian that, henceforth, when any animals were presented as strays they "should be scanned to see if they are microchipped, so that the owners can be contacted." Additionally, the RCVS's Microchipping: Ownership Dispute policy states that if a client who has presented an animal "declines to consent to release of his or her name and contact details of the animal and microchip, a veterinarian should breach client confidentiality to pass the necessary information to the PetLog Reunification Service." 14

Conclusion
While identification microchips are good, their increasing presence on the veterinary scene should not convert a veterinarian from being a person who treats and cares for animals into an adjudicator of facts and law in resolving ownership disputes or regulatory police. That is not and should never become the role of veterinarians in society.

Finally, if we require veterinarians to establish the validity of ownership before treatment when a microchip is detected, are we then opening the door to requiring veterinarians to verify lawful ownership whenever any animal is presented? Do we, as a society and profession, really want to go there?

Editor's Note: Any opinion expressed in this article is that of the author and not of the California Veterinary Medical Association or any other association, entity or person. This article is not intended for nor should it be relied upon in any manner as legal advice. Any reader of this article should, and is fully encouraged to, consult with an attorney of their choice for any question they might have or for advice they might want to seek on the subject matter of this article.

Footnotes for this article can be found at CVMA.net.

Footnotes
1 See Department of Consumer Affairs, Veterinary Medical Board, Policy 97/98-1: Microchip Implantation. www.vmb.ca.gov/laws_regs/po197_1.shtml
2 E.g., Georgia Attorney General Opinion 95-3, 1995 Ga. Att'y Gen. 4, 1995 WL 124592 (February 6, 1995): "If a microchip is implanted solely for the purpose of identification of an animal, then such a procedure would not constitute the practice of veterinary medicine since it does not involve the diagnosis or treatment of an animal disease, defect, or injury." Minutes of the Kansas Board of Veterinary Examiners Meeting, Wednesday, January 30, 2008, p. 2: “...the consensus of the Board was that micro-chipping does not constitute the practice of veterinary medicine as defined in Kansas statute.” www.kansas.gov/veterinary/bdminutes_013008.pdf
3 E.g., Florida: “Florida [animal] shelters can continue to implant microchips in animals up for adoption but can no longer be allowed to provide free or low-cost microchips to pet owners, unless a licensed veterinarian implants the chips.” Miller, Vets Must Put Microchips in Pets, State Says, Palm Beach Post (March 19, 2008).

An Indiana regulation governing the registration of Indiana Bred embryos, specifies that a 125 MHz microchip must be implanted by a licensed veterinarian. 71 Ind. Admin. Code § 14.5-2-1.5(g)(3).

Louisiana requires a microchip to be inserted by: a licensed veterinarian or under the direct supervision of a licensed veterinarian; state or local governmental animal control agency; or a humane society which has a contract with a local government to perform animal control services. 46 La. Admin. Code Part LXXXV, § 713. Another Louisiana regulation requires big exotic cats to be implanted with a microchip by a licensed veterinarian or a person acting under the direct supervision of a licensed veterinarian. 76 La. Admin. Code Part V, § 115(H)(8).

The New York Veterinary Practice Act specifically includes “the subcutaneous insertion of a microchip intended to be used to identify an animal” in its definition of the “practice of veterinary medicine.” N.Y. Education
Law § 6701.

Pennsylvania only permits a licensed veterinarian, a person authorized by the Pennsylvania Veterinary Medicine Practice Act, or an animal owner to implant microchips. See e.g., 7 Pa. Admin. Code § 21.51.

South Carolina statute suggests that only a licensed veterinarian or animal shelter employees can implant a microchip. South Carolina Code Ann. § 47-3-55(c).

Business & Professional Code § 4826 defines the practice of veterinary medicine, surgery and dentistry as, among other things, the diagnosing or prescribing of “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.” Also, 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, except where the medicine, appliance, application, or treatment” Further, performing “a surgical or dental operation upon an animal” or “any manual procedure for the diagnosis of pregnancy, sterility, or infertility upon livestock or equidae.”

South Carolina Code Ann. § 47-3-55(a)

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lymphosarcoma or some other life-threatening condition, and the person who found the dog not willing to pay for its
treatment, the veterinarian euthanized the animal though she knew presenter was not the owner. The appellate court
noted a claim of conversion was an intentional tort for which a jury could, if it wanted to, award punitive damages.

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See also, Microchipping of Animals (December 3, 2007).

Microchipping animals, Frequently asked questions.
www.avma.org/issues/microchipping/microchipping_faq_pf.asp

See also, Australian Veterinary Association, Microchip Protocols (November 12, 2007); Canadian Veterinary

The veterinary licensing and disciplinary authority in the United Kingdom.

Royal College of Veterinary Surgeons Preliminary Investigation Committee Chairman’s Report to Council
June 2005, Stray Animals, ¶ 18. www.rcvs.org.uk/Shared_ASP_Files/UploadedFiles/E6611C1C-B793-48FA-

In 2008 the RCVS dismissed a complaint by a horse owner against a veterinarian who, at the request of a
humane society and police had euthanized their horse. The horse had apparently been down on the ground for many
days, in a very poor condition and had tetanus. Neither the society, police nor the veterinarian knew who owned the
animal. The complainant’s charge was the veterinarian should have attempted to find the owner and he euthanized
the animal without the owner’s consent. Among the RCVS’s reason for dismissal was the veterinarian had scanned
the horse for a microchip and found none. Royal College of Veterinary Surgeons Preliminary Investigation
Committee Chairman’s Report to Council November 2008, ¶ 15, p. 3 & ¶ 19, p. 4.
www.rcvs.org.uk/Shared_ASP_Files/UploadedFiles/rcvs/FE756476-0E68-4374-8FA0-
B1F7EDB108F0_PIC_CRC_0811.pdf

The PetLog Reunification Service website is www.microchipping.com/

See e.g., Latalladi v. People, 2009 WL 357943, 2009 V.I. Supreme LEXIS 10 (V.I. 2009): defendant took her dog
to a veterinary clinic and identified herself by using her neighbor’s name and address and signed admission and
surgical consent forms accordingly. Bill for veterinary services was mailed to the neighbor. After investigation and
trial, the defendant was convicted of unlawfully assuming the character of another person and forgery.

Propes v. Griffith, 25 S.W.3d 544 (Mo. App. W.D. 2000): defendant took two of her neighbor’s dogs to a
local veterinarian and requested he euthanize them. The veterinarian suspected the animals belonged to the neighbor
and did not do so. The defendant then took the dogs to a veterinarian in another town. The defendant signed a
euthanasia consent form indicating she was the owner. The second veterinarian euthanized the dogs. The dog owner
awarded a judgment against the defendant.

Wadsworth v. Olive, 53 Ga. App. 539, 186 S.E. 590 (1936): the plaintiff’s evidence tended to show his
hound dog had been stolen from him while he was hunting. The dog was later in the defendant-veterinarian’s
possession before he turned him over to another person, also a defendant. Judgment for the plaintiff.