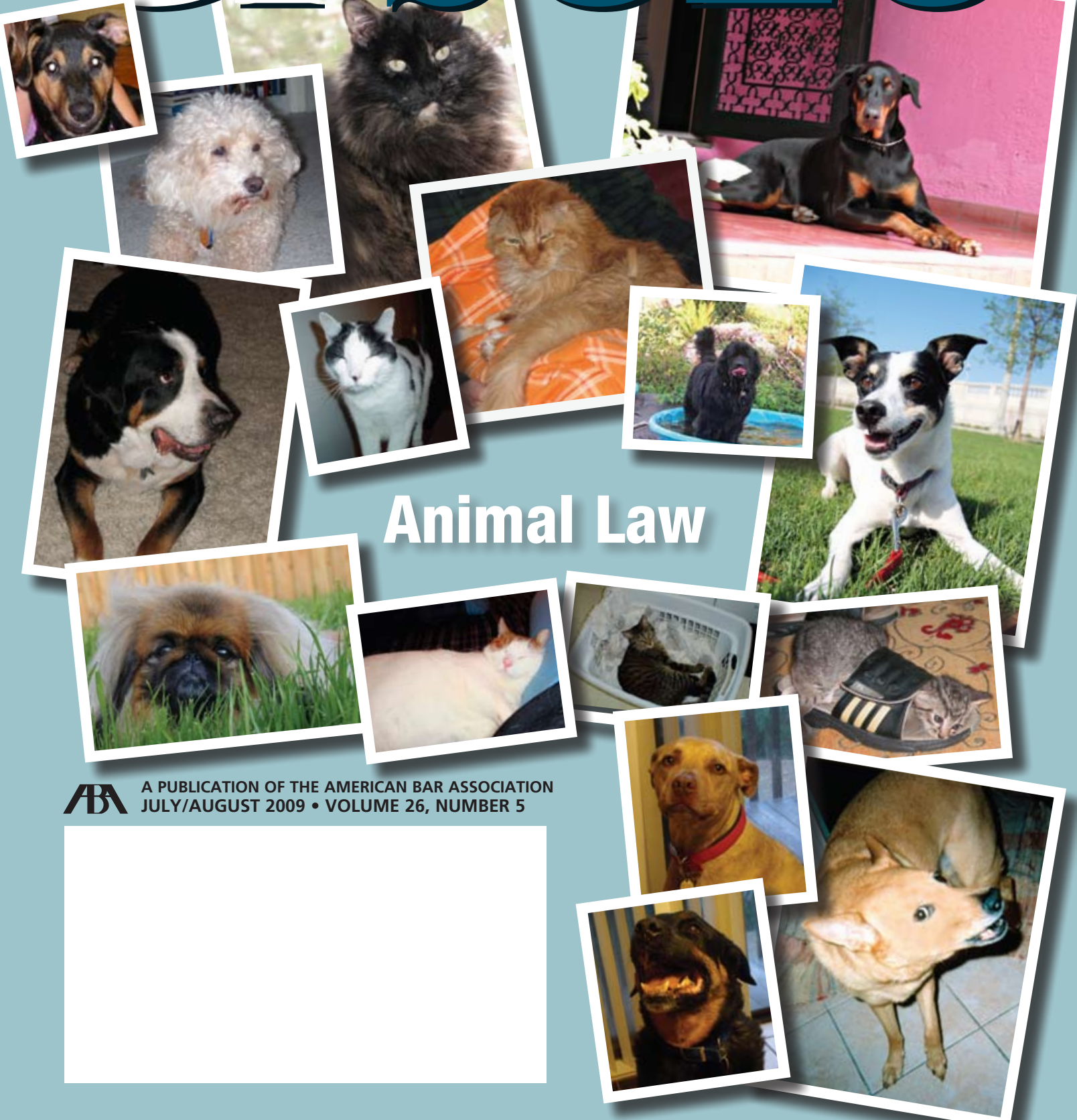


GENERAL PRACTICE, SOLO & SMALL FIRM DIVISION

# GPSOLO



## Animal Law



A PUBLICATION OF THE AMERICAN BAR ASSOCIATION  
JULY/AUGUST 2009 • VOLUME 26, NUMBER 5



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# GP | Solo

ABA General Practice, Solo & Small Firm Division

## **ABA 2009 Annual Meeting**

**July 30-August 2**

**Swissôtel Chicago**

**Chicago, Illinois**

- 14 GPISolo CLE programs held at the Presidential CLE Center
- Committee business meetings
- Keithe E. Nelson Memorial Military Law Luncheon
- Swearing-in ceremony for the U.S. Court of Appeals for the Armed Forces
- Solo and Small Firm Lawyers Caucus Breakfast
- Networking with your colleagues

## **GP | Solo 2009 Fall Meeting and National Solo & Small Firm Conference**

**October 15-17**

**Millennium Biltmore Hotel**

**Los Angeles, California**

- The National Solo & Small Firm Conference, offering more than 20 CLE sessions and four plenary sessions
- Young Lawyers Institute offering six CLE programs for law students and new lawyers
- Committee business meetings
- Welcome reception
- Difference Makers Awards Dinner co-sponsored by West, a Thomson Reuters business
- Networking with your colleagues

## **ABA 2010 Midyear Meeting**

**February 3-9**

**Walt Disney World Swan and Dolphin Resort**

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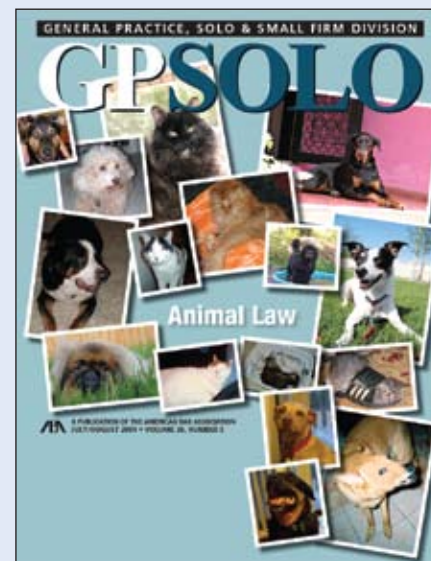
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**GP | Solo**  
ABA General Practice, Solo & Small Firm Division

# Pack Leader

By Joan M. Burda

“I like pigs. Dogs look up to us. Cats look down on us. Pigs treat us as equals.” So said Winston Churchill. I’m partial to dogs myself. Cats and I have a philosophical arrangement. I leave them alone; they do the same for me.

This is our “animal law” issue. When Jennifer Rose and I first suggested this issue, we were met with instant disdain and caterwauling. At the time, many members of the Editorial Board thought this was a frivolous topic. Little did they, or we for that matter, know how many state and local bar association magazines would publish articles on the subject. Whenever another article appeared, I made sure the Board knew about it. We were on the cusp of something important.

Many solos and small firm lawyers are marketing their services to pet owners, veterinarians, stables, and small farmers. Pet owners whose pets died or were injured are suing vets for malpractice. Pet health insurance plans are becoming more popular. We’re talking about a multi-billion-dollar industry.

Lawyers deal with pet issues in family law and probate cases. People fight over custody of their pets. Leona Helmsley left her dog a multimillion dollar trust—since reduced, but still, that is a lot of dog treats.

According to a 2008 National Pet Owners Survey, 63 percent of U.S. households own a pet, which equates to 71.1 million homes. In 1988, the first year the survey was conducted, only 56 percent of U.S. households owned a pet. The pet product industry estimates that pet owners will spend \$45.4 billion on their furry/scaly/winged friends.

What’s really interesting is how many companies that previously had marketed only to humans are now developing pet product lines. Look at Omaha Steaks, Paul Mitchell (how do you think those poodles get those ‘dos?), Harley-Davidson (there’s a rebel in all of us), and Old Navy (that one I don’t quite get). Just think of the contract opportunities.

And these offerings are not limited to fine dining and beauty. An increasing number of pet owners realize their pets need to relax just like the rest of us. Pet yoga classes, spa treatments, and massages are gaining in popularity.

But, for every doting pet owner, there are those who brutalize animals. The Animal Planet network carries a show called *Animal Cops*. That’s one program I cannot

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watch. Abusing children and animals is inexcusable. Prosecutors are pursuing these cases. One former pro quarterback found that out the hard way.

Service animals provide the disabled with the chance to live life a little easier. We are familiar with dogs accompanying a blind person, but this is just the tip of the tail. People with differing disabilities and life restrictions—including the elderly and autistic children—use companion animals. We’ve seen service dogs in training. It’s tough, sometimes, to remember they are working and are not pets. It’s also important to remember that these animals have rights, along with their human companions. Although there are still people and places that do not permit service animals, these are the people and places that do not understand or ignore the law. I went into a post office recently and saw the sign, “Only dogs for the blind allowed.” Even the USPS does not understand the changes in the law concerning companion animals.

I’ve read the articles in this issue and I’m excited about them. You don’t need to have a pet to find these articles interesting, but it can help. I hope this issue piques your curiosity in how to incorporate this fast-developing area of law into your practice. Get ahead of the curve—become a “pack leader,” to use the phrase of Cesar Millan (of the television program *Dog Whisperer*).

Oh, and please note, we didn’t use stock art for the cover this time. Those are our pets, past and present. I want to thank everyone who shared pet photos with us. As you can see—dogs rule! Cats just drool! And, as for ole Winnie; I’m afraid pigs just ain’t my style.

We seek out authors for future issues of *GPSolo*. The Editorial Board sets the issue themes and the articles we’re including. Send an e-mail to me ([jmburda@mac.com](mailto:jmburda@mac.com)) or our ABA Staff Editor, Rob Salkin ([Salkinr@staff.abanet.org](mailto:Salkinr@staff.abanet.org)), for details of upcoming issues. As always, let me know what you think of this issue. And don’t forget to spend some time with whatever furry, scaly, or feathery friend you have in your home. **GPSOLO**



# GP | Solo Division Member Benefits

ABA General Practice, Solo & Small Firm Division

## Savings That Exceed the Cost of Your Division Membership

We realize that the economy may be putting a strain on your law practice. An ABA General Practice, Solo and Small Firm Division membership can assist you during these tough times. The GPISolo Division has the resources and tools a general practitioner, solo, or small firm lawyer needs to run a law practice more efficiently and cost effectively.

- **Our flagship magazine, *GPSolo***, keeps you on top of the latest trends and legal developments of interest to general practitioners and solo or small firm lawyers.
- **Up-to-the-minute electronic newsletters** such as *Law Trends & News, Solo*, and *Technology e-Report* provide valuable practice information and tips from each of GPISolo's substantive practice areas.
- **A thriving online community** of general practitioners, solos, and small firm lawyers is just a mouse click away thanks to *SoloSez*, the e-mail discussion list and online resource for lawyers to share and obtain information on a wide range of personal and professional subjects.
- **Free Division Committees** give you access to the specialized information you need for your practice. Join any three—there are more than 30 substantive Committees to choose from.
- **Invaluable educational programs** can be found year-round in our schedule of seminars, national institutes, and Division meetings. Also remember the convenient, high-quality seminars offered through CLE Now!, which provides free and low-cost programs online.
- **Special member discounts** are available on all GPISolo books and sample forms on disk, which provide essential tips for profitably managing your practice and serving your clients well. These savings alone will pay for your membership. And don't forget the other discounts your membership in the ABA and GPISolo provides, such as:
  - **Ethics Search**, a personal consultation service to help you resolve your ethical concerns.
  - **Competitively priced life insurance** and other insurance programs for members and their families.
  - **The Legal Technology Resource Center**, which can assist you with understanding and implementing technology important to running your law practice.
  - **ABA Member Advantage discounts** on office supplies, products, and services from Office Depot, Dell, UPS, Hertz, Starwood Hotels, and more.

**Don't delay! Join today at [www.abanet.org/genpractice](http://www.abanet.org/genpractice) or call Kim Anderson, GPISolo Director, at 312/988-5636.**

# Trail's End

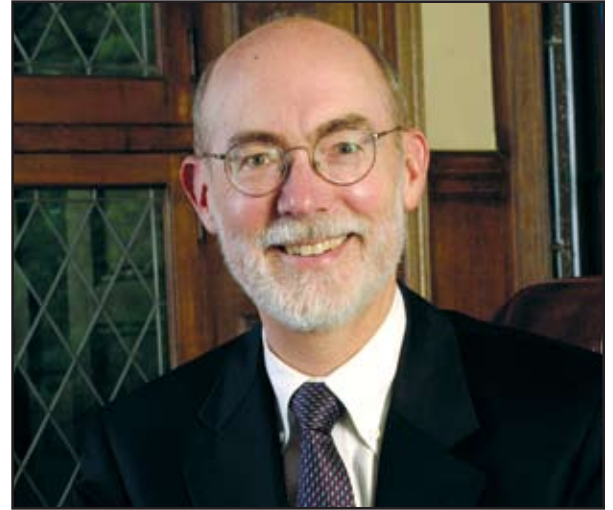
By Robert A. Zupkus

There are so many wonderful aphorisms. "A stitch in time. . . ." "You attract more bees. . . ." I often wonder where they originated. After serving as GP|Solo Division Chair for a year, I now know the answer for at least one aphorism: "Life is the reality that happens unnoticed while you are busy planning for it." Such was this Bar Year, 2008-2009.

In advance of my term as Chair, there was long and detailed planning of Division programs, events, and meetings. There is a traditional template for a GP|Solo Bar Year, which, like an annual garden, still needs careful planting, watering, and weeding. For example, each Chair typically selects a theme, a short series of carefully chosen words, to symbolize the Division's goals for the year. The theme is selected in consultation with more than one planning committee. The theme this year has been "Bar None: Inclusivity of People and Ideas." It symbolizes human diversity and a melting pot of philosophies, even if discordant. It anticipated four pleasant and exciting meetings to match the seasons. It anticipated increased Division assets, an interactive web-based Solo Resource Center, a Diversity Committee poised to mentor Division Diversity Fellows and merge their talents into long-term, valued service to the Division, and so much more. Such glorious planning.

And then life seemed to direct the planned brilliance into the reality of a dark alley. Revenue dropped. The Midyear Boston meeting was scaled back to a minimum. Division investment reserves dropped with the stock market. Concerns about swine flu led to cancellation of the Los Cabos Spring Meeting, which was to be held in conjunction with the ABA Judicial Division. This was to be a meeting gem. Speakers committed to participate included the President of the Mexico Bar Association and the Chief Judge of Sinaloa State. CLE programming included sessions with Mexican and U.S. attorneys on topics of cross-border practice and the difference in legal lifestyles. A beach fundraiser was set for a local day care center. The children had agreed to sing at a plenary session of both Divisions. Then the wicked H<sub>1</sub>N<sub>1</sub> surf swept away countless hours of staff and member planning, organizing, and coordinating.

And guess what? The sun still rises and shines over GP|Solo. There is no grumbling that this was a year that never was. Work on Division goals continues despite challenges. With the help of Kim Anderson, Steve Beam, and Jeff Allen, the Solo Resource Center is alive and moving forward. They are assisted by senior staff member Sarina Butler and by Kevin Henderson of Member-



Robert A. Zupkus

ship and Marketing. The GP|Solo financial knights Stan Riffle (Budget Officer plus), John Macy (Revenue Director), and Joe DeWoskin (Corporate Sponsors Committee Chair) drove the fiscal dragons from the gate. Marc Stern and the Bankruptcy Committee offered a pro bono Chapter 7 to GP|Solo, but that was made unnecessary by the efforts of so many of the Division's active members and special friends. I will highlight a few active members here, with full respect and thanks to the many, many others who also worked so hard for GP|Solo.

GP|Solo membership remained solid despite the economic downturns because Tony Alvarado and the Membership Committee continue to remain sensitive to the economic and product needs of solos and small firm lawyers.

Publications continue with great success, led by Mike Hurley. CLE programs have solid content and quality because David Lefton and Brian Hermanson never left the field. Brian also performed heavy lifting on behalf of Corporate Sponsors. Joan Burda, Jeff Allen, Chuck Driebe, and Jim Schwartz continue to make our magazine and newsletters dazzle. Laura Farber and the Council push themselves to think, debate, and decide issues to support solos and small firm lawyers across the country. Jennifer Rose and Bruce Dorner keep the SoloSez lamp lit despite the huff and puff of those who would darken it.

The Division held a fabulous fall meeting in Sante Fe. The New Mexico Bar proved to be wonderful hosts, as we knew they would. The Third Annual National Solo & Small Firm Conference was a wonderful success because of the effort and dedication of Deb Mathews and Vicki Levy Eskin. ABA staff members Kim Anderson, Laura Ramirez, Nicole Nikodem, and Dee Lee were the glue that held together the many, many moving pieces of this meeting (and the whole year, for that matter).

Tom Johnson, Marvin Dang, and Ignacio Pinto-Leon are perfect models for the Division's own Three Muske-



teers. They truly were all for one, one for all—the one being the Division. Each gave far beyond their job descriptions and did so selflessly. Behind them ride the rest of the Bar None posse: Betty Adams, Pamela Brown, Larry Ramirez, Bryan Spencer, and the Committee Chairs. Thank you so much, each of you, for watching the back of GP|Solo.

The Division Directors, Jennifer Rymell, Elio Martinez, Joe DeWoskin, and David Lefton, were each the star of every quarter. They mentored, nurtured, and inspired their constituent groups.

The Division is also blessed to have “Home Office” representatives who are dedicated and tireless. Kathleen Hopkins, our Board of Governors liaison, rolls up her sleeves and works so hard that we need to remind her she has already “arrived” as a “trusted advisor.” Lee Kolczun, Bill Hogan, Dwight Smith, and Sharon Stevens always answer the 3:00 AM phone call on behalf of the Division. Past chair

Keith McLennan continues to earn new laurels for the Division. He does not rest on any past laurels.

For any disappointment brought to the Division by outside events, please know that it is in solid shape and careful hands. It continued to measure the year in successes. And those successes are best reflected in the examples of uncomplaining, unwavering service given by the above Division members and ABA staff. Because of them, I would do the year all over again in a second. But that adrenaline rush of excitement now belongs to Colonel James Durant. And he will pilot the Division with full dedication.

So, Marc Stern, keep asking the relevant questions. Jennifer Rose, *hasta la vista*. John Macy and Keith McLennan, keep the good cheer alive in us. And to my wife Donna, thank you for infinite patience with me, your insight, and your caring for me and this hardy band of lawyers. **GPSOLO**

## Service to Others

By James M. Durant III

**S**ervice to Others defines what we do as legal professionals—and for the ABA General Practice Solo and Small Firm Division, it establishes our core value statement for the 2009-2010 Bar Year. My oldest son, Jimmy, once asked me, “Dad, what do you do?” Carefully responding to a then-four-year-old child, I concisely said, “Daddy helps people.” Now, I could have told him about my job as an active-duty Air Force officer and judge advocate. I could have given him details about being a prosecutor trying court-martial, about helping legal assistance clients, about advising generals as a NATO lawyer, and about all the many other legal matters I deal with on a daily basis. However, I decided to keep it simple, in a way that he would understand. Similarly, his brother, Jonathan, now five, will tell you that “Daddy is a *wawyer* who helps people and I want to be a *wawyer* when I grow up.”

Little did I realize that my brief comments to Jimmy and Jonathan would actually help me encapsulate the theme for my term as Chair: *Service to Others*. The 30,000 members of GP|Solo are the collective voice for more than 60 percent of all lawyers across the United States, and *Service to Others* is an appropriate mantra articulating what we do as lawyers. Of course, this single goal is not new. On the contrary, it is a culmination and continuation of many service-related visions carefully shaped by past GP|Solo Division chairs (*Renaissance: Rethink, Renew, Retool* by Karen Mathis; *Who Are We?* by



James M. Durant III

Bill Hogan; *Team GP|Solo* by Lee Kolczun; *Celebrating America's Main Street Lawyer* by Dwight Smith; *Do Something* by John Macy; *Simplify* by Keith McLennan; and most recently, *Bar None* by Bob Zupkus.)

How does this core value, *Service to Others*, actually translate to our everyday practice? Simple: It is the overarching principle upon which we base our lives as lawyers. Like Jonathan said, “*wawyers* help people.” We cannot forget this essential principle—and paraphrasing famed civil rights attorney and former dean of Howard University School of Law, Charles Hamilton Houston, we mustn’t settle for just being lawyers, but must strive to be “social engineers.” It is indisputable that *our* calling provides us with a remarkable opportunity to truly serve others.

**(Continued on page 9)**

# The Dog Days of Summer

By Kimberly Anderson

**T**he “dog days of summer” occur during the hottest and muggiest part of the year, usually from early July through early September. “Dog days” is also known as a period of stagnation or inactivity.

With the economy as it is, this might not be the best time to become inactive. But fear not—the ABA General Practice, Solo and Small Firm Division has programs and services to keep you moving with minimal effort.

These summer days may be just the time for you to catch up on your CLE. The ABA Connection program has a webcast archive available on a complimentary basis to ABA members via CLE Now! ([www.abanet.org/cle/cle-now](http://www.abanet.org/cle/cle-now); ABA members pay a \$9.75 line charge to participate in live ABA Connection teleconference). The ABA-CLE monthly podcast series ([www.abanet.org/cle/podcast](http://www.abanet.org/cle/podcast)) features the nation’s leading legal experts as audio or video downloads in MP3 and MP4 format or on preloaded iPods. You also may access online CLE programs 24 hours a day, seven days a week from the convenience of your home or office computer through WestLegalEdCenter ([www.westlegaledcenter.com/program\\_guide/search\\_results.jsf?courseTopicType=1&provider=57&format=On%20Demand&sc\\_cid=ws\\_abagps](http://www.westlegaledcenter.com/program_guide/search_results.jsf?courseTopicType=1&provider=57&format=On%20Demand&sc_cid=ws_abagps)); remember, GP|Solo Division members receive a special discount on all their GP|Solo online CLE.

Perhaps the economy is distracting you from your practice and from enjoying these lazy days of summer. Find the latest information from the ABA on how to get through the downturn. Our Economic Recovery Resources portal (<http://new.abanet.org/economicrecovery>) contains resources and tips on a variety of topics from practice management to professional development, job searching, and more.

You may want to mix some business with pleasure by attending the Division’s activities at the ABA Annual Meeting from July 30 through August 2 at the Swissôtel Chicago in Chicago, Illinois. You can bring some Zen to your practice with the two-part series for Solo Day, “The How and Tao of Legal Entrepreneurship.” This two-track program will focus on “hard” and “soft” skills and issues affecting law firm formation and growth. Part one, “How,” will focus on fundamental business start-up

issues and skills such as preparing business plans for the firm’s use or for lenders, principles of budgeting, cash flow projections, and other financial aspects necessary for planning and growth. Part two, “Tao,” will focus on the law firm as an entrepreneurial enterprise and will include discussions on entrepreneurship, leadership, core firm and personal values, and their importance in ensuring growth for the firm. You don’t want to miss the historical trial, “The Insanity Trial of Mrs. Abraham Lincoln,” which documents that only ten years after Abraham Lincoln was assassinated, a Chicago court found his widow insane and committed her to a mental institution. Was she really insane or did her son, attorney Robert Todd Lincoln, conspire against her? Join forensic expert Professor James Starrs, psychologist Dr. Darlene Shelton, trial consultant David Weinberg, and trial lawyers Carlin Phillips and Shain Khoshbin as they retry this historic case before the Honorable George Leighton using modern technology and forensic science.

The Division has been keeping itself busy during these dog days, too. First, there have been some changes to the officer ladder. Jennifer J. Rose resigned as Vice Chair and Joseph A. DeWoskin was named her successor. Additionally, the 2009-2010 Diversity Fellows and Young Lawyer Fellows were confirmed. The Diversity Fellows are Chauntis T. Jenkins of New Orleans, Louisiana; Ignacio Pinto-Leon of Houston, Texas; Ireneo A. Reus III of Long Beach, California; and Daniel J. Tann of Philadelphia, Pennsylvania. The Young Lawyer Fellows are Doris L. Gruntmeir of Muskogee, Oklahoma, and Sarah Sharp Theophilus of Sioux Falls, South Dakota.

Finally, it’s time to start planning for your time after these dog days end. Mark your calendar now for the National Solo & Small Firm Conference, which will take place in conjunction with the American Bar Association General Practice, Solo and Small Firm Division’s Fall Meeting in Los Angeles, California. It’s a growing trend for small firm lawyers to gather to network with other like-minded lawyers, get information on technology products appropriate to their size of practice, hear well-known speakers, and generally just have a good time. This year the National Solo & Small Firm Conference will host more than 20 CLE sessions, four plenary sessions, and a pre-conference marketing workshop. New to the program is the Young Lawyers Institute, offering six CLE programs for law students and new lawyers. These educational offerings at the conference will feature presentations from a mix of nationally known legal experts, veteran members of the GP|Solo Division with advice to share, active participants in the SoloSez online community, practice management advisors, and other solo and small firm lawyers just like you.

Now is the time to keep motivated and moving! Don’t let the dog days of summer slow you down. For more information about GP|Solo, please visit [www.abanet.org/genpractice](http://www.abanet.org/genpractice). **GPSOLO**

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## THE CHAIRS' CORNER

(Continued from page 7)

I like to think that I make a difference every day in the lives of others. Moreover, I like to think that it is not only about remuneration. Don't get me wrong, we all live on a budget. The character, Reggie Love, in John Grisham's *The Client*, best epitomizes service to others when she endured personal and professional sacrifice to represent her client, 11-year-old Mark Sway, for a mere \$1 retainer. We, too, endure personal and professional sacrifice as ABA volunteers representing more than 600,000 solo, small firm, and general practice practitioners across the United States. As volunteers in the ABA, we are charged with enabling those in the legal profession to serve others.





Through a focused effort to *Simplify* our practice by *Rethinking*, *Renewing*, and *Retooling* our *Team* approach to the great work of our substantive committees, I have appointed committee chairs who have pledged (1) to publish record numbers of written products that assist the *Main Street Lawyer* in daily practice; (2) to *Do Something* by producing greater numbers of quality CLEs in conjunction with other ABA entities and with state and local bar associations and to serve as ambassadors to these other bar entities; (3) to *Bar None* by opening the doors of opportunity for bar leadership through a concentrated membership drive, recruiting talent germane to specific substantive areas of the law to further answer the question of *Who Are We*; and (4) to identify viable resources targeted for partnering with the Division to help us truly *Serve Others* during trying economic times.

This edition of *GPSolo* magazine is dedicated to raising the awareness of animal law. Our family dog during our childhood, Duke, was a de facto member of the family with rights and privileges, albeit some limited. Yet, all too often we witness dogs left restrained in the

elements with insufficient nourishment. And for those who abuse animals, the deterrent often is limited to a misdemeanor or infraction. Although a few jurisdictions have successfully dealt with this issue head on, we have witnessed few legal efforts to protect animals from abuse.

Fortunately, some jurisdictions have successfully challenged this cause with great returns. I direct your attention to Scruffy's Law, a bill introduced by Kansas State Senator David Haley and passed in March 2006 by votes of 116 to 7 in the Kansas State House and 40 to 0 in the Kansas State Senate. The law, which makes it a felony to deliberately neglect, torture, or kill animals in Kansas, was named for Scruffy, a Yorkshire Terrier that was beaten and burned by four men who also videotaped his killing. The penalties for torturing and maiming of animals under this law are stiff—up to 30 days in jail and fines up to \$5,000. In a recent conversation with me, Senator Haley noted that several animal abusers have been prosecuted since the enactment of Scruffy's Law, and that the state has seen a marked reduction in reported animal abuse cases. Although it took more than nine years to pass the bill, Senator Haley is very pleased with the final result. He told me that his research for Scruffy's Law revealed that the intentional abuse of animals is a gateway action for many who later engage in spousal abuse, assault, and even murder. Moreover, following his testimony to members of the U.S. Congress, he was excited about the national attention Scruffy's Law garnered. Several states across the country are now pursuing similar legislation. Senator Haley is a friend of GPSolo Division and my cousin. We had the pleasure of his company during the Kansas City Fall meeting in 2006. I applaud Senator Haley for curbing animal abuse, and for truly *Serving Others* through the passage of Scruffy's Law. For more information on Scruffy's Law, I recommend you contact Senator Haley (785/296-7376, david.haley@senate.ks.gov). **GPSOLO**

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# ANIMAL LAW AN OVERVIEW

By Robert J. Derocher

**T**he reactions, says sole practitioner Barbara Gislason, were quick and almost universal five years ago when she told people her practice included animal law: “You must be a blood-on-a-fur-coat activist. You must be out there.”

The reactions today, she says, are much different: “It doesn’t trigger a conclusion. It triggers a conversation.”

It’s an indication, Gislason and others say, of how animals and their growing interactions with people and the law are fast becoming a more serious topic of discussion in the legal community. From a boom in law school course offerings to increasing membership in local, state, and national bar association committees, animal law is quickly moving from the fringe to the mainstream.

The high-profile 2007 conviction of former football star Michael Vick on dogfighting and animal cruelty charges highlighted the role of animals in criminal law, and the \$12 million bequest of former hotel queen Leona Helmsley to her pet Maltese dog that same year sparked conversations about the role of animals in civil law.

Lawyers and observers in the field maintain that carving out a niche solely in

animal law remains challenging for solos and small firm practitioners. But as animals increasingly become part of custody proceedings, business transactions, wills, trusts, litigation, and criminal prosecutions, the field of animal law will likely present increasing opportunities for the people who practice in a wide array of law disciplines.

## **A Growth Industry**

How attached are people to their pets? A study released in 2006 by the Pew Research Center found that 85 percent of dog owners and 78 percent of cat owners considered their pets to be family members. Toss in other numbers showing that 57 percent of all Americans are pet owners and that pet industry sales jumped 50 percent between 2001 and 2008 to more than \$45 billion, and it would indicate that pets are big business.

And it’s not just pet owners who have a large financial stake in animals. According to U.S. Department of Agriculture (USDA) statistics, the value of livestock sales jumped about 50 percent between 2002 and 2007, totaling more than \$150 billion in 2007. By the end of 2007, the USDA pegged the cattle (beef and dairy) inventory at 97 million and the hog and pig population at 65 million.

Although estimates on how much is spent on legal needs and issues for pet and animal owners are hard to come by, those in the field are seeing the increasing interest in animal law. At the Animal

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# Animal Legal Defense Fund

By Lisa Franzetta

For many people faced with a legal situation involving a companion animal, it comes as a shock to discover that the laws protecting their families, neighbors, and friends from violence and abuse fail to protect their four-legged loved ones. Despite the important role they play in so many of our lives, animals in this country are still considered “property” by law—in most cases no different than a table or a chair. Existing laws are often inadequate, full of loopholes, or lack enforcement. There are still states where no matter how badly someone abuses or tortures an animal, he cannot be charged with a felony. The federal Animal Welfare Act explicitly excludes birds, rats, and mice, and there are no federal laws protecting the billions of animals being raised for food from the most egregious abuses on factory farms.

For 30 years, the Animal Legal Defense Fund (ALDF) has been fighting to protect the lives and advance the interests of animals through the legal system. This mission is based on the premise that lasting change can only come when the law reflects what most Americans already believe to be true—that abusing an animal is wrong. Attorneys are in a unique position to push the envelope toward a more humane, and just, future for animals.

A nonprofit organization formed by a handful of attorneys in 1979, ALDF has won landmark cases that have shaped the face of animal law. ALDF has filed suit against large federal bureaucracies such as the U.S. Department of Agriculture to ensure they uphold their duty to protect animals; drafted historic animal protection laws, from state anticruelty statutes to international treaties protecting endangered species; and worked to get neglected and exploited animals out of the hands of their abusers.

ALDF’s Animal Law Program is dedicated specifically to nurturing the growth of animal law among legal professionals and in law schools. When the program launched in 2000, there were 12 Student Animal Legal Defense Fund chapters in U.S. law schools; today, there are 140 chapters across North America, including a chapter at every top-ten law school in the United States. ALDF’s Future of Animal Law conferences bring together the leading minds in animal law to discuss cutting-edge topics in the field.

Through its Criminal Justice Program, ALDF provides free assistance to prosecutors and law enforcement agencies to ensure that state criminal anticruelty statutes are vigorously enforced and that those convicted of animal abuse receive tough sentences. With a special emphasis on cases where the lives of large numbers of animals hang in the balance, ALDF makes sure prosecutors punish criminals who beat, torture, and neglect animals; ALDF exposes the link between violence to animals and violence to humans.

ALDF’s Litigation Program files groundbreaking lawsuits to stop animal abuse and expand the boundaries of animal law. Recently, ALDF lawsuits have used creative legal strategies to get neglected dogs, cats, and horses out of the hands of animal hoarders and singled out factory farms for using confinement practices that violate state anticruelty laws. ALDF also files amicus curiae briefs in pet custody and damages cases, arguing that judges should consider the best interests and emotional value of animals in weighing their decisions in civil cases involving animals.

Today, ALDF’s work to push the legal system to end the suffering of abused animals is supported by hundreds of dedicated attorneys and more than 100,000 members. Visit [www.aldf.org](http://www.aldf.org) for more information on ALDF’s work and how to get involved as a volunteer attorney.

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Legal Defense Fund (ALDF), which has been fighting animal neglect and abuse for 30 years, an Animal Law Program was launched in 2000 to encourage animal law instruction law schools, says Pamela Alexander, the program director. When the program was launched, there were nine animal law classes offered and a dozen law school chapters in the program nationwide. Today, there are more than a hundred classes and 140 chapters. “It’s very telling of what a burgeoning field this is,” she says. “We want to make sure there’s a chapter and classes offered at law schools throughout the country.” The ALDF is also making plans for an Animal Law Conference in spring 2010. Two previous conferences in 2004 and 2007 sold out, Alexander says. (For more on the ALDF, see the sidebar at left.)

After helping establish an Animal Law Committee at the Minnesota State Bar Association, Gislason says she became “the Johnny Appleseed of animal law for the national bar” when she helped found the Animal Law Committee within the ABA Tort Trial and Insurance Practice Section (TIPS) in 2004. In just five years, the committee has grown from a few dozen members to nearly 300, boasting its own discussion board, newsletter, and 22 sub-committees.

“There are so many serious scholars and academics who are involved in this field today,” says Pamela Frasch, assistant dean and executive director of the Center for Animal Law Studies at Lewis and Clark Law School in Portland, Oregon. “This is an intellectually challenging and robust field.”

A veteran animal law attorney who has taught at Lewis and Clark for 11 years and co-authored two books on the subject, Frasch is bullish on the potential opportunities for lawyers to get involved in the field. “We’ve seen and we’re continuing to see tremendous change. It’s a growth area,” she says.

## Areas of Impact

Part of what makes animal law an increasingly active and appealing area of law for solos and small firm practitioners, Frasch and others say, is its continually widening reach. “We see it cut across every area of



law,” Frasch says. “You are pretty much guaranteed to encounter some aspect of animal law somewhere in your career.”

Solo attorney Geordie Duckler of Portland, Oregon, is a rarity in the legal profession: He is one of a small number of lawyers whose entire practice is devoted to animal law. He’s been at it for ten years, and his caseload grows each year.

“I think I would have had a real hard go of it more than ten years ago, or if I wasn’t in a metropolitan area,” he says. “It’s a diversifying area. I’ve seen a number of things change.”

A former corporate attorney who is also a Ph.D. biologist who has written and lectured on animal anatomy, Duckler got into animal law as a way to marry his interests—although he cautions that he is “not an animal rights person. I’m an owner’s rights person.”

“Many of my clients do all sorts of things. Some treat [animals] like children and others treat them like automobiles,” he says. “I represent pig farmers. Their entire job is to farm pigs and sell them for slaughter. But what do they do when there is poison in their feed product and it kills their pigs? They need a lawyer.”

Duckler’s active caseload averages around 50, he says, with the most common involving veterinary malpractice, disputes among breeders, pets injured or killed by others, and livestock and exotic animal owners who often find themselves in disputes with local, state, and federal government authorities.

But perhaps the fastest-growing area of the law that involves animals, he and others say, concerns pet custody in matrimonial and family law.

“Animals are legally treated as property, but everybody knows that a pet is not the same as your iPod,” says Diane Sullivan, a longtime professor of animal law at the Massachusetts School of Law. As a result, she says, more judges in such cases are making provisions in rulings that accommodate demands for pet custody, visitation, health care, and upkeep.

Orders of protection for pets that might be threatened in domestic disputes are also becoming more common, says Kathy Hessler, a Lewis and Clark law professor and director of the school’s Animal Law Clinic.

## ABE

## The evolving, frontier nature of animal law adds to the allure—and potential—for many attorneys.

The highly publicized Helmsley case has also brought increased attention to how pets are provided for in wills and trusts, Hessler adds. Although their bequests usually are not as extreme, more people are making provisions for what happens to pets after the owner dies.

“The courts are continuing to grapple with these cases, since many [state] legislatures are not,” she says. “The [legal field] here has not yet been saturated.” In the Helmsley case, for example, a judge reduced the \$12 million set aside to care for Helmsley’s Maltese, Trouble, to \$2 million, while providing estate funds for two Helmsley grandchildren who had been cut out of an inheritance.

In the area of criminal law, many state and local prosecutors are taking a closer look at animal cruelty and neglect cases—particularly in what are known as “hoarding” cases, says Frasch, when authorities discover people housing large numbers of malnourished dogs or cats.

“There have always been these cases out there, but the difference is that now we’re seeing the [animals’] suffering, and that’s evolved. We are opening doors that were once closed,” Frasch says. “Prosecutors often seek out assistance with animal control cases.”

Additionally, observers say, law enforcement is taking a greater interest in cases where pets are involved in attacks and confrontations with people. More communities are passing nuisance laws that seek to hold pet owners more responsible for their animals, Gislason says, and that, in turn, is spilling over into issues such as insurance and criminal defense. “[Those issues] are of interest to a broad range of lawyers. The insurance issue, in particular, is huge,” she says.

Still, Gislason and Duckler say, the ma-

ajority of their animal law cases center on veterinary malpractice. “When someone’s animal is harmed or killed,” Gislason says, “they want recourse.”

### A New Frontier

Still, even malpractice cases point out the evolving and somewhat frontier nature of animal law, adding to the allure—and potential—for many attorneys. With most animals regarded as property, compensating a pet owner for a wrongful death remains a murky area for the courts. Just a few states attach “special value” to pets rather than what the replacement cost would be, Duckler says, and even then that value is small.

“There’s a huge need for appropriate tort law to address the value of animals in this country,” Gislason says. “We sometimes forget to see animals as friends and family.”

The issue of animal activism—exemplified by groups such as People for the Ethical Treatment of Animals (PETA)—can also have an influence on the future of animal law. Although PETA has brought attention to animal cruelty, it has also sparked controversy with sharp attacks on meat consumers, farmers, and others. Splashing fake blood on fur wearers is a much-publicized tactic.

“You need more of a middle ground to make changes [in the law],” Sullivan says. “I’m a pet owner and a vegetarian, but [PETA] is too far out there for me.”

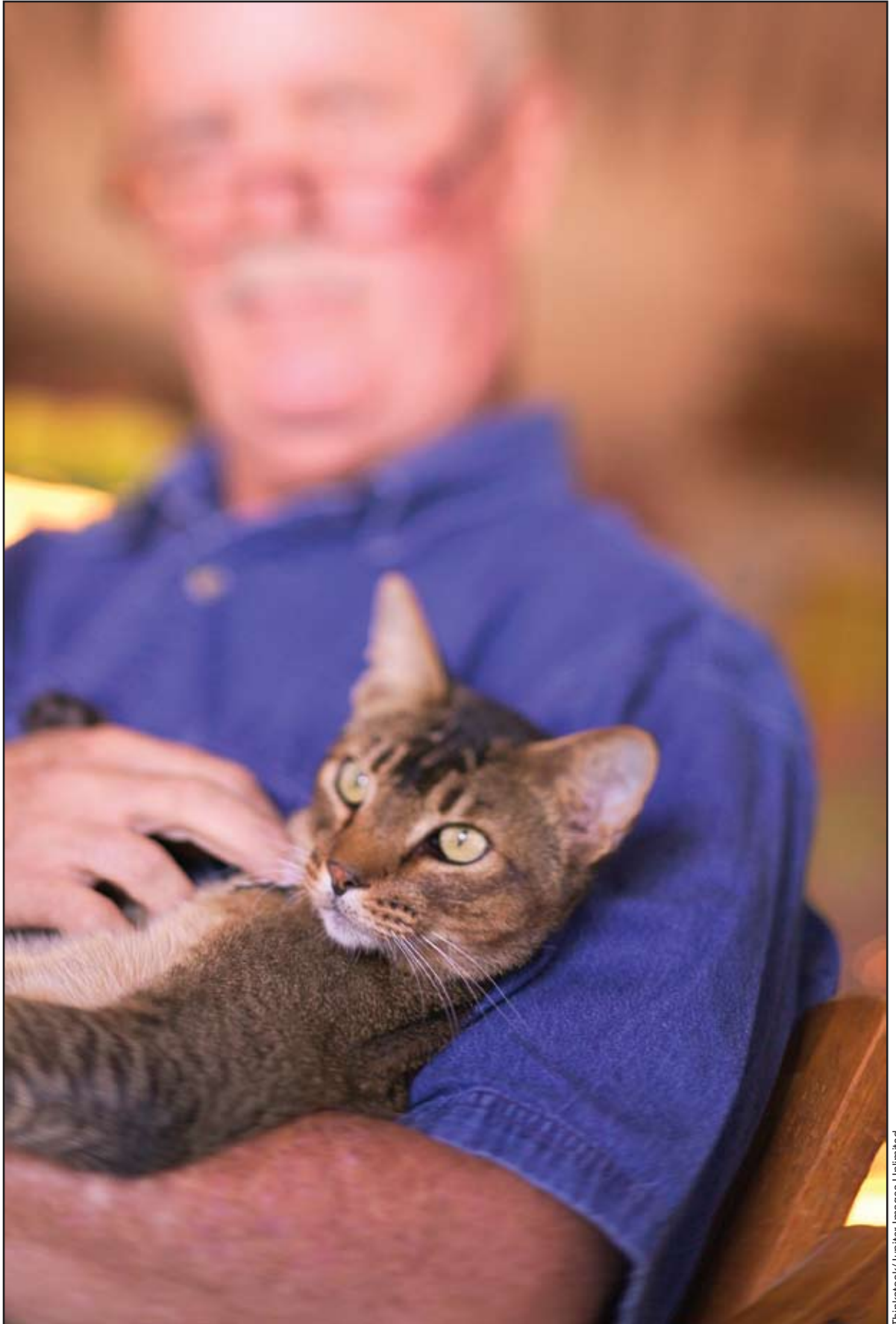
Duckler adds that it is important for lawyers to make the separation between activism and the law.

“You don’t need to be an activist, yet you need to have knowledge of animals and the law,” he says. “Right now, I’m turning away cases.”

“No state in the country has pet custody laws,” she says. “There has to be a serious effort made to address this issue.” **GPSOLO**

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# ESTATE PLANNING ISSUES INVOLVING PETS

By Rachel Hirschfeld

**L**egally, pets are classified as property. But to their owners they often mean more than the couch or the desk—they are best friends, companions, and family (sometimes the owners' *only* friends, companions, or family). When a person begins the estate planning process and classifies property and beneficiaries, the pets must be addressed as well.

If your clients own pets—and odds are they do—you are almost certainly going to address this situation eventually. Americans are very concerned about providing continuing care for their dearly loved pets. Sadly, a considerable number of domestic pets are unwittingly condemned to imprisonment and a life without love because their owners did not know—and were not well advised—to make arrangements for them.

Only legally enforceable documents can guarantee a pet's secure future. Because of reasons as diverse as allergies, conflict with other pets, and exclusion of pets from rental apartments, the informal vows and promises made by friends and family to care for your clients' pets often fail.

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The idea of legally enforceable documents that ensure companion animals' continuing care is relatively new. The mainstream press often makes a mockery of transitioning pets from owners to pet guardians; they focus only on the large funds left for the pets' care and ignore the fact that the remainder beneficiaries are often animal charities. Leona Helmsley, a "notorious" celebrity who left millions of dollars for the care of her dog, Trouble, raised the world's awareness to the possibility of estate planning for pets. Sadly, she was ill-advised, and none of the instructions she left in her will were followed.

This article is a guide to the basic elements of, and what you should include in, estate planning documents to ensure that your clients' wishes regarding their pets are actually carried out.

## Three Legal Documents for Pet Protection

There are three documents to consider when planning the estates of pet owners. The *will* is valid after death, and its purpose is to distribute property. The free-standing, traditional *pet trust* enlists a trustee who distributes funds and ensures that the person caring for a pet follows the owner's instructions. The *pet protection agreement* is the layperson's pet trust—an affordable fill-in-the-blank legally enforceable document.

**Wills.** The belief that pets can be adequately protected if they are mentioned in a will is a myth. Consider the following pitfalls of a will:

- Instructions in a will are written in invisible ink; that is, instructions in a will are *not* enforceable. Wills disburse property: Jane gets the house and cat. Wills cannot enforce de-

## Unlike a directive in a will, a pet trust provides a host of protections and advantages.

mands that every year Jane paint the house she now owns. Nor must Jane care for the cat.

- Wills are not enacted immediately. There will be a waiting period before the will is read and the property changes hands. Ask yourself who owns and cares for the pet before the will is probated? Where will the pet be held during this waiting period? And if legal disputes arise, the final settlement of property can be prolonged even further.
- Wills do not allow disbursement over a pet's lifetime. In a will, the owner cannot distribute funds over time, which can be achieved with a free-standing traditional pet trust or pet protection agreement.
- Changes to the will are in the court's discretion. Who do you want deciding the fate of your clients' pets: your client or a judge?
- Wills make no provisions for incapacity. A will cannot address the possibility that the pet may need to be cared for during the owner's lifetime.
- Pet provisions in a will may be "honorary." Forty states and the District of Columbia recognize statutory pet trusts; in these jurisdictions, pet owners who include a simple directive in their will (e.g., "I leave my dog Soup-bone and \$5,000 for his care to my friend Jane") can be assured that the funds and pet will remain together. In the ten states without statutory pet trusts, however, these provisions are "honorary." The person who receives the funds decides whether or not to use them for the pet's care. There is nothing to prohibit the "trustee" from dumping the pet at the pound and using the money to go to Paris.

The presence of these pitfalls does not mean that wills should never include a provision for pets. Rather, it means that such a provision should be supplemented by a pet trust and/or pet protection agreement.

**Pet trusts.** Unlike a simple directive in a will, a pet trust provides a host of additional protections and advantages:

- Pet trusts are valid during the pet owner's life and after his death.
- Pet trusts can help preempt problems

with substantial and involved estates. Pet trusts are particularly useful if the client expects a contest to the estate—for example, if the amount left for the pet's care is enough that someone will contest the client's capacity, or if there is a litigious family member whom the pet owner believes may dispute the final documents.

- Pet trusts and pet protection agreements control the disbursement of funds.
- Pet trusts allow for an investment trustee. A trust protector (separate from the pet guardian or trustee) can be appointed to invest funds with a view toward growth of the principal and future use on behalf of the pet, heirs, and charitable recipients.
- Pet trusts and pet protection agreements allow provisions for incapacity. Pet trusts and pet protection agreements can ensure that the owner and pets will remain together in the event that your client moves to a nursing home or other long-term care facility. Studies have shown that seniors and those with health issues receive increasing benefits from their pets—lower blood pressure, increased exercise and circulation, reduced anxiety and stress, boosted mental acuity, enhanced opportunities for social interaction, and decreased loneliness. *The New York Times* has reported that nursing home residents live longer when a pet is present. With a pet trust or pet protection agreement, owners may even leave a portion of the funds remaining after the pet's death to the facilities that kept the owner and pet together.

**Pet protection agreements.** The pet protection agreement is a laypersons' document that I created to establish continuing care for companion animals when owners are unable to care for them. It is a unique product that affords pet owners the opportunity to easily dictate care for all their pets—without the need for large legal bills.

Although most pet owners want to make arrangements for their pets' care, too many people do not want to go to a lawyer's office, nor do they have the time



or the funds to do so. Sitting with a lawyer and discussing that the pet loves the beach (but doesn't like Uncle Joe) is important but very time-consuming, and therefore potentially expensive.

As a result of these financial concerns among pet owners, I ended up doing a lot of pro bono work to ensure that pets' needs for continuing care did not go unmet. This experience led me to create a unique document that incorporated the best qualities of a will, a pet trust, and a contract. The pet protection agreement—a quick, effective, and affordable way for the layperson to guarantee the well-being of all pets for the rest of the pets' lives—was born.

The pet protection agreement can be completed with or without a lawyer's help. Any trusted advisor (such as an accountant, trustee, insurance representative, investment advisor, lawyer, or paralegal) can help a client complete this document. Like the pet trust, the pet protection agreement is valid during the owner's lifetime as well as after the pet owner's death. Unlike a pet trust, however, a pet protection agreement cannot ensure that owner and pets will remain together in a long-term care facility.

### **Elements of Estate Planning Documents for People with Pets**

Regardless of which estate planning document you choose, you must address the following issues when considering how to provide for your clients' pets.

**Pet owner.** I look forward to the day when all advisors will ask clients, "Do you have any pets?" It is important to establish who the owner is, especially because pets are legally classified as property. As a matter of law, the courts protect children in divorce or separation; because animals do not have that same protection, we frequently see partners in domestic violence and divorce cases using the pet to cause the other partner pain.

The experience of victims of Hurricane Katrina provides yet another example of the need to pre-determine ownership. Displaced owners often unwillingly left pets behind; when they returned to retrieve them, they found that the pets had been adopted out in the absence of ownership and emergency

contact information. For this reason, copies of all pet trusts and pet protection agreements should be distributed to everyone who signed them, as well as those who are only mentioned in them (such as groomers, veterinarians, and walkers).

**Pet guardian.** The pet guardian can be a person or an organization. The pet guardian will keep the pets, generally in the guardian's home, and must carry out the pet owner's instructions. If a pet organization assumes this role, the document should include directions about adoption.

Ideally, there should always be a successor pet guardian selected to ensure care if the pet guardian is unwilling or unable to assume care for the surviving pet. Ultimately, the concern is that the pet will always be cared for. In case the pet outlives or otherwise does not have a pet guardian, a shelter, sanctuary, or breed rescue of "last resort" should be named. Usually, shelters and sanctuaries require a fee, and this must be factored into the consideration of how much money to leave.

**Funding.** If you were leaving your children to a family member, would you expect Uncle Joe to say that he would not take your child unless you left him the farm? Well, look at estate planning for pets the same way. Funding is optional in both pet trusts and pet protection agreements.

Although funding is optional, it is recommended. Funds can be a fixed amount or a percentage of an insurance policy, bank account, 401(k), or even a portion of the sale of a home.

Many factors should be considered when deciding how much to leave for a pet's care, not the least of which is the fact that pets are more expensive as they age. Some things to consider are: How many pets are included? What type of pets are they? How long are they expected to live? Does the pet guardian need funds to keep the pets in the manner to which they are accustomed? Is the pet guardian going to be compensated from the remaining funds after the pets pass, or should the pet guardian receive monthly or yearly compensation?

Another consideration is emergency funds. I had a client who left her pets to her sister in North Carolina. Trouble was, the client lived in Connecticut, and when the client passed away the sister did not

**Pet protection agreements let pet owners easily dictate care for all their pets.**

## No one likes to see a pet consigned to a place not of the owner's choice.

have the funds to fly up and retrieve the pets. I had to lend her the money until we could access the bank account. That's when I learned that it's a good idea to consider leaving a small bank account in the joint names of the pet owner and pet guardian. It also tests the pet guardian's trustworthiness while it's still possible to change the document.

The same person or organization named as the pet guardian can also be in charge of the funds, but appointing a different person or organization to each role creates a system of checks and balances and further protects the pets. In a pet trust, the person who manages the funds is called the trustee; in a pet protection agreement, that person is the distributive representative. Always consider alternatives in case the first choice is unavailable. In the pet trust, it is the trustee who passes the pet to the pet guardian, who then acts as the new owner.

**Remainder beneficiaries.** Most people incorrectly believe that all of the funds must be spent on the pet. This is not true. As a matter of fact, it is vitally important to direct the distribution of all funds remaining in the documents so that the court doesn't get involved in doing this. The majority of pet owners leave the remaining funds after the pets' death to animal charities and family. It is important that the remainder is left in percentages as opposed to whole numbers; you never know what the final number may be.

**Pet's detailed description.** Identifying the pet in detail is critically important to prevent a pet guardian from replacing the original pet in order to illegally extend trust distributions or benefits.

**Instructions for care.** Instructions regarding the pet's care should be as detailed as instructions that a parent might provide when leaving a baby in a sitter's care for an extended period. Detailed instructions help ease the transition between pet owner and pet guardian. However, the instructions should allow the pet guardian to exercise some discretion when facing new circumstances.

**Keeping pets together.** If the pet owner wants to keep together certain pets because they were raised together or have otherwise bonded, make sure to include this instruction in the document; it will not happen automatically. The ability to keep pets together can have a significant impact on the choice of pet guardians.

**Including all present and future pets.** All pets owned by the pet owner, including those the pet owner does not yet have at the time the documents are written, should be included. It saves the effort of having to formally amend or create a new document every time a pet dies or a new one comes into the family. Including the term "all my pets" accomplishes this.

### Conclusion

No one likes to see a pet consigned to a place not of the owner's choice, and no one wants the court to decide a pet's fate when its owner is no longer able to care for it. As painful as it is to think of leaving beloved pets behind, there is no greater sense of security for pet owners than knowing that all their companion animals are provided for. You will be doing your clients a great service when you help them secure their pets' futures. **GPSOLO**

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# Animal Custody Cases

By Christine Garcia

**W**hen clients come to me with a pet custody matter, I always tell them that possession is 90 percent of the fight. Of course, if they had simply held tight to their rightful possession of an animal, my caseload would be significantly lighter. The problems occur when individuals are not familiar with their rights and waive possessory or “ownership” interests in their animals. When another person (e.g., a spouse) or entity (e.g., the government) takes possession of the animal, it is much more difficult to regain and win rightful ownership and control through the court system. This is true for the two most common custody disputes: dangerous dog hearings and custody battles between private individuals.

## Dangerous Dog Hearings

Frequently my cases begin with a telephone call from a stressed dog guardian who recently had a visit from local animal care and control officers. The caller will tell me that the officers came to her home and took away her dog “temporarily,” and only later she received notice the animal would be put to death.

Usually in such cases the animal care and

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control officers are acting on a telephone call from a neighbor or passerby who alleged that the dog in question either lunged, looked aggressive, or bit the individual. Such telephone tips or in-person complaints are generally not signed. Officers who encounter impediments from the animal’s guardian often threaten an arrest for obstruction. Some officers tell the guardian that the dog will be returned in ten days. Through either placation or duress, the guardian of the dog hands over their pet and then shortly thereafter receives notice of the animal’s impending death.

**Fourth Amendment rights.** People are not aware that animals are still considered property. Although many cities, such as San Francisco, have adopted legislation redefining the owner of an animal as a “guardian,” the federal government and the states still recognize animals as property. But all is not lost with this designation. Because the government perceives animals as property, the rights associated with Fourth Amendment searches and seizures apply. In *Fuller v. Vines* (36 F.3d 68 (9th Cir. 1994)), the Fuller family of Richmond, California, alleged that police officers’ wrongful shooting of their dog constituted a Fourth Amendment seizure. The Ninth Circuit Court of Appeals agreed, ruling that a dog is an “effect” or “property” and that the destruction of property is a “meaningful interference” constituting a seizure under the Fourth Amendment. There are now analogous cases in almost every circuit in the country.

I advise individuals to assert their Fourth Amendment rights when an officer comes knocking at their door. There is no reason why an animal guardian shouldn’t demand to see a court order or warrant before allowing an improper seizure. Nonetheless, many clients waive their custodial rights and hand over the animal. It is important for people to demand a probable cause hearing prior to this detention of the animal. If the government is allowed to take

your client’s dog without protest, getting the animal back will require a legal battle with the government for custody rights, which can take anywhere from a few days to more than a year—during which time the dog waits, impounded.

**Backyard quarantines.** In California it is the common practice and policy that domestic dogs or cats that bite humans be placed in quarantine and watched for signs of rabies for ten days following the exposure date, regardless of the animal’s vaccination status, or else be killed immediately and tested for rabies in an approved public health laboratory. Officers often misapply this policy. Even in cases of a non-penetrating nip from dog to dog (with no human involvement), law enforcement may insist on impounding the dog for the ten-day quarantine. Regardless of whom the dog bites, there is no law that insists that this impoundment must be at an animal shelter, and therefore nothing prevents a quarantine at home or another location where the animal will be watched for ten days. I recommend practitioners become familiar with their local state rabies quarantine laws to see if guardians of animals have the same option in their home state.

**Disputing custody with the local government.** Once animal care and control or local law enforcement has taken your client’s animal, there are usually proceedings available to dispute custody. These laws are often located in the state health and safety or food and agricultural codes. There are also local ordinances to contend with. In California, there are reasonable and some may say generous or favorable definitions of “dangerous dog,” which would theoretically work to the dog guardian’s advantage; however, the California Food and Agricultural Code states that local authorities are not bound by the state law and may create a more restrictive regiment of laws defining and “controlling” allegedly dangerous dogs.

## **Animal custody fights can be highly emotional and charged with personal issues.**

Inevitably, the process to regain possession and custody of the animal will be in court either through writ or appeal, usually after some administrative hearing. (Often your client must proactively demand such a hearing.) The battle for custody is not the only litigation your client might face concerning the animal, however. Criminal charges may still be brought against your client for being in possession of a dangerous dog or a dog “at large.” Additionally, a civil complaint may be brought against the guardian of a dog that allegedly bit or attacked; states such as California have strict liability laws. In my practice, I consider the fight for the life and welfare of the animal to be the most import among three types of litigation, especially because home insurance usually covers civil claims against dog guardians.

### **Custody Battles Between Private Individuals**

Animal custody fights between significant others ending their relationship are usually highly emotional and charged with leftover personal issues. Animal custody battles can be pursued in regular civil trial court or through the use of a mediator. If the custody dispute arises during a divorce, the fight can play out as part of the divorce proceedings. I have never practiced family law, but I have encountered cases outside the family court context, independent of a formal divorce proceeding.

Although these custody disputes can be contentious, in my own experience I have found that clients are almost always honest about the care and love that their former partners have given to the animal. Additionally, I have found these former partners to be very reasonable when I explain the need to act for the welfare of the animal and when I question these clients about their true interest in this action. Could it be for personal healing or other unresolved issues and not about animal care? When assessing the best place for the animal, persuasive points to raise with the client may include, but are not limited to, the age of the animal (is it worth subjecting an older animal to the upheavals of adjusting to a new home during the remaining time it has left?), possible separation from friend-animals (would the loss of contact with neighborhood dogs impact

the animal’s quality of life?), the stress of long-distance travel (would change of custody require a potentially hazardous flight in the cargo section of an airplane?), and even the nature of the animal-related statutes in the new jurisdiction (are there potentially problematic laws on the books there, such as breed-specific bans?). Creative shared-custody or visiting plans may be possible if both parties are amenable.

Pet custody cases acquire an entirely different character in situations involving domestic abuse. Countless times, victims of domestic violence refuse to leave the abuse situation because they do not want the family companion animal left alone with the abuser, who might retaliate by harming the pet. In 2007 California and Illinois passed legislation to protect animals in such domestic violence situations, and several additional states have since considered similar measures. Such laws allow courts to include pets in domestic violence restraining orders and also to require law enforcement to remove the animals from domestic violence situations when they are removing the victims to a safe home. Because animals are usually not accepted into safe homes, the legislation states that local animal shelters should get involved to take the animals into custody. If your client fits this profile but your state does not have a similar law, please do not hesitate nonetheless to include named animals on restraining orders in family court. There is a place on restraining order applications to include family members, and I have found that courts have not opposed the inclusion of animals if good cause can be shown. In California, I successfully attained restraining orders for animals without issue prior to passage of the state’s domestic violence animal sheltering law.

### **Third-Party Custody Disputes**

Increasingly, I am being consulted by people who want to win custody of an animal but who are *not* an ex-partner of the animal’s guardian. These people either (1) have possession of the animal and want to maintain custody because they believe the animal’s formal guardian to be negligent or (2) do not have possession of the animal but want to win custody and control of the animal because they believe its for-

mal guardian to be negligent.

An individual in the first category (having possession) may be a babysitter with whom the animal was left by the original dog or cat guardian. In one of my cases, the clients were casual friends of the original guardian, whom they met repeatedly at a local dog park. One day the original guardian asked if this nice couple would mind the animal for a couple weeks. The weeks turned into months and months into several years. When the original guardian came to town, the dog would stay with her. Through the years, the original guardian paid no vet bills, made no telephone calls to check on the dog's welfare, and sent no money for the dog's food and support. This was an ideal case to maintain ownership possession of the dog. Only on paper—the official dog license—was this the original guardian's dog. In these cases, the license means very little, and the actual practice of support and responsibility mean much more. The lifespan of the average dog also factors into custody decisions in such cases. Ultimately in this case, the dog guardians who had no license for dog ownership were able to keep the animal, and the suit against them resulted in a dismissal with the couple as rightful owners.

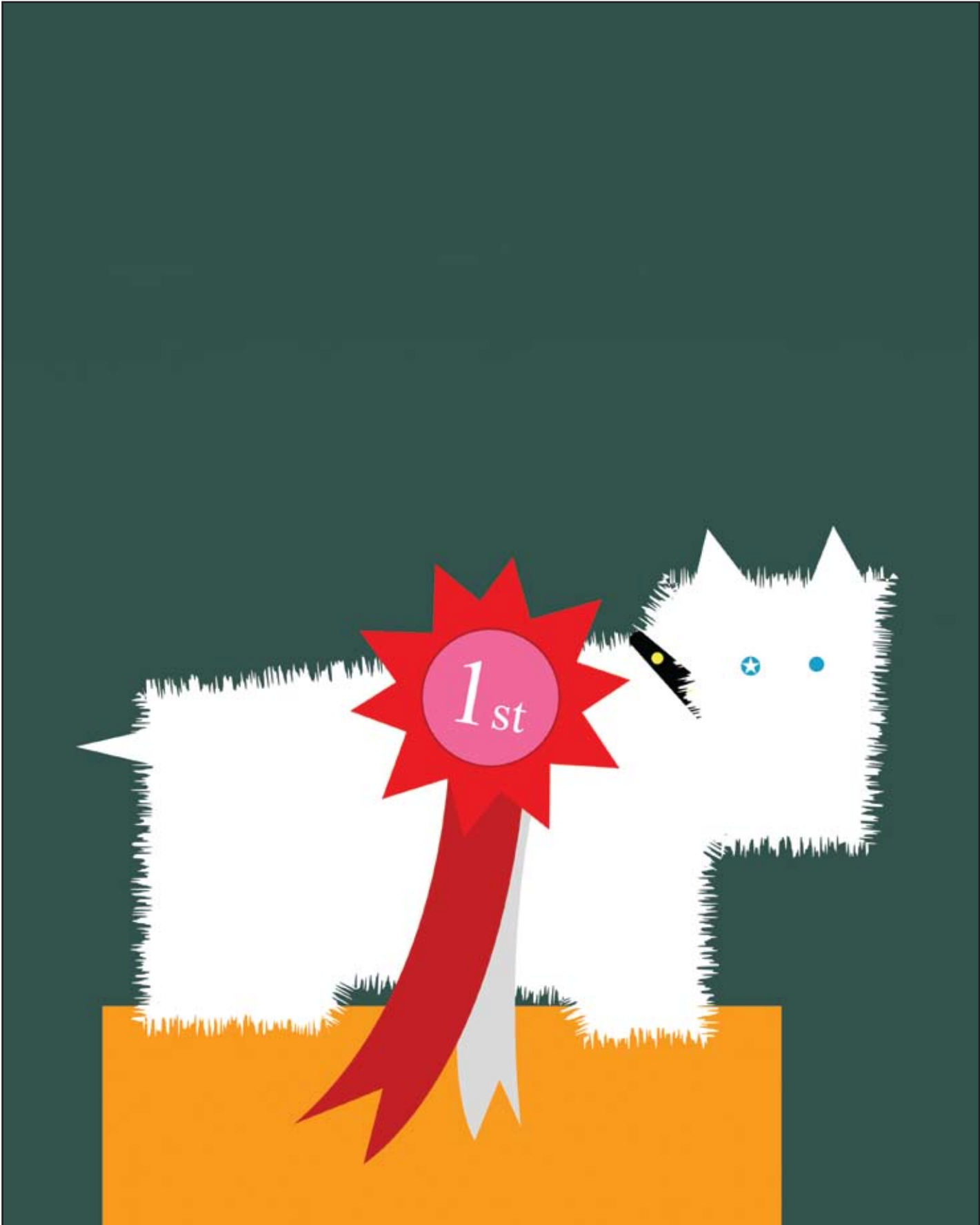
It is more difficult to gain custody and possession of an animal not currently in the client's possession, but which the client has observed to be neglected by the current guardian. I often get calls from people who observe that the dog in the backyard next door is not fed regularly, is tied to a tree for extended periods of time, or is not walked outside of the kennel. In such cases I recommend that the caller not contact law enforcement immediately, but first go directly to the neighbor in an uncontentious way and see if the neighbor will give the dog to the caller. This is a simple and obvious way to end the animal's suffering without initiating what could be a long legal battle. If the client is not prepared to take custody, there are numerous agencies and nonprofits that can help place the animal in a loving home. (Note, however, that after taking the animal from the neighbor and having it evaluated by a veterinarian, the client may still wish to report its condition to local animal care and control or law en-

forcement to prevent the neighbor from adopting another animal in the future.)

If the issue is not resolved peacefully through such an agreement with the current guardian, the next step is calling animal care and control. Custody of the animal may be sought criminally or civilly. In most states, there are criminal anti-cruelty statutes that make the lack of feeding and neglect of an animal a misdemeanor; the California anti-cruelty statutes also prohibit constant tethering. It is the local law enforcement's responsibility to report these misdemeanors when brought to their attention. Some sheriffs and local police officers designate the animal care and control department or even the employees of a local nonprofit animal shelter as official delegates to whom they report animal cruelty violations. Once a report has been made, bringing this report to the local district attorney's attention is imperative.

If custody is sought through a civil rather than a criminal action, the client must file for a restraining order pending the outcome of the civil suit. The immediate restraining order could request the dog be moved from the negligent neighbor's home to the responsible party's home; however, courts are more apt to grant an alternative request for an order to move the dog to a non-partisan group such as a nonprofit rescue organization, a foster program, or the local shelter. I always recommend making arrangements with a local nonprofit to sponsor a foster home for the animal rather than sending it to the local shelter. (Shelters can be extremely stressful environments with animals in close quarters, and they tend to be underfunded and understaffed.) If the nonprofit is currently filled beyond capacity and cannot take in any more animals, do not stop there. Usually, if you can find a foster home for the animal and suggest this to the nonprofit, the nonprofit is likely to approve of the location and commit to be the named temporary custodial bailor for the court. Once you have secured the animal in a safe location, you have won the hardest part of the case. The veterinarian expert witness will testify to the neglect and mistreatment of the animal, and your client's case to gain custody or to remove custody from the neighbor is well on its way. **GPSOLO**

**It is difficult to gain custody of an animal not currently in the client's possession.**



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# Show Dogs and Breeding

By Lloyd D. Cohen and Debra S. Hart-Cohen

**I**t was the lawyers' dog day afternoon. First, a family complained about their Pomeranian puppy obtained from the local shopping mall's pet shop. Later, a show dog fancier inquired about the legal recourse available for a defective show dog puppy. Complicating things was the fact that although both were unhappy with their purchase, both by now had bonded with their four-legged friend.

According to the Pomeranian's owners, the sales clerk had explained their pet was a "show-quality AKC purebred," so they could rest assured that they were purchasing a "purebred" in good health for whom "papers" could later be obtained if they decided to "have it registered." Unfortunately, their supposedly healthy "pure-pom" had, in their words, "grown into a sickly looking mixed-spitz."

The show dog fancier said that she is a breeder/owner/handler showing "conformation-quality" show dogs for the purpose of winning both championship titles and prize money. She breeds her conformation champions for profit, selling "AKC show-quality registered purebred champi-

onship line" puppies. She wants a refund for her latest acquisition, explaining, "I have since discovered that my new puppy has a genetic problem that will hinder future puppy sales."

These two examples from opposite ends of the dog-law spectrum highlight the same issues of breed standards and puppy lemon laws. However, breed standards and puppy lemon laws come from different places and serve different purposes.

## Breed Standards

The starting point for any discussion about breed standards, show dogs, and dog registration in the United States is the American Kennel Club (AKC). The AKC is dominant because of its size and age. Founded in 1884, it recognizes more than 153 breeds and annually sanctions more than 15,000 events involving several million dogs and members. Agility, obedience, tracking, herding, and field trials are only a few of the events that AKC licenses and sanctions each year. However, the AKC's signature event is conformation (known as "dog shows"). In conformation dog shows, judges decide which dog best conforms to the AKC standard for each breed. Its prestige event is the annual Westminster Kennel Club Dog Show.

The AKC maintains a registry of lineage or ancestry that, depending on the breed, could date all the way back to 1878. The AKC offers several types of registration, including full registration, limited registration, and purebred alternative listing (PAL). An ancestry record, known as a pedigree certificate, is maintained only for those having full or limited registration. More restrictively, only the offspring of AKC full-registered dogs (male) or bitches (female) are eligible for registration cer-

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**The representation that a puppy is an AKC “purebred” does not mean it is of conformation show quality.**

tificates and certified pedigree forms. Limited registration helps breeders protect their breeding programs because the offspring are not to be used for breeding purposes, so they are not eligible for AKC full registration (unless later modified by the litter breeder). In addition, AKC conformation events are limited to AKC full-registry dogs. The offspring of conformation champions can be worth thousands of dollars. PAL is available for dogs that do not have an AKC full registration and pedigree certificate. It is essentially a self-declaration about the dog. With PAL, as with limited registration, these dogs can compete in AKC-licensed and sanctioned events other than conformation. However, unlike those with full registration, the litters of the dam (mother) or offspring of the sire (father) do not receive pedigree certificates.

Making matters more complicated, the AKC is not the only registry. In North America there is also the United Kennel Club (UKC). Both Canada and Mexico, along with at least 32 other countries, have their own national clubs as well. Each club has its own set of guidelines, restrictions, events, titles, and breed standards. In addition, the AKC does not recognize every definable breed. For instance, some dog breeds that are recognized by European kennel clubs are not yet recognized by AKC. Moreover, the popularity of some dog breeds are so new or limited that recognized breed standards have not yet been developed or become generally accepted.

The AKC is a registry body that does not sell or breed dogs itself. Its registration certificate only identifies the dog as the offspring of a known sire and dam born on a known date. Many consumers think that because they purchased an AKC-registered dog, it is of good health and of great quality. Because of this, scammers often use the term “AKC” very loosely. Being misguided about exactly what AKC registration does and does not guarantee, consumers may become disappointed after the purchase of a new puppy that was represented to be “AKC.” Disappointment may result from animal health problems, the breed being “mixed,” or it just not having the temperament of the trained dogs seen on television. This, in turn, contributes to the large

number of abandoned dogs that end up in animal shelters or with rescue groups. In particular, backyard breeders often loosely assure buyers that a dog is “AKC registerable” when only a limited registration is available. Consumers need to be cautious about pet stores, backyard breeders, puppy mills, and Internet distributors who emphasize “AKC-registerable” dogs for sale.

So, just because one gets an AKC dog type, it may not necessarily be a dog that has “papers” (i.e., be eligible for AKC full registration), or be of conformation show quality, or act like a dog seen on Animal Planet. The assurance that a puppy is an “AKC breed” might mean no more than it is similar enough to an AKC-recognized breed type to be eligible for PAL registration. The representation that a puppy is an AKC “purebred” might only mean that it is substantially similar to a standard breed recognized by AKC. It does not mean that the puppy is of conformation show quality. Although the animal may be a very nice specimen, the reputable breeder will classify it as a “pet.” Additionally, the assurance of a puppy being a specific breed or being a “purebred,” or even being an “AKC-registered dog” is not an indication about its health. Puppies that have been mishandled by careless retailers, born into the filth of puppy mills, or abused by backyard breeders can be susceptible to particular health concerns or even emotional issues regardless of any purebred representations. Then, too, even classic show dogs can have their own health concerns, and many breeds have specific genetic issues.

Unfortunately, there are many breeders and retailers who casually reference “AKC-registerable purebred,” or even “AKC championship dam and sire” in their advertisements. These slogans appear in the retail setting, on the Internet, and in postings displayed by the casual breeder. The goal is to lure inexperienced or novice puppy buyers who have dreams of owning a dog that could appear in a flashy show ring like they might have seen on television—or who at least desire to have bragging rights.

What is not well understood is that the champion dogs seen on television and at

shows have more than just a great breed line. They have a great deal of money, time, training, and grooming behind them as well—perhaps years of investment before making it into a flashy ring with prize money and awards. The winnings in top shows, such as the AKC/Eukanuba National Championships, can reach into thousands of dollars. Besides the prize money, the recognition of the winning dog itself holds great value for the owner, breeder, and handler. The owner or breeder can make money from commercial endorsement, stud service, or sale of offspring. The handler makes money by being hired to show dogs for others because everyone wants to go with a winning track record. There are many different championship levels, however, and most advertised championship sires and dams are not top champions. Still, novice buyers continue to be lured in.

Reputable breeders will be up-front about the puppy sale and will be concerned that the puppy finds a loving and caring home. They will be clear about whether they are selling the puppy as a potential show quality prospect or as a pet. If sold as a show dog, they will take great care to make sure that the potential show dogs meets AKC breed standards for the show ring. Furthermore, a reputable breeder will have a clause in the sale contract stating that if the puppy has a breed-standard defect or fault, the breeder will work with the buyer to find a replacement dog. Purchase contracts for true show dogs will often guarantee ancestry and registration and specify breeding rights. Also, joint ownership for top show dogs is not uncommon. For true show dog buyers, it may take years of being on a breeder's waiting list before getting what is hoped to be a top-quality show dog.

### **Puppy Lemon Laws**

Because of the unhealthy conditions prevalent in “puppy mills” (see the sidebar at right) and careless handling in some retail stores, a number of states have enacted “puppy lemon laws.” Although some of the laws address representations made about breed standards, most concentrate on animal health. Many provide a return period (sometimes up to a year).

## **Puppy Mills**

Buying a dog in the old days necessitated a personal visit to a dog breeder. If the breeder had sick puppies living in filthy, overcrowded, disgusting conditions, consumers would take one look at the kennel and head the other way. But by the early 1970s the puppy business had been changed by the rise of mass wholesalers who would sometimes pack vegetable crates full of month-old puppies for nationwide shipment. More recently, the puppies are not even shipped directly to retailers but to brokers who sort and distribute the livestock to individual stores—whose owners prefer to remain ignorant about the puppies' origin. In 1970 Congress reacted by amending the 1966 Animal Welfare Act (which originally regulated sales of animals to research) and set minimum standards for dog breeders. The U.S. Department of Agriculture enforces the standards. However, the media is filled with examples of how ineffective this system has been.

As a result of well-publicized problems with enforcement of federal regulations, at least 21 states have enacted “puppy lemon laws” since 1977. These laws are often amendments to local unfair and deceptive practices acts. Although some of these laws deal with breed definitions, most concentrate on animal health by providing a period of time in which a sick pet may be returned. Some states even allow compensation for veterinary expenses, and others permit partial compensation to owners who still desire to keep the pet. Virginia and Louisiana also limit breeders' overall size.

To bypass these laws, puppy mills have begun making direct Internet sales, and some of these mills are even located offshore. When these mills masquerade as small-scale, caring, quality breeders, their Internet advertisements are referred to as “puppy scams.” Congress included a provision in the 2008 Farm Bill banning the foreign importation of dogs less than six months of age for purposes of resale. Introduced during the same congressional session was the proposed Puppy Uniform Protection Statute (PUPS), which would uniformly regulate all Internet puppy wholesalers, but at the time this article went to press, the bill remained stalled in committee.

Puppy mills are large-scale commercial operations where profit is given priority over the well-being of the dogs. They are unlike responsible breeders who place the utmost importance on producing the healthiest puppies possible and placing them into good environments. There are responsible breeders of all sizes operating in all parts of the country. So even though not all big direct breeders deserve to be called puppy mills, while some backyard and Internet distributors deserve to be so labeled, the odds are good that the cutie behind the glass at the national pet franchise had a dubious and cruel start at a puppy mill. [GPSOLO](#)

**In states without “puppy lemon laws,” the acquisition of a pet is no more than the sale of goods.**

Some states permit reimbursement for veterinary expenses and others will allow an adjustment of the sale price even if the owner decides to keep the sick pet. These laws provide significant consumer protection. In states without them, the acquisition of a pet is no more than the sale of goods as modified by any applicable deceptive sales practices act.

Such laws would impact the two example cases discussed above. If the family who ended up with the sickly Pomeranian-Spitz mix happens to live in a “puppy lemon law” state, they may be due an adjustment because of the dog’s illness. If, however, the complaint is one of breed disappointment, many pet stores use the commercial code to their advantage by offering to take the animal back in exchange for another. The stores bet that owners will bond with their beloved four-legged friend and will not want to part with their companion over a breed issue. If the question is one of ability to obtain official registration papers, the owners should be advised to start building a deceptive sales practices case by taking a close look at the representations that were actually made.

In the case of the show dog fancier with the defective show dog puppy, a claim for

adjustment owing to illness or breed defect usually requires return of the animal under most show dog contracts. However, the time and money spent developing the show dog is probably a write-off.

**Planning for Your New Pet**

As part of purchasing a dog, try to match size, grooming requirements, and temperament to your family and lifestyle. When contemplating taking a new companion into your home, consider how much you care about the environment from which the puppy came and how particular you are about a specific breed. The advantage of getting an identifiable breed is knowing ahead of time what type of companion you are purchasing. Breed recognition should give the owner some assurance about how the animal will look and act when it matures. Beyond that, some owners who never intend to take their dog into a show ring may still appreciate the lineage, standard appearance, and common behavioral traits of a purebred.

At the same time, keep in mind that many fine four-legged friends have been found in animal shelters or with rescue groups based on personality and temperament alone. Mixed breeds can make wonderful companions, too. Plus, there are many trained service animals that people depend on and are grateful to even though they may never win a ribbon at a dog show.

With all of this explained, a final word of caution goes to prospective new owners. Be careful to evaluate your choices, consider your needs, and think about what you are buying. Then check the paperwork to see if the sales representations being made actually match the written guarantees being given. Sometimes, people are so eager to bring a new furry friend into their home that they might not be aware of others who are poised to take advantage of their enthusiasm. **GPSOLO**

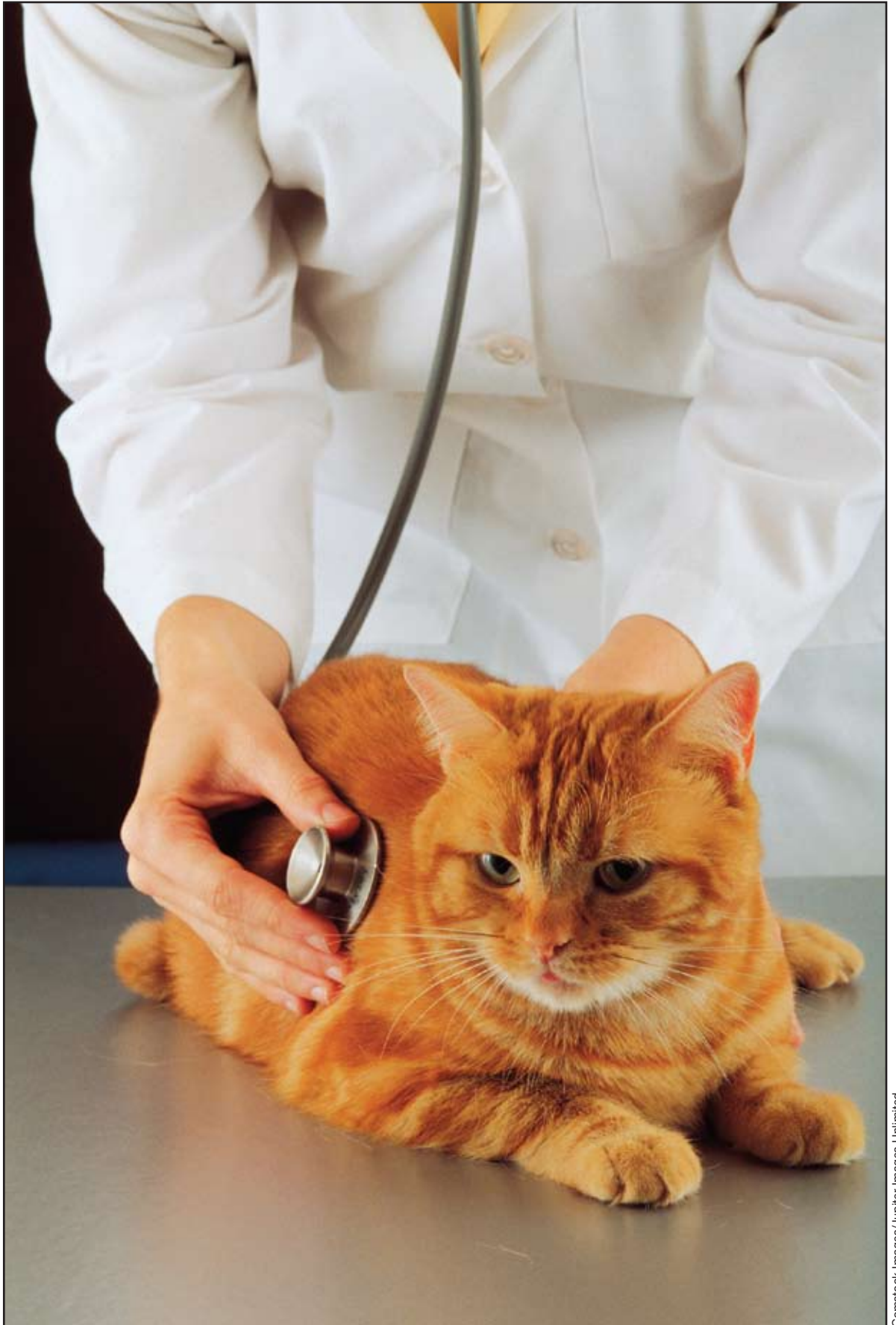
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TIPS law book



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# NON-ECONOMIC DAMAGES: A BAD IDEA FOR PET LAWSUITS

By James O. Cook and Adrian Hochstadt

Americans love their pets—and for good reason. They give us joy, provide companionship, and are a source of unconditional love. Then there are the well-documented health benefits. People with pets have lower blood pressure, better cholesterol levels, and visit the doctor less often. Sixty percent of U.S. households own pets, including more than 150 million dogs and cats.

Veterinarians understand and appreciate this human-animal bond. After all, love of animals is what drove veterinarians to their chosen profession. They also recognize that many people who enjoy the companionship of a pet do not think of their animal as “property” but rather as a unique, living being. What’s wrong then with taking the next step and recognizing an owner’s claim for pain and suffering, emotional distress, loss of companionship—in short “non-economic” damages—arising from a wrongful pet loss in cases of professional negligence?

As pet owners, we empathize with those whose pets have been harmed. We, too, are heartbroken when something bad happens to our own beloved pets. But as lawyers and veterinarians, we need to

guard against a drastic change in the law if it will result in serious, unintended negative consequences. In our view, allowing non-economic damages will harm the very animals we seek to protect.

Courts and legislatures have consistently rejected non-economic damages in regard to animals, with rare and carefully targeted exceptions. For example, an Illinois law allows such damages in cases of aggravated cruelty or torture. A Tennessee statute authorizes non-economic damages when a pet has been killed or fatally injured on the owner’s property or while under the control and supervision of the owner. Courts are more receptive to awarding enhanced damages where criminal or outrageous behavior results in injury or death of a pet. However, in actions where professional negligence is alleged, courts limit recovery to the replacement cost of the animal or allow additional measurable economic damages.

The American Veterinary Medical Association (AVMA) believes that in negligence cases involving animals, courts should take into account certain economic factors. These include:

- purchase price;
- age and health of the animal;
- breeding status;
- pedigree;
- special training;
- veterinary expenses related to the incident in question; and
- any particular economic utility the animal has to the owner.

Under the current legal structure, veterinarians and other animal health providers give quality and affordable care to our pets, which are living longer and healthier than ever. One need not be wealthy to afford a pet in the United States—now. But

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## Extending remedies beyond economic damages would ultimately harm animals.

that could change if we take the drastic step of overturning established legal doctrine in this area. We believe that extending available remedies beyond economic damages would be inappropriate and ultimately harm animals.

We contend that there are much better ways to honor the value of pets. As explained above, we favor recognition of measurable economic damages, even beyond fair market value or replacement cost, and support the awarding of punitive damages for intentional or criminal behavior that results in harm to an animal. Further, we support the idea of states adopting statutory language recognizing that animals are unique, living beings. Finally, we favor strong state veterinary medical boards to help ensure a robust disciplinary system to protect the public by weeding out those few incompetent or negligent practitioners.

In drafting the current Restatement of the Law of Torts, the American Law Institute recognizes that:

While pet animals are often quite different from chattels in terms of emotional attachment, damages for emotional harm arising from negligence causing injury to a pet are also not permitted. Although there can be real and serious emotional disturbance in some cases of harm to pets (and chattels with sentimental value), lines, arbitrary at times, that limit recovery for emotional disturbance are necessary.

Tort law balances a plaintiff's right to compensation against public policy considerations. There are several compelling public policy reasons to limit awards to economic factors in animal litigation.

First, non-economic damages will increase the cost of veterinary services. Historically, the cost of veterinary liability insurance has been relatively stable. However, the number of lawsuits against veterinarians will certainly grow if the size of awards and settlements rises. Some pet owners and attorneys will see an incentive to file suits. The cost of liability insurance will rise, with the costs passed on to consumers. And keep in mind that the demand for veterinary care is more elastic than in human medicine. The AVMA's pet demographics study shows that in

2006, 20 percent of consumers selected their veterinarian primarily on fees, while 17 percent of dogs and 36 percent of cats didn't receive any veterinary care.

In today's economic conditions, additional pressures on discretionary income could well result in millions of Americans deciding they simply cannot afford medical care for their pets. Low-income pet owners would be especially hard hit. Rabies, a major public health concern in many foreign countries, might become prevalent when rabies vaccinations are foregone because of rising costs. Abandonment rates are already on the increase as owners can no longer afford to keep pets. Animal shelters are overburdened and lack the resources needed to handle more animals.

Incidentally, the harm of non-economic damages would not be limited to the veterinary profession. The cost of all animal-related services and products—such as animal drugs, pet supplies, grooming, and boarding—would be affected. All pet owners could face increased liability if their pets got entangled with another person's animal. Auto insurance rates would rise owing to litigation stemming from animals that run out into the road. Local governments, animal shelters, and animal rescuers all could face hikes in liability and insurance premiums. Even law enforcement officers might hesitate before protecting themselves or the community from threatening or loose animals.

Another concern is that, with the expected increase in lawsuits, veterinarians will be forced to spend more time on depositions, interrogatories, and other court proceedings rather than treating animals. We also expect veterinarians, like other health care professionals, to begin to practice more "defensive medicine," performing treatments to avoid litigation. This will also add to the cost of veterinary care.

The specter of more lawsuits also will result in an erosion of the veterinary-client relationship, with a loss of trust on both sides. Studies have shown that consumers are pleased with their veterinarians and find them trustworthy and honest. Imposing an adversarial relationship will surely have an impact to the detriment of the animals we love.

Another unintended consequence of



expanding non-economic damages is the fact that human-animal relationships would be elevated above many human-human relationships, a truly bizarre result. Recovery for negligent infliction of emotional distress is generally limited to very close relationships, such as spouses, children, or parents. Even then, restrictions such as the “zone of danger” rule have been created to place some reasonable limit to liability. Grandparents, aunts, fiancés, and friends generally cannot recover emotional distress damages, regardless of how close these individuals were with the deceased. The human-animal relationship would now be deemed more important than those human-human relationships.

Non-economic damages have been routinely awarded in human medicine for several decades. Their impact on the practice of medicine has been troubling to say the least. Although the extent of the harm is debated passionately, there can be no doubt that large recoveries have been a factor in the skyrocketing of health care costs.

Myriad studies and statistics on the subject should give us pause before embarking on the same path in veterinary medicine. These show obstetricians and gynecologists making changes to their practice as a result of a lack of affordable liability insurance, medical students selecting specialties based on liability, and physicians reporting that fear of liability discouraged open discussion and thinking about ways to reduce health care errors.

The U.S. Department of Health and Human Services estimates the cost of defensive medicine to be between \$70 billion and \$126 billion a year. The Physician Insurers Association of America’s claim trend analysis revealed that average settlements increased from \$212,861 to \$335,847 between 1997 and 2006. Only 6 percent of those claims went to a jury verdict, where the defendant won 91 percent of the cases. The shocking number, however, was that the average defense costs were \$94,284 per claim where the defendant prevailed at trial, and \$18,887 where the claim was dropped or dismissed.

As a first step toward achieving the expansion of damages in animal cases, some propose to cap or limit the amount that would be recovered for loss of a pet. Pro-

posed caps have ranged from \$5,000 to \$25,000 per incident. However, caps can and will be raised. For example, the Tennessee statute contained a cap on non-economic damages in negligence cases of \$4,000 when originally enacted in 2002. Within two years, that cap was raised by 25 percent to \$5,000. In addition, courts in several states have struck down medical malpractice caps as unconstitutional while leaving in place unlimited liability.

Activists contend that non-economic damages are needed to acknowledge that pets are special and valued by their owners in ways that are very different from inanimate types of property. We point out that our state laws have recognized this fact for some time. Statutes in all 50 states protect pets from cruelty, abuse, neglect, and torture. These laws, which don’t apply to any other kind of legal property, serve as recognition that pets are living, unique, and special. We don’t believe there is any reason to make a drastic change in the existing tort system simply to make a symbolic statement.

Another argument frequently made in support for expanding damages is that they are needed to deter veterinary negligence. This ignores the fact that all state legislatures in the United States have created veterinary medical boards to discipline veterinarians where there is evidence of misconduct or incompetence. Given the sacrifices of time and money required to become a veterinarian, the risk of losing a license or having it suspended or restricted is a serious deterrent indeed.

The premise that fear of litigation will stamp out negligence has been challenged by research. Studies suggest that a substantial majority of malpractice claims in

human medicine are not based on actual provider carelessness, and the only significant predictor of payment to medical liability plaintiffs in terms of jury verdicts or settlements is the severity of plaintiff’s disability, not the presence of an adverse event owing to negligence.

Some argue that non-economic damages will bring the law in line with modern realities and wishes of the American public. In our experience, only a small number of animal rights activists and attorneys are pushing this issue. State legislatures consistently reject proposals to extend non-economic damages to lawsuits alleging veterinary negligence. The reason is that their constituents are pleased with the quality of services provided by animal care providers and do not believe that veterinary malpractice is a problem needing to be rectified through a solution that will increase the cost of caring for animals. This is a classic case of a solution looking for a problem to advance an ideological agenda.

Most Americans do not wish to embrace the litigious nature of the human health care delivery model. The human-animal bond has grown and flourished under a legal system that, for 250 years, has not allowed for pain and suffering, loss of companionship, or any other type of “soft” awards for emotional or non-economic compensatory damages in animal litigation.

Employing the big hammer of non-economic damages in order to provide considerable financial awards to a small number of pet owners and attorneys does not justify compromising the quality and affordability of the entire animal health care system. We think America’s pets are worth more than that. **GPSOLO**

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# Pit Bull Bans: The State of Breed-Specific Legislation

By Dana M. Campbell





Brand X Pictures/Jupiter Images Unlimited

**W**hen animal control officers in Kansas City, Kansas, seized Mike and Amy Johnson's dog Niko in 2007 for violating the city's ban against harboring pit bulls, it took eight months of legal wrangling and a DNA test on Niko before the city agreed with what the Johnsons and their paperwork had been saying all along—that Niko was a boxer mix. During that time Niko waited in an animal control kennel, separated from his family, losing weight and fur, and picking up a cough. It's hard not to draw comparisons between the Innocence Project, which has used DNA evidence to free from prison hundreds of wrongly convicted persons, and the case of Niko the dog. The case of the wrongly accused Niko and his eight-month imprisonment for being judged as something he was not provides a good illustration of many of the controversies currently surrounding the topic of "breed" bans, also known as "pit bull bans" or "breed-specific legislation" (BSL).

#### **What Problems Prompted BSL?**

Dealing with dangerous dogs is a problem that has perplexed communities for ages, leading some of them to resort to passing laws banning certain breeds perceived as especially prone to dangerous behavior, usually after a well-publicized attack on a human. In fact, a spokesman for the KCK Kennels where Niko was held said the ban is there to protect people, adding that a pit bull had attacked and killed an elderly woman about a year before Niko was seized. These efforts to purge certain breeds are perhaps the easiest ways to attempt to reduce the probability of an attack by simply reducing the mere presence of certain types of dogs in a community. Other communities place restrictions on the owners of certain breeds without

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## Challenges to BSL have focused on substantive due process, equal protection, and vagueness.

completely banning the breeds.

The American Kennel Club (AKC), the nation's largest dog-breed registry, does not recognize a "pit bull" breed per se. The AKC-recognized breeds most commonly included within current BSL are Bull Terriers, American Staffordshire Terriers, and Staffordshire Bull Terriers. Also frequently included are Rottweilers, Chow Chows, Mastiffs, and Presa Canarios. But the focus of public and government concern has not always been pit bulls; in the 1970s the concern was over German Shepherds, and in the 1980s, Doberman Pinschers.

### Who Has Passed BSL?

Hundreds of municipalities of all sizes and geographic locations throughout the country have adopted BSL. (One of the most comprehensive, up-to-date lists of BSL jurisdictions can be found at [www.understand-a-bull.com](http://www.understand-a-bull.com).) Still other towns are repealing existing bans, such as Edwardsville, Kansas, which removed its pit bull ban after the nearby Niko case ended.

In 2009 new statewide BSL bills were introduced in Hawaii, Montana, and Oregon, where there are two BSL bills pending. One would ban "pit bulls" from Oregon unless a person has obtained a permit within 90 days of the bill's passage; the other would require minimum liability insurance coverage of \$1 million for pit bull owners. Although other jurisdictions, as well as insurance companies, have also implemented provisions requiring minimum liability insurance coverage for owners of certain breeds, Oregon's bill may be the first to cross the million-dollar threshold if it passes. Because some dog owners will be unable to obtain such insurance owing to the cost or the nature of their dog, these requirements act as an indirect restriction on ownership of certain breeds.

Interestingly, 12 states have passed laws *prohibiting* the passage of BSL by local governments: Florida and Pennsylvania (although bills are currently pending to repeal this prohibition in both states), California, Colorado, Illinois, Maine, Minnesota, New Jersey, New York, Oklahoma, Texas, and Virginia. Like the other 11 states, California has ruled that no specific dog breed mix shall be declared potentially dangerous or vi-

ciuous as a matter of breed, but it does allow BSL related to mandatory spay/neuter programs, meaning it requires dogs of certain breeds to be "fixed." The city of Denver has perhaps the most tortured history with BSL. Denver passed BSL in 1989, but the Colorado State Legislature outlawed BSL in 2004. Denver later reinstated BSL after the city challenged the state's BSL prohibition, and a judge ruled that Denver's BSL could be allowed to stand as a home rule exception.

Just two weeks before President George W. Bush left office, the U.S. Army issued a memo detailing pet policy changes for privatized housing on military installations; the memo bans American or English Staffordshire Bull Terriers, Rottweilers, Chow Chows, Doberman Pinschers, and wolf hybrids as well as a host of other pets and exotic animals including reptiles, rats, hedgehogs, ferrets, and farm animals. The policy, which went into effect immediately, grandfathers in existing pets and contains a clause allowing for certain exceptions but lists no criteria for the exceptions. Some military families have lamented online and in the media that the nature of military service requires frequent moves from base to base, making the grandfather clause nearly meaningless. The Obama administration has promised to look into the military's breed ban but has not yet rendered an opinion on whether it would be allowed to stand.

### BSL in the Courts

Court cases challenging BSL have focused on constitutional concerns such as substantive due process, equal protection, and vagueness. Most BSL will survive the minimum scrutiny analysis allowed by the due process clauses of the Constitution's Fifth and Fourteenth Amendments because there is no fundamental right at issue. This analysis requires that the law being challenged must be rationally related to a legitimate government goal or purpose. Because state and local jurisdictions enjoy broad police powers, including protecting the public's safety and welfare, courts have not had trouble finding that BSL is rationally related to the goal of protecting the public from allegedly dangerous breeds.



Challenges based on equal protection arguments are similarly difficult to sustain. Here courts are looking at whether there is a rational purpose for treating pit bull breeds differently from other dog breeds. Dog owners have attacked the rational purpose requirement by arguing either that BSL is over-inclusive, because it bans all dogs of a breed when only certain individuals within the breed have proven to be vicious, or under-inclusive, because many types of dogs have injured people and the BSL fails to include those other breeds. However, again under minimum scrutiny review, BSL will survive as long as the government can establish that the BSL is rationally related to its purpose, even if the law is found to be over-inclusive or under-inclusive.

Claims that BSL is unconstitutionally vague have brought dog owners mixed success. Procedural due process requires that laws provide the public with sufficient notice of the activity or conduct being regulated or banned. Here owners of pit bulls or other banned breeds argue that the breed ban laws do not adequately define just what is a “pit bull” (or other banned breed) for purposes of the ban. Another argument is that the laws are too vague to help the dog-owning public or the BSL enforcement agency—such as animal control or police—to be able to identify whether a dog falls under the BSL if the dog was adopted with an unknown origin or is a mixed breed. In the Niko case it took a DNA test to resolve this issue, after which the charges based on the BSL were dropped.

### **Enforcement Issues**

Enforcement of BSL naturally leads to the question: Who determines whether a dog is one of the banned or regulated breeds, and what is the procedure for that determination? Surprisingly, in places such as North Salt Lake, Utah, the city manager has sole authority to make that call. In other places it is the mayor or animal control officers. No special training in breed identification is required. Some jurisdictions have passed their BSL legislation without any input from a veterinarian, presumably the type of expert most capable of identifying dog breeds. Attorney

Ledy VanKavage has spent the last decade studying BSL and is considered one of the country’s foremost experts on the subject. She is now general counsel for Best Friends Animal Society after working for years as the senior director of legislation and legal training for the American Society for the Prevention of Cruelty to Animals (ASPCA). She calls BSL “breed discrimination laws” and asserts that with the advance of DNA analysis for dogs becoming more available, the days of mere “canine profiling” and arbitrary enforcement are numbered. VanKavage believes that because the government has the burden of proving that a dog is one of the breeds banned or regulated by BSL, cities will have to seriously weigh whether they should pony up the high cost of DNA tests or simply give up trying to enforce BSL.

### **Is BSL Effective?**

Extensive studies of the effectiveness of BSL in reducing the number of persons harmed by dog attacks were done in Spain and Great Britain. Both studies concluded that their “dangerous animals acts,” which included pit bull bans, had no effect at all on stopping dog attacks. The Spanish study further found that the breeds most responsible for bites—both before and after the breed bans—were those breeds not covered by it, primarily German Shepherds and mixed breeds.

One of the few known instances in which a breed ban’s effectiveness was examined and reported on in the United States occurred in Prince George’s County, Maryland, where a task force was formed in 2003 to look at the effectiveness of its pit bull ban. The task force concluded that the public’s safety had not improved as a result of the ban, despite the fact that the county had spent more than \$250,000 per year to round up and destroy banned dogs. Finding that other, non-breed-specific laws already on the books covered vicious animal, nuisance, leash, and other public health and safety concerns, the task force recommended repealing the ban.

In a different study looking at dog-bite data, the U.S. Centers for Disease Control and Prevention, the Humane Society of the United States, and the American

**Enforcement leads to the question: Who determines whether a dog is one of the banned or regulated breeds?**

## Skewed news coverage might influence calls for breed bans from a frightened public and its legislators.

Veterinary Medical Association together produced a report titled “Breeds of Dogs Involved in Fatal Human Attacks in the US between 1979 and 1998,” which appeared in the September 15, 2000, issue of the *Journal of the American Veterinary Medical Association*. Among its findings, the study reported that during this 20-year period, more than 25 breeds of dogs were involved in 238 human fatalities. Pit bull-type dogs caused 66 of the fatalities, which averages out to just over three fatal attacks per year, and Rottweilers were cited as causing 39 of the fatalities. The rest were caused by other purebreds and mixed breeds. At the time the report was released, Dr. Gail C. Golab, one of the study’s co-authors, was quoted as saying, “[s]ince 1975, dogs belonging to more than 30 breeds—including Dachshunds, Golden Retrievers, Labrador Retrievers, and a Yorkshire Terrier—have been responsible for fatal attacks on people.”

The authors noted that the data in the report cannot be used to infer any breed-specific risk for dog bite fatalities, such as for pit bull-type dogs or Rottweilers, because to obtain such risk information it would be necessary to know the total numbers of each breed currently residing in the United States, and that information is unavailable.

A 2008 report on media bias by the National Canine Research Council (available on their website at <http://nationalcanineresearchcouncil.com/dog-bites/dog-bites-and-the-media/audience-interest>) compared the type of media coverage given for dog attacks that occurred during a four-day period in August 2007 with intriguing results:

- On day one, a Labrador mix attacked an elderly man, sending him to the hospital. News stories of his attack appeared in one article in the local paper.
- On day two, a mixed-breed dog fatally injured a child. The local paper ran two stories.
- On day three, a mixed-breed dog attacked a child, sending him to the hospital. One article ran in the local paper.
- On day four, two pit bulls that broke off their chains attacked a woman trying to protect her small dog. She

was hospitalized. Her dog was uninjured. This attack was reported in more than 230 articles in national and international newspapers and on the major cable news networks.

It is not a stretch to see how such news coverage could influence calls for breed bans from the frightened public and its legislators.

### Options Beyond BSL

The National Canine Research Council has identified the most common factors found in fatal dog attacks occurring in 2006:

- 97 percent of the dogs involved were not spayed or neutered.
- 84 percent of the attacks involved owners who had abused or neglected their dogs, failed to contain their dogs, or failed to properly chain their dogs.
- 78 percent of the dogs were not kept as pets but as guard, breeding, or yard dogs.

Stephan Otto, director of legislative affairs for the Animal Legal Defense Fund, notes that “if a person keeps a dangerous dog to guard their drugs or property or for fighting purposes, they’ll just switch to a different breed and train that dog to be dangerous to get around a breed ban. The BSL accomplishes nothing in those cases.”

VanKavage points to all of the above factors as reasons for communities to focus on “reckless owners” rather than singling out specific breeds to be regulated, and she recommends improving dangerous dog laws generally, addressing the above factors without singling out any breeds. She cites St. Paul, Minnesota, and Tacoma, Washington, as both having passed model laws in 2007 that target troublesome pet owners.

The ASPCA has proposed a list of solutions for inclusion in breed-neutral laws that hold reckless dog owners accountable for their aggressive animals:

- Enhanced enforcement of dog license laws, with adequate fees to augment animal control budgets and surcharges on ownership of unaltered dogs to help fund low-cost pet-sterilization programs. High-penalty fees should be imposed on those who fail to license a dog.

- Enhanced enforcement of leash/dog-at-large laws, with adequate penalties to supplement animal control funding and to ensure the law is taken seriously.
- Dangerous dog laws that are breed neutral and focus on the behavior of the individual dog, with mandated sterilization and microchipping of dogs deemed dangerous and options for mandating muzzling, confinement, adult supervision, training, owner education, and a hearings process with gradually increasing penalties, including euthanasia, in aggravated circumstances such as when a dog causes unjustified injury or simply cannot be controlled. (“Unjustified” typically is taken to mean the dog was not being harmed or provoked by anyone when the attack occurred.)
- Laws that hold dog owners financially accountable for failure to adhere to animal control laws, and also hold them civilly and criminally liable for unjustified injuries or damage caused by their dogs.
- Laws that prohibit chaining or tethering, coupled with enhanced enforcement of animal cruelty and fighting laws. Studies have shown that chained dogs are an attractive nuisance to children and others who approach them.
- Laws that mandate the sterilization of shelter animals and make low-cost sterilization services widely available.

Recently, VanKavage revealed that Best Friends Animal Society has developed an economic analysis tool (view it at their website, [www.bestfriends.org](http://www.bestfriends.org)) that would help cities determine the potential fiscal impact of enforcing BSL versus having a good non-breed-specific dangerous dog law in place. Armed with this tool, cities can now consider cost as one additional factor to weigh before deciding to enact BSL.

National animal organizations such as the American Veterinary Medical Association, Humane Society of the United States, Animal Legal Defense Fund, Best

Friends Animal Society, American Society for the Prevention of Cruelty to Animals, the American Kennel Club, and the National Animal Control Association all oppose BSL. Otto sums up their position this way: “If the goal is dog-bite prevention, then dogs should be treated as individuals under effective dangerous dog laws and not as part of a breed painted with certain traits that may not be applicable to each dog. By doing so, owners of well-trained, gentle dogs are not punished by a breed ban, while dangerous dogs of all breeds are regulated and may have their day in court to be proven dangerous.”

As an example, consider the 2007 Michael Vick dogfighting case in Virginia, in which 50 of the former pro football player’s fighting dogs were seized and about to be euthanized according to conventional wisdom that dogs trained to fight to the death are too dangerous to humans and other animals and cannot be retrained. However, in an unprecedented move, the court agreed with amicus briefs filed by animal welfare groups and appointed a special master, animal law professor Rebecca Huss, as a guardian for the dogs to oversee temperament evaluations to be done on each dog by a team of behaviorists. As a result, only one dog was destroyed owing to temperament; the other 49 were saved and shipped to rescue groups, where they were rehabilitated and are now enjoying media attention as service dogs and beloved companions. Time will tell whether this unexpected outcome successfully turns on its head the argument that fighting dogs or certain breeds of dogs are inherently dangerous, untrainable, hopeless.

### **Conclusion**

The number of places passing breed bans and prohibiting breed bans continues to fluctuate widely. Perhaps the most accurate way to sum up the state of BSL in the United States today is to say the laws are controversial, generating both howls of protest and vehement support wherever they have been considered. **GPSOLO**

**Significant legal issues arise when an individual chooses to buy, sell, or own an exotic animal.**

# EXOTIC ANIMALS AS PETS

By Katherine Hessler and Tanith Balaban



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**A**ccording to the 2007-2008 National Pet Owners Survey, about 63 percent of all households in America, or about 71.1 millions homes, have at least one pet, including cats, dogs, birds, fish, reptiles, hamsters, guinea pigs, and other common animals. But there is also a brisk trade in “exotic pets” such as giraffes, monkeys, zebras, lions, tigers, chimpanzees, and yes, bears. The Humane Society of the United States estimates that billions of wild animals are brought into this country each year, many of them bound for the exotic pet market. Experts believe the exotic pet trade is a booming business, ranging from \$10 billion to \$15 billion a year in this country alone.

Although the idea of owning an exotic pet may be appealing to some, these situations often result in problems for the owners of such animals, or their neighbors, and present significant concerns for the animals themselves. Owners, breeders, and sellers of exotic animals need to be aware of applicable federal, state, and local laws. Breeders and sellers importing animals must comply with federal legislation, not only relating to importation, but also for maintaining adequate living facilities for the animals. Owners are likewise responsible for the conditions in which the animals live, as well as the safety of their neighbors. The most well known legal concerns arise when an exotic animal injures someone. For example, news reports have focused on the problem of chimpanzees as pets after a recent mauling in Connecticut resulted in significant physical harm to a friend of the owner and subsequent death of the animal.

The legal issues relating to the exotic pet trade require balancing the property

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interests of owners, breeders, and sellers with the governments’ police power to regulate nuisance and to protect public health and safety. Not only can individuals be injured by exotic animals, but public health at large can be compromised by diseases brought to a community by non-native species, such as the monkeypox outbreak stemming from pet prairie dogs in Wisconsin in 2003. The environment is also at risk. To see the harm that can be done to an ecosystem by releasing non-native animals, one only has to search the Internet for “pythons” and “Everglades.”

Finally, the animals themselves are in significant jeopardy as they are often sold to individuals without the capacity to provide appropriate food, medical care, or habitat. This combination of risk factors often leads to legal concerns. In addressing the legal concerns related to the exotic pet trade, a practitioner must be aware of the relevant federal, state, and local regulation.

#### **Local Legislation**

The first place to look for regulations applicable to exotic pets is at the local level—the city, town, or county ordinances, especially zoning ordinances regulating real property to ensure public health and safety and to combat nuisance. Sometimes health departments have regulations in addition to the city laws. Should these ordinances be hard to find, a local humane society, animal shelter, or veterinarian may have advice as they are often involved with the consequences of exotic pet ownership.

This will usually be the level where the most restrictive laws have been enacted, but the degree of regulation, the types of animals regulated, and the consequences for violations all differ widely from locale to locale.

#### **State Legislation**

The next step is to check for state regulations. A good source of information on this type of regulation is the state’s department of wildlife or natural resources department.

Exotic pet regulations also vary widely from state to state. Where some states have a complete ban on exotic pets, others require permits for their possession, and some states have no regulations what-

**Significant legal issues arise when an individual chooses to buy, sell, or own an exotic animal.**

**One of the first questions to consider is whether the animal arrived in the United States legally.**

soever. The definition of what constitutes an exotic pet will also vary widely.

In jurisdictions with licensing schemes, individuals must obtain a permit, usually from the state fish and wildlife department, prior to owning an exotic pet. Other states regulate (but do not ban or license) the possession of exotics, limiting the quantity of animals an individual may have or setting standards for importation and animal care.

**Federal Legislation**

The next step is to check federal legislation. The animal in question may require a license by the U.S. Department of Agriculture (USDA). Other agencies such as the U.S. Fish and Wildlife Service (FWS) and the U.S. Department of Agriculture's Animal and Plant Health Inspection Services (APHIS) may oversee the import and export of animals that are sold as exotic pets. Federal law affects breeders and sellers of exotic animals more than owners of exotic pets.

The reach of federal regulation is far broader than the state and local level regulations but is limited to regulating the ownership, transportation, exhibition, importation, and exportation of captive wild animals through interstate commerce and foreign policy. Because the federal government does not have a gen-

eral police power, most regulations occur at the state and local levels, where police power does allow for general regulations for the public welfare.

**Importation**

When presented with a case involving an exotic animal, one of the first questions to consider is whether the animal arrived in the United States legally. To answer this question, a lawyer needs to know if the animal is covered by the Endangered Species Act (ESA).

The ESA is a broad regulatory regime under which more than 1,000 species of animals and plants are officially listed as endangered or threatened in the United States. With limited exceptions, none of these animals may be imported or exported either alive, as parts or products, or as hunting trophies.

Generally, an importer/exporter must use one of the FWS designated ports, and the shipment must be declared through a FWS Form 3-177 (Declaration for Importation or Exportation of Fish or Wildlife) and receive clearance. In most cases, the importer/exporter also must be licensed through the FWS and pay certain fees with each shipment.

U.S.-based shipments do not have to be declared through FWS; however, the shipment must comply with foreign wildlife laws, and live wildlife must be transported humanely. A person who ships certain species (such as those listed as endangered and threatened species, migratory birds, marine mammals, or injurious species) may not be transported through the United States. There are some exceptions for those who engage in conservation of endangered and threatened species.

The APHIS, the U.S. Customs and Border Protection, the U.S. Public Health Service, the U.S. Food and Drug Administration, and the National Marine Fisheries Service also regulate the importation and exportation of wildlife and may impose additional requirements.

If the animal in question came from abroad, the importer may have needed to comply with the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). CITES is a multinational agreement to regulate trade

**SOME FEDERAL LAWS THAT IMPLICATE THE EXOTIC PET TRADE**

- African Elephant Conservation Act
- Animal Welfare Act
- Asian Elephant Conservation Act
- Captive Primate Safety Act
- Captive Wildlife Safety Act
- Eagle Protection Act
- Endangered Species Act
- Lacey Act
- Marine Mammal Protection Act
- Migratory Bird Treaty Act
- Rhinoceros and Tiger Conservation Act
- Wild Bird Conservation Act

# FOR MORE INFORMATION

For copies of applicable state and federal regulations and lists of protected species, write to the Assistant Regional Director for Law Enforcement of the U.S. Fish and Wildlife Service Office in your region.

AS, CA, GU, HI, ID, MP, NV, OR, WA      Assistant Regional Director for Law Enforcement, Region 1  
U.S. Fish and Wildlife Service  
911 NE 11th Avenue  
Portland, OR 97232-4181  
503/231-6125

AZ, NM, OK, TX      Assistant Regional Director for Law Enforcement, Region 2  
U.S. Fish and Wildlife Service  
P.O. Box 329  
Albuquerque, NM 87103  
505/248-7889

IA, IL, IN, MI, MN, MO, OH, WI      Assistant Regional Director for Law Enforcement, Region 3  
U.S. Fish and Wildlife Service  
P.O. Box 45, Federal Building  
Fort Snelling, MN 55111-0045  
612/713-5320

AL, AR, FL, GA, KY, LA, MS, NC, PR, SC, TN, VI      Assistant Regional Director for Law Enforcement, Region 4  
U.S. Fish and Wildlife Service  
P.O. Box 49226  
Atlanta, GA 30359  
404/679-7057

CT, DC, DE, MA, MD, ME, NH, NJ, NY, PA, RI, VA, VT, WV      Assistant Regional Director for Law Enforcement, Region 5  
U.S. Fish and Wildlife Service  
300 Westgate Center Drive  
Hadley, MA 01035  
413/253-8274

CO, KS, MT, NE, ND, SD, UT, WY      Assistant Regional Director for Law Enforcement, Region 6  
U.S. Fish and Wildlife Service  
P.O. Box 25486-DFC  
Denver, CO 80225  
303/236-7540

AK      Assistant Regional Director for Law Enforcement, Region 7  
U.S. Fish and Wildlife Service  
1011 E. Tudor Road, Suite 155  
Anchorage, AK 99503-6199  
907/786-3311

Headquarters      Chief  
Office of Law Enforcement  
U.S. Fish and Wildlife Service  
4401 N. Fairfax Drive, Room 520  
Arlington, VA 22203-3247  
703/358-1949

Additional information can be found at the U.S. Fish and Wildlife Service website ([www.fws.gov](http://www.fws.gov)).

## Claims against owners, breeders, and sellers will most likely be tort actions.

in endangered or threatened plant and animal species to protect the survival of wild populations. CITES is implemented pursuant to the ESA.

Some states may also impose requirements. A practitioner should contact the state fish and wildlife agency about any state-level requirements or restrictions of importation, exportation, and transportation of wildlife.

### Ownership

The next question to consider is whether ownership of the animal is regulated by federal law and subject to additional conditions on its treatment and care. Relevant laws include the ESA, the Captive Wildlife Safety Act (CWSA), and the Animal Welfare Act (AWA). There are no federal laws that regulate or prohibit keeping exotic animals as pets.

The ESA (7 U.S.C. § 136, 16 U.S.C. § 1531 *et seq.*) prohibits a person from possessing, selling, delivering, carrying, transporting, importing, exporting, or shipping, by any means whatsoever, any endangered species of fish or wildlife. The ESA also prohibits any action that causes a “taking” of any listed species of endangered fish or wildlife—this includes harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting. It is unlawful for a person to trade or possess any specimens traded in violation of CITES. There are some exceptions to this rule (for scientific purposes, for example). In these specific instances, the person must get a permit through FWS.

The CWSA (Pub. L. 108-191, 117 Stat. 2871-2872), which went into effect September 17, 2007, prohibits the interstate commerce of live big cats across state lines or U.S. borders unless the person qualifies for an exemption. Big cats covered by the CWSA include lions, tigers, leopards, snow leopards, clouded leopards, jaguars, cheetahs, and cougars; all subspecies of these species; and hybrid combinations of these species. Penalties can result in jail terms of up to five years and fines of up to \$500,000.

Also note that any retail pet store that sells exotic pets must be licensed as a dealer under the AWA (7 U.S.C. 2131 *et*

*seq.*). The AWA ensures that animals kept for use in research facilities, for exhibition purposes, or as pets are provided humane care and treatment; the AWA also ensures humane treatment during transportation. Under the AWA, the secretary of agriculture is authorized to promulgate standards and other requirements governing the humane handling, housing, care, treatment, and transportation of certain animals by dealers and other regulated businesses, such as pet stores. (Regulations established under the AWA are contained in 9 CFR parts 1, 2, and 3.)

In addition, the administrator of the APHIS regulates animal dealers by issuing them annual licenses and conducting unannounced inspections of their premises to check for compliance with the AWA standards and regulations.

There are no private rights of action under the AWA. Penalties for violations under the AWA range from \$1,500 to \$2,500 for each day of each violation and up to one year in prison.

### Possible Claims

What are the consequences to an exotic pet owner or seller/breeder if they violate a statute or if their animal causes injury to another? What happens to the animal?

Claims against pet owners, breeders, and sellers will most likely be tort actions—such as nuisance, conversion, trespass, negligence, and ultra-hazardous activities. In addition, if the animal has been abused or neglected, there may be separate charges under the applicable animal cruelty law.

An offending owner or breeder may be fined or imprisoned, and the animal may be taken, either to be euthanized or sent to a wildlife sanctuary.

However, a practitioner should be aware there may not be a claim for damages that flow from an injury through the federal or state statutes. Some federal legislation does not allow for a private right of action; instead, the aggrieved files a complaint with the appropriate federal agency.

Representing an aggrieved pet owner or breeder/seller changes the way one looks at the problem. A breeder/seller needs to comply with certain federal provisions. If these have been complied with,



then state legislation should be examined. Lastly, local regulations should be consulted. When defending an exotic pet owner, the order of research should be the opposite—local, then state, then federal—because the regulations will mostly likely be more applicable at the local level.

Besides bringing suit, exotic pet owners or breeders whose animals have been confiscated may also either challenge the applicability of the regulation to their situation or challenge the legitimacy of the regulation.

If an exotic animal has been seized by animal control or by a state or federal wildlife department, owners may challenge the agency's application of the regulation to their specific case by arguing that the animal does not fall within the parameters of the regulation. In administrative law, however, courts are deferential toward administrative determinations. A pet owner may also challenge the legislative or administrative body's authority to have passed the regulation at all.

An exotic pet owner or pet breeder may also bring constitutional challenges, both facially and as-applied. An equal protection challenge under the Fourteenth Amendment may be brought if cities or counties enact zoning ordinances restricting people from owning exotic pets but do not include an allowance for those who already own these animals to continue to do so as a non-conforming use. In addition, any zoning ordinances must apply equally to those possessing

permitted wildlife and other property owners; otherwise, the ordinances may be found invalid as applied. A procedural due process challenge under the Fifth and Fourteenth Amendments may be brought in cases where the government deprives a pet owner or breeder of property without giving appropriate notice or the opportunity to be heard. A regulatory taking challenge can also be brought under the Fifth and Fourteenth Amendments, which require "just compensation" when private property is taken for public use. If an owner or seller has violated exotic pet regulations, however, the courts have found this not to be a regulatory taking.

### Conclusion

Significant legal issues arise when an individual chooses to buy, sell, or own an exotic animal. Given the serious negative consequences that can result from this activity, significant protection is afforded by local, state, and federal law to the people adversely affected by the presence of these animals. Additionally, there are often terrible outcomes for the animals themselves, which are often not considered at the outset. Practitioners advising individuals in this context need to familiarize themselves with a very broad set of laws and regulations; the number and variety of these regulations is only likely to increase in the future owing to rising concern about the health and safety implications of exotic animals as well as concern for the welfare of the animals themselves. **GPSOLO**

**Owners and breeders may challenge the applicability or legitimacy of the regulation.**



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# Service and Support Animals in Housing Law

By John Ensminger and Frances Breitkopf



Gabe, with therapy dogs Oz and Opi, at Saugerties Junior/Senior High School, May 2009; photo by Frances Breitkopf.



Andrew, with therapy dog Opi, at Saugerties Junior/Senior High School, May 2009; photo by Frances Breitkopf.

**D**etermining the rights of a tenant or the purchaser of a condominium in the face of a no-pets policy requires a determination of what law applies to the specific situation. There are four federal regulatory regimes (two of them now virtually identical), as well as separate state statutory systems, some of which are specific to housing and real estate and some of which are mixed in with more general public accommodation access rules. There has been a general trend, most noticeably in the regulatory releases of the U.S. Department of Housing and Urban Development (HUD), to acknowledge that tenants should often be accommodated in their requests to be accompanied by animals that are not specifically trained as guide dogs or other service animals, and that these requests come from legitimate needs for emotional support. Even here, however, there is an acknowledgement that the health and comfort of the tenant must be balanced against the inconvenience to other residents and the costs to the housing facility.

There is also an increasing acknowledgment that, even where the standard for admission of an animal is its qualification as a service animal, such animals may not always have to be trained, at least beyond a basic obedience level. There is, for instance, increasing evidence that seizure-alert dogs are often not trained to react to oncoming seizures. This may also be true of hypoglycemia-alert dogs (a new category), or severe migraine-alert dogs (a skill documented several times). Many states specify that service animals must

be trained, yet states such as Illinois and New Jersey also include seizure-alerting as a type of service that qualifies a dog as a service animal. Both federal and state legislatures and the courts must recognize that the number of tasks that dogs can perform is increasing, and the level and type of training needed to make dogs useful to disabled individuals vary considerably depending on the service provided. The boundary between pets and service animals is no longer as simple as it seemed when service dogs could be categorized as those that helped the blind, deaf, or mobility impaired.

Courts that have faced inconsistencies between federal and state law regarding the rights of the handicapped with respect to service and emotional support animals have favored the federal laws. (See, e.g., *Green v. Housing Authority of Clackamas County*, 994 F.Supp. 1253, D. Oregon 1998, which found a state law that signal dogs must use orange leashes could not preempt federal law on what qualifies as a service animal.) State laws cannot be ignored, however. A number of states, for instance, put trainers of service animals on a par with the individuals who will ultimately use the animals once they have been trained. Thus, many states have statutes that provide a trainer of guide dogs can take such a dog into a restaurant. Some states give such blanket equality in this respect that a trainer would have a right to housing at the same level as the ultimate user of the animal. The authors have found no decision directly in point, but we suspect that this is because most trainers work with a number of dogs, not all of which are being trained as service animals, and would not particularly want to live in a building that was not friendly to animals.

### **Regulatory Regimes**

Three sets of regulations have been issued regarding housing and pets or assistance animals by HUD, covering respectively (1) a handicapped person in almost any dwelling unit, (2) persons in projects for the elderly or persons with disabilities under federally administered and subsidized housing programs, and (3) persons with disabilities in public housing. Both

**The boundary between pets and service animals is no longer as simple as it once seemed.**

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**The animal does not need to be a trained service animal as long as the tenant needs the accommodation.**

the second and third sets of regulations implement legislation designed to recognize the importance of animals in the lives of the elderly, disabled, and individuals living in subsidized housing. Finally, regulations issued by the U.S. Department of Justice apply to places of public accommodation, which include inns, hotels, and other places of lodging, including single-room-occupancy hotels where renters may rent for a short term.

**General HUD anti-discrimination rule.** The first of the three HUD regulations implements the Fair Housing Amendments Act of 1988, 42 U.S.C. 3601 et seq. Under the act, discrimination in the sale or rental of a dwelling to a buyer or renter because of a handicap is unlawful. Discrimination includes, under 42 U.S.C. 3604(f)(3)(B), “a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.” An example in 24 CFR 100.204(b)(1) concerns a guide dog:

A blind applicant for rental housing wants to live in a dwelling unit with a seeing eye dog. The building has a *no pets* policy. It is a violation of §100.204 for the owner or manager of the apartment complex to refuse to permit the applicant to live in the apartment with a seeing eye dog because, without the seeing eye dog, the blind person will not have an equal opportunity to use and enjoy a dwelling.

The principle is broader than just guide dogs and applies at least to all service dogs.

**Rules regarding projects for the elderly and persons with disabilities.** In October 2008, HUD amended regulations governing requirements for pet ownership in HUD-assisted public housing and multifamily housing projects for the elderly and persons with disabilities (72 Fed. Reg. 58448, October 27, 2008). Under 24 CFR 5.303, as amended, project owners and public housing agencies may not apply or enforce policies (such as no-pets policies) against animals “that are necessary as a reasonable accommodation to assist, support, or provide service to persons with disabilities.” The new

rule applies to assistance animals that reside in projects for the elderly or persons with disabilities, as well as to animals that visit the projects. Animals that visit the projects to provide support could include therapy dogs and their handlers involved in visitation programs.

Prior to the amendments to 24 CFR Part 5, a tenant had to certify that he or a member of his family was a person with a disability, the animal had been trained to assist persons with that specific disability, and the animal actually assisted with that disability. HUD eliminated this requirement and now says, according to the preamble, that housing agencies are authorized to verify that the animal qualifies as a reasonable accommodation if:

(1) An individual has a disability, as defined in the Fair Housing Act or Section 504, (2) the animal is needed to assist with the disability, and (3) the individual who requests the reasonable accommodation demonstrates that there is a relationship between the disability and the assistance that the animal provides.

There must, therefore, be “an identifiable relationship, or nexus, between the requested accommodation and the person’s disability.” Further:

The Department’s position has been that animals necessary as a reasonable accommodation do not necessarily need to have specialized training. Some animals perform tasks that require training, and others provide assistance that does not require training. Thus, the animal does not need to be a trained service animal, or even be a service animal, as long as the tenant needs the accommodation:

[P]ersons who are seeking a reasonable accommodation for an emotional support animal may be required to provide documentation from a physician, psychiatrist, social worker, or other mental health professional that the animal provides support that alleviates at least one of the identified symptoms or effects of the existing disability.

This does not mean that any animal providing some benefit to a tenant must always be accepted. The mental health professional must connect the tenant’s



possession of the animal with an alleviation of at least one symptom of the disability. This requires more than a mere statement that a dog or cat makes a tenant feel good. Alleviating depression (if depression is a symptom of the mental condition, or the condition itself) is a function of an emotional support animal and should satisfy the requirement.

An animal with a history of dangerous behavior need not be accepted:

[A] housing provider is not required to make a reasonable accommodation if the presence of the assistance animal would (1) result in substantial physical damage to the property of others unless the threat can be eliminated or significantly reduced by a reasonable accommodation; (2) pose an undue financial and administrative burden; or (3) fundamentally alter the nature of the provider's operations.

A fundamental alteration would include an animal that is not kept in specified areas or defecates and urinates in public spaces other than those designated as dog walks. Just because a tenant has a need for an animal does not mean that he or she must not care for it.

**Rules regarding public housing.** A separate rule covers animals that assist, support, or provide service to persons with disabilities who live in public housing, other than housing developments for the elderly or persons with disabilities. This rule, in 24 CFR 960.705, reads in all substantive respects the same as that of 24 CFR 5.303, discussed above. Much of the analysis in the preamble to the 2008 revision of rules regarding housing for the elderly and disabled—the nexus requirement (between the disability and the requested accommodation), the fact that some assistance animals do not require training (e.g., seizure-alert dogs), and that emotional support is an acceptable assistance function—should apply to public housing situations and probably all rental accommodations.

**Rules regarding public accommodations, including short-term lodging.** In 28 CFR 36.104, the Department of Justice defines a service animal as a

guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individ-

ual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.

This is a narrower definition than that used in the HUD rules in that it requires that the animal be trained and “do work or perform tasks.” This excludes emotional support animals and may exclude seizure-alert dogs that have not been trained to perform other functions. However, many seizure-alert dogs are trained for other functions. One study found that 59 percent of dogs trained as seizure-response dogs (dogs trained to bring medication and help to the owner during a seizure) spontaneously developed seizure-alert capabilities once placed with families.

Service animals, under 28 CFR 36.302(c)(1), are to be admitted to places of public accommodation, which include an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of the establishment as the residence of the proprietor.

Appendix B to 28 CFR Part 36 (originally the preamble to the 1991 regulatory issuance) distinguishes places of lodging from a residence:

[I]n a large hotel that has a separate residential apartment wing, the residential wing would not be covered by the ADA [28 CFR Part 36] because of the nature of the occupancy of that part of the facility. This residential wing would, however, be covered by the Fair Housing Act [for our purposes, 24 CFR 100.204]. The separate non-residential accommodations in the rest of the hotel would be a place of lodging, and thus a public accommodation subject to the requirements of this final rule. If a hotel allows both residential and short-term stays, but does not allocate space for these different uses in separate, discrete units, both the ADA and the Fair Housing Act may apply to the facility.

Extensive revisions to 28 CFR Part 36

**An animal with a history of dangerous behavior need not be accepted.**

## Can a landlord reject a particular emotional support animal and still make a reasonable accommodation?

were proposed by the Department of Justice in 2008 (73 Fed. Reg. 34508, June 17, 2008), which, among other things, would alter the definition of “place of lodging” to include time-shares, condominium hotels, mixed-use, and corporate hotel facilities. The preamble to the proposal discusses places of lodging in detail, but as of this writing there are no indications when, or even if, the proposal will be finalized. (The proposal has encountered resistance from, among others, the fledgling guide horse industry, which provides miniature horses with guiding skills to the blind but which would not be considered service animals if the rules were finalized.)

Despite the limited application of 28 CFR Part 36 in the context of rental housing, this part of the Code is sometimes relied on by courts analyzing more permanent housing situations. (See, e.g., *Prindable v. Association of Apartment Owners of 2987 Kalakaua*, 204 F.Supp.2d 1245 (D. Hawaii 2003), which found no evidence that the dog was an individually trained service animal, so no accommodation was deemed necessary.)

### Emotional Support Animals in Housing

The Department of Justice in the 2008 proposal makes clear that animals “whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or promote emotional well-being are not service animals.” Curiously, however, the Department concedes that its position may not be appropriate in the housing context:

The Department recognizes, however, that there are situations . . . particularly in the context of residential settings and employment, where there may be compelling reasons to permit the use of animals whose presence provides emotional support to a person with a disability. Accordingly, other federal agency regulations governing those situations may appropriately provide for increased access for animals other than service animals. (73 Fed. Reg. 34516)

The question, then, is how broadly should HUD’s pronouncements regarding emotional support animals in projects for the elderly and disabled apply to housing in general (other than short-term housing

covered by Department of Justice rules). The authors believe that there should be such uniformity and that the better reasoned case law supports such an argument.

A case from the Northern District of California, *Janush v. Charities Housing Development Corp.* (169 F.Supp.2d 1133 (ND Cal. 2000)), held that, where a tenant owned two birds and two cats, the landlord failed to establish that there was no duty to reasonably accommodate non-service animals. In *Majors v. Housing Authority of the County of DeKalb, Georgia* (652 F.2d 454 (5th Cir. 1981)), the Fifth Circuit dealt with a case where the tenant sought to avoid eviction for keeping a small poodle in her apartment in a federally subsidized project. Although the decision was largely based on the Rehabilitation Act of 1973, 24 U.S.C. 794, the court remanded to the trial court for consideration of whether a reasonable accommodation could be made, given that the tenant had a mental disability that required her to keep the dog in her apartment. Both *Janush* and *Majors* were cited by HUD in its 2008 rulemaking on housing for the elderly and disabled (73 Fed. Reg. 63837), noting that “the Department’s position is consistent with federal case law that has recognized, in cases involving emotional support animals in the housing context, that whether a particular accommodation is reasonable is a fact-intensive, case-specific determination.” Courts have also recognized that training of service dogs need not always be formal. In *Bronk v. Ineichen* (54 F.3d 425 (7th Cir. 1995)), the Seventh Circuit found a trial court’s jury instructions improper in implying that a hearing (or signal) dog needed training from a certified school.

There are, admittedly, cases that have not been as accepting of non-service animals. A Massachusetts state court case, *Nason v. Stone Hill Realty Association* (Mass. 1996), held that a tenant failed to show a clear nexus between her multiple sclerosis and her need to have a cat, despite her physician’s statement that she would suffer serious negative consequences if deprived of the cat. (The physician’s letter did not sufficiently correlate the tenant’s condition with the presence of the

cat.) The court suggested that “chemical therapy” might work as well as a cat.

A question that has arisen occasionally concerns whether a landlord may reject a particular emotional support animal and still make a reasonable accommodation. In *Oras v. Housing Authority of the City of Bayonne* (373 NJ Super. 302, 861 A.2d 194 (2004)), the court held that a landlord could not impose a 20-pound limit that applied to pets in a public housing authority to prohibit a tenant from keeping a dog that provided emotional support but that happened to weigh more. In an unpublished order from 2002 (*Zatopa v. Lowe*), however, the district court for the Northern District of California allowed a landlord to exclude a pit bull mix because of the reputation of pit bulls, despite the fact that testimony regarding the specific dog suggested strongly that it was a gentle animal. The landlord had been willing to accept a “safe and gentle breed,” such as a Cocker Spaniel. The order was unfortunate because an attachment had already formed between the dog, obtained from

a pound, and its owner, a man suffering from AIDS and depression. If the dog turned out to be dangerous, or beyond the control of the tenant, the landlord would be able to remove the dog on that basis, but in the opinion of the authors, a dog should not be excluded based on the public perception of a breed.

#### **Conclusion**

Using dogs in therapeutic settings is undergoing phenomenal growth. The evidence for the benefits of animals is found in a substantial and well-researched medical and psychological literature, and the authors have collected more than 500 articles related to various aspects of this issue. Although restaurants have good arguments for excluding animals that have not been trained to a sufficient level, this approach is not valid for housing. This is an area where scientific advancements argue for flexibility in the law and tolerance from landlords in whose buildings disabled individuals wish to live. **GPSOLO**

**Scientific advancements argue for flexibility in the law and tolerance from landlords.**

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Canine Companions for Independence



# CANINES IN THE COURTROOM

By Debra S. Hart-Cohen

**R**esearch into the benefits of human-animal bonding dates to the 1700s in York, England, where the Society of Friends established a facility called The Retreat to provide humane treatment for the mentally ill. Society officials theorized that having patients care for the many farm animals on the estate would aid in the patients' rehabilitation.

Through the ensuing three centuries, therapists, sociologists, pediatricians, and psychologists have devoted countless hours researching the physiological benefits of human-animal interactions. Such studies have shown that the mere presence of a friendly animal can result in decreased anxiety and lessened sympathetic nervous systems arousal. Benefits include reduced blood pressure, lowered heart rate, a decrease in depression, increased speech and memory functions, and heightened mental clarity.

As a result of these studies, many in the criminal justice systems have become convinced of the positive effects of using animals as a "comfort item" to aid victims during their testimony in the courtroom, particularly in child abuse cases.

The use of "support persons" and "comfort items" by victims and witnesses in court has been widely accepted—and supported by general case law—for years.

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Specific statutes or rules may also apply, depending on the jurisdiction. The use of such support persons and items is almost always applicable in cases involving children, and often with adults, as well. In cases involving children, support persons can include parents, teachers, or victim advocates. Comfort items have traditionally included familiar objects such as toys or dolls.

Increasingly, however, child advocates in the courts are expanding this list to include animals such as therapy dogs. Indeed, prosecutors and judges are finding that the presence of a well-trained dog aids witness testimony by providing the victim with emotional support and comfort both in the witness room and in the courtroom. Success stories are beginning to emerge demonstrating that the use of canines in the courtroom not only provides the victim with a more positive outcome but also offers the victim a positive, life-changing experience.

One of the original courthouse dogs to aid young victims was a German Shepherd named Vachss, used by the Children's Advocacy Center (CAC) in Jackson, Mississippi, in the 1990s. In 1994 Vachss was presented with the Hero of the Year award for his role comforting children in the courtroom while they testified in abuse cases. (For more on the story of Vachss, along with a memorandum supporting the use of a dog to accompany the witness to the stand, see [www.vachss.com/dogs/vachss\\_dog.html](http://www.vachss.com/dogs/vachss_dog.html).)

More recently, the Children's Advocacy Center of Johnson County, Cleburne, Texas, has started using a therapy dog program. They have dogs accompany children in the courts and the interviewing rooms. The program, the first of its kind in Texas, has been such a success that the prosecutors' offices in California, Colorado, Idaho, and Michigan have contact-

# THERAPY DOGS VERSUS SERVICE DOGS

People often confuse “therapy dogs” with “service dogs,” but these are two distinct terms and carry with them different levels of protection under the law.

## Therapy Dogs

A therapy dog is specially trained to offer comfort, companionship, and affection to those in need of a friendly presence. These gentle animals are used in a variety of situations, including courtrooms, nursing homes, hospitals, schools, mental facilities, and disaster areas. Activities involving therapy dogs (or other therapy animals) are usually classified as AAA (animal assisted activities) or AAT (animal assisted therapy). The use of animals as therapeutic companions appears to help people relax, reduce their level of stress, and feel more comfortable in their environment, whether it be a hospital or a courtroom.

To qualify as a therapy dog, the animal must be evaluated and registered with a national organization such as Therapy Dogs International (TDI; [www.tdi-dog.org](http://www.tdi-dog.org)) or the Delta Society ([www.deltasociety.org](http://www.deltasociety.org)). Most of these organizations offer training and volunteer opportunities for both the dog and the dog handler. The therapy dog is only half of the therapy team; the handler, most frequently the dog owner, is the other half. Organizations such as Land of PureGold Foundation (<http://landofpuregold.com>) offer dog therapy volunteer opportunities for people who do not own a dog.

Note that even with a certificate from one of these organizations, “therapy dog” is not a legally recognized title. Although certain facilities may allow, and even encourage, these pets to visit, therapy animals do not have the legal *right* to do so.

## Service Dogs

Service dogs (also called companion dogs) are canines that play an important, defined role in the life of a disabled human partner. Service dogs provide their disabled partners more independence and self-sufficiency. The training for a service animal represents months of hard work, as the animal must be trained to be good natured and obedient in a variety of situations while also protecting its owner.

Some breeds are favored over others as service dogs, but the primary concern is the animal’s temperament. The dog must be patient, friendly, kind, and gentle with a wide variety of people in an assortment of circumstances. Although its owner undoubtedly loves it, a service animal is *not* a *pet*. It is a *working animal* with important responsibilities to enhance the quality of its owner’s life.

Most nations have laws protecting the rights of service animals aiding disabled persons. In the United States service animals enjoy extensive legal protections under the Americans with Disabilities Act (ADA). According to the ADA, a service animal must be allowed everywhere its owner is and shall not be treated as a “pet” by business owners. This law supersedes local ordinances, which may, for example, prohibit dogs from restaurants. Failure to admit someone with a service animal into a business or workplace is grounds for what could be a very serious lawsuit. Most service dogs wear an identifying jacket or patch to mark them as a service animal at work.

Owners often carry ID cards for their service dogs to ensure they will be permitted into public facilities without incident. For more information, and to learn how to obtain valid certification and ID cards for service dogs, see the Registered Service Dogs website ([www.registeredservicedogs.com](http://www.registeredservicedogs.com)).

ed the center for advice on starting their own courtroom therapy dog programs. In 2007 the *National Center for Prosecution of Child Abuse Update* newsletter ran a two-part “Animal Assistance” series discussing the program (both parts, “The Use of Animal Assistance at Child Advocacy Centers” and “Pets in the Courtroom: The New ‘Comfort Item,’” are available online at the National District Attorneys Association website, [www.ndaa.org](http://www.ndaa.org)).

In Florida the Second Judicial Circuit has partnered with the Office of the State Attorney, the Leon County Board of County Commissioners, and a local volunteer animal visitation program called ComForT to create the Pet Therapy in the Courts Program. According to Susan Wilson, Leon County’s senior deputy court administrator and the program’s coordinator, “[t]he goal of the program is to have the dogs provide comfort to reduce the victim’s anxiety, resulting in more accurate testimony” (“Comfort for Crime Victims in the Court System,” [www.2ndcircuit.leon.fl.us/newsmagazine/Resources/pettherapy.pdf](http://www.2ndcircuit.leon.fl.us/newsmagazine/Resources/pettherapy.pdf)). Because of the program’s success, state attorney victim advocates now mail brochures about it to victims of violent crimes following the defendant’s first court appearance. Helene Pollock, director of the Victim/Witness Assistance Program for State Attorney Willie Meggs, states, “We’re confident that many crime victims and their families will benefit from this program.”

In Carroll County, Maryland, an 11-month-old Black Lab/Newfoundland mix named Buddy aided the State Attorney’s Office with a child abuse case involving a four-year-old female. In the presence of Buddy, this young victim became comfortable talking to prosecutors and agreed to testify; her abuser ultimately opted out of a trial, and the court convicted him on child abuse charges. (For more, see the ABC News story “Victims Find a ‘Buddy’ at the Courthouse” at <http://abcnews.go.com/TheLaw/Story?id=5244356&page=1> and the CrimProf Blog entry “Therapy Dogs Easing Stress for Victims of Violent Crime as They Prepare to Testify” at [http://lawprofessors.typepad.com/crimprof\\_blog/2008/06/therapy-dogs-ea.html](http://lawprofessors.typepad.com/crimprof_blog/2008/06/therapy-dogs-ea.html).)

And victims are not the only ones benefiting from these new programs. Judges, lawyers, victim advocates, and court staff—all those who deal on a daily basis with the often-horrible consequences of crime—can find their morale boosted through the presence of dogs in court. According to Judge Wesley Saint Clair of the Superior Court of King County, Washington, “the dog’s presence dissipates tension for everyone when dealing with difficult issues and provides a sense of normalcy” (*King County Bar Bulletin*, quoted at [www.courthousedogs.com](http://www.courthousedogs.com)).

Those considering starting a program of canines in the courtroom should read the informative article “Dogs in the Courtroom” by Idaho lawyer Rebecca Wallick ([www.thebark.com/content/dogs-courtroom](http://www.thebark.com/content/dogs-courtroom)) and visit the website [www.courthousedogs.com](http://www.courthousedogs.com), operated by Courthouse Dogs, LLC. Courthouse Dogs

was founded by Ellen O’Neill-Stephens, senior deputy prosecuting attorney in King County, Washington. On the organization’s website, she sums up the whole philosophy behind the use of canines in the courtroom:

The use of courthouse dogs can help bring about a major change in how we meet the emotional needs of all involved in the criminal justice system. The dog’s calming presence creates a more humane and efficient system that enables judges, lawyers, and staff to accomplish their work in a more positive and constructive manner.

A similar conclusion is reached by Rena Marie Justice in her article “Animal Assistance Part II, Pets in the Courtroom: The New ‘Comfort Item,’” (*National Center for Prosecution of Child Abuse Update*, volume 20, number 3, 2007). After reviewing the research supporting the use of therapy

dogs, Justice concludes:

However and whenever a jurisdiction chooses to include a therapy dog program, the benefits will outweigh any concerns. The human-animal bond is strong and evidence of its power is being seen in therapists’ offices, advocacy centers, nursing homes and hospitals across our country. Perhaps now it is time for the courtrooms.

As we become more aware of the positive outcomes that can result from the incorporation of the human-animal bonding experience in the therapeutic setting, we are also becoming more appreciative of the benefits that individuals can derive through the appropriate use of canine companions in the judicial system. It’s time our friends with paws had their day in court. **GPSOLO**



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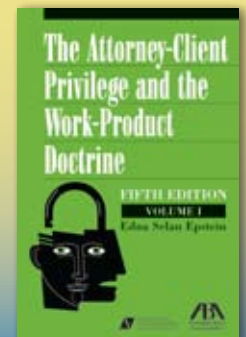
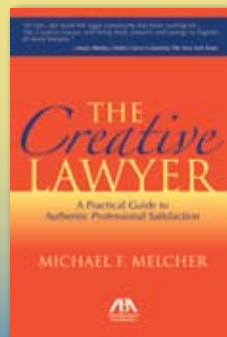
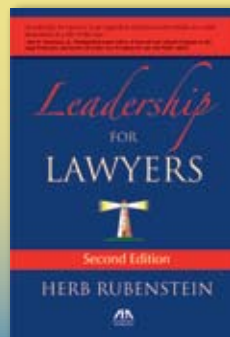
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# Agricultural Animals and the Law

By Katherine Hessler and Tanith Balaban

**T**he legal issues surrounding agriculture and livestock farms have undergone vast changes through the last 50 years. These changes were heralded by Earl L. Butz, secretary of agriculture under Presidents Richard Nixon and Gerald Ford, who said that farming “is now a big business” and the family farm “must adapt or die” by expanding into large operations reliant on industrial pesticides, herbicides, and fertilizers. Whether this is true or not is open to debate.

What is not open for debate is that the shift from small to large farms has been dramatic and has led to a panoply of legal issues. These include habitat loss and degradation, soil erosion and sedimentation, water resources depletion, soil and water salinization, agrochemical releases, nonpoint water pollution through runoff from fields and livestock operations, chemical air pollution, antibiotic resistant bacteria, salmonella, E. Coli and Pfiesteria outbreaks, increased injury to workers, and the development of inhumane animal management practices.

Because the trend is toward larger farms and livestock operations, it is unlikely that a solo or small firm practitioner will repre-

sent the larger companies. Instead the solos and small firm lawyers will more likely represent someone complaining about intensive farming practices and must address numerous legal issues, including the impact on land values and the environment as well as concerns of neighbors.

Approximately 10 billion land animals are raised and killed for meat, eggs, and milk each year. Of those 10 billion animals, about 35 million cattle are raised for beef, 9 million for milk, and 1 million for veal. Approximately 95 percent (9.5 billion) of the animals in food production are birds.

Most Americans today get their food from a system that raises animals in intensive confinement—several thousand pigs or tens of thousands of chickens per barn. This system of livestock husbandry is called either an animal feeding operation (AFO) or a concentrated (or confined) animal feeding operation (CAFO) and is commonly known as factory farming. This new system for raising animals for food results in new problems for consumers, neighbors of the operations, the environment, workers, and the animals. Intensive animal crowding indoors is not the traditional form of livestock husbandry and has led the industry to create new techniques in animal handling to make the business more efficient. These new systems also lead to problems that may result in legal issues.

For example, a single hog farm with 10,000 animals will produce as much waste as a city with a population of 100,000 people. The question of waste disposal becomes one of the central concerns for a factory farm. And the phenomenally high concentration of waste results in bad odors, flies, and chemical

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## Farm practices may affect food safety, environmental protection, animal welfare, and property value.

and infectious compounds in the air or water runoff sufficient to create significant health and environmental problems. The U.S. Centers for Disease Control and Prevention (CDC) state that in 2003, the nation's 238,000 feeding operations produced 500 million tons of manure. (For more, see the CDC's web page on concentrated animal feeding operations: [www.cdc.gov/cafos/about.htm](http://www.cdc.gov/cafos/about.htm). See also the U.S. Environmental Protection Agency's web page on national pollutant discharge elimination systems: [http://cfpub.epa.gov/npdes/home.cfm?program\\_id=7](http://cfpub.epa.gov/npdes/home.cfm?program_id=7).)

The overcrowded conditions of the animals create additional problems for the industry, its neighbors, and consumers. The stressful conditions for the animals result in illness and injury. One way factory farmers address the illness problem is to treat *all* the animals with sub-therapeutic levels of antibiotics. This reduces illness among the animals but contributes to the creation of antibiotic-resistant diseases. The stress of overcrowding can cause the animals to fight among themselves, leading to injury or death. To address these concerns, factory farmers de-beak chickens so they cannot peck at each other and dock the tails of pigs; both procedures are done without anesthesia. Because of the enormous numbers of animals in each barn, the animals typically do not ever leave the barn and are fed automatically, reducing the time people spend tending to them. This results in long delays before dead animals are removed from the midst of the other animals. All of these practices result in concerns for food safety, environmental protection, animal welfare, and the value of adjacent properties.

### Federal Legislation

**Clean Water Act.** On factory farms, raising livestock implicates the Clean Water Act (CWA), which governs the operations of AFOs and CAFOs. In order for an agricultural operation to be considered a CAFO, a facility must first be defined as an AFO.

AFOs are agricultural operations where animals are kept and raised in confined situations. AFOs congregate animals, feed, manure, dead animals, and production operations on a small land area instead of an operation where cattle are allowed to range

for food in pastures. AFOs are defined as facilities where animals are confined and fed for 45 or more days in any 12-month period and vegetation or forage is not sustained in the normal growing season over any portion of the lot or facility.

Under the CWA, CAFOs are split into large, medium, and small sizes depending on the number and type of animals, the contact with surface water, and the extent to which the facility could pollute surface and groundwater. Federal regulations require CAFOs to obtain a permit and to develop plans designed to keep animal waste from contaminating surface water and groundwater. It is important to note there is no private right of action contained within the CWA. Instead, any aggrieved party must file a complaint with the EPA.

**Clean Air Act.** The Clean Air Act (CAA) is also relevant because of the significant amount of chemicals released into the air from CAFOs. These releases come from the barns where the animals are housed as well as from manure lagoons and other waste sites. Methane, hydrogen sulfide, nitrogen, and ammonia are released in significant quantities and can lead to air and water pollution and illness.

**Other federal statutes.** There is no federal legislation regulating the conditions of animals being raised on farms. Federal law focuses primarily on the integrity of the food supply.

- *Animal Health Protection Act.* Allows for the quarantine, destruction, and disposal as well as restriction of transit of diseased livestock.
- *Animal Disease Risk Assessment, Prevention, and Control Act of 2001.* Requires a report on foot-and-mouth disease, bovine spongiform encephalopathy (BSE—also known as “mad cow disease”), and related diseases.
- *Animal Enterprise Terrorism Act.* Makes it a crime to travel in interstate commerce or use the mail for the purpose of damaging or interfering with any animal enterprise (including farms).
- *Commercial Transportation of Equine for Slaughter Act.* Regulates the commercial transportation of equine for slaughter.
- *Humane Slaughter Act.* Provides accept-

able methods of slaughter of animals to be used as food; exempts birds.

- *Twenty-Eight Hour Law*. Restricts the transportation of animals such that they may not be confined in a vehicle for more than 28 consecutive hours without unloading them for feeding, water, and rest, with some exceptions that extend the time; birds are not covered.

### State Constitutional Protections

Some state constitutions, including those of New York, Hawaii, and Nebraska, contain provisions protecting traditional ways of life, including hunting, fishing, and farming. Thus, depending on the state, a livestock owner may have state constitutional protection.

Other state constitutions contain provisions specifically addressing protections for animals. For example, Florida has a constitutional provision to protect pigs, and in 2008 California passed Proposition 2 prohibiting veal crates, battery cages, and sow gestation crates that do not allow animals to turn around freely, lie down, stand up, and fully extend their limbs.

### State Legislation

All 50 states have animal cruelty statutes. However, most of these statutes explicitly exempt common farming practices. Oregon's anticruelty statute is somewhat different because it exempts only "good" farm practices and has no farm exemption for intentional or knowing torture or the malicious killing of an animal.

Some states are now considering whether to require minimum standards of care. Most notably, New Jersey requires humane standards for the care of farm animals. This statute was challenged in *New Jersey Society for the Prevention of Cruelty to Animals v. New Jersey Department of Agriculture*, 2008. The question presented was whether certain practices could be deemed humane. The court said that the New Jersey Department of Agriculture was required to do more than accept currently used practices: Their job was to identify and allow only those practices that met a humane standard, and they had failed to do that. The court accepted the agency's decision with respect to certain practices but deemed that its blanket ex-

emption of routine practices was an abuse of the interpretive process because the statute requires humane practices.

This is an area likely to see additional development across the country and bears watching.

### Right-to-Farm Laws

One aspect that filters into every legal issue surrounding livestock farming is right-to-farm laws (RTFs). RTFs have been adopted in all 50 states. This is important because RTFs modify the law of nuisance (discussed below).

Generally RTFs cover the growing and harvesting of crops; the feeding, breeding, and management of livestock; and other agricultural and horticultural activities. However, many RTFs apply only to commercial activities, so hobbyists or non-farmers do not qualify for the nuisance protection.

Although RTFs modify nuisance laws, they do not have any impact on environmental laws or pollution legislation. Thus, producers must comply with legislation governing clean water and the disposal of animal manure, absent agricultural exemptions. In addition, negligent or improper operation at an agriculture facility is not protected.

Generally, lawsuits against people or companies raising livestock have two points of entry—when the enterprise first starts and when the operation changes or expands the nature or size of its operation.

### Public and Private Nuisance Actions

Nuisance is a use of property that causes injury to others and comes in two forms: private and public. A private nuisance is one that affects the use or enjoyment of land; normally it is privately enforced through a tort action for damages. A public nuisance affects the public at large, does not need to be connected to the land, and is normally enforceable by public officials. However, a public nuisance can give rise to a parallel private nuisance action if private lands are also affected.

As previously stated, the law of nuisance may be modified by RTFs. Common RTFs state that a farming operation shall not be considered or come to be considered a nuisance if it was not a nuisance at the time it began operation, even

## Right-to-farm laws filter into every legal issue surrounding livestock farming.

## Agricultural law may be a rapidly changing area in the coming years.

if conditions change in the surrounding area. Usually the agricultural use must have been in place for one year.

These RTFs modify the traditional “coming to the nuisance” rule—creating an implicit negative easement, prohibiting development on surrounding property and preventing adjacent property owners from suing to prohibit or modify the use as an agricultural nuisance.

In other cases, some courts will consider priority in time as an important factor in nuisance cases and may hold against a plaintiff who “came to a nuisance.”

These laws do not always protect a farm once its use changes or expands. For example, if an owner raised livestock, but then added a slaughterhouse or a processing plant at a later date, this expanded use may not be protected. It is also not clear how the RTFs would affect a dispute between a small farm and a large one.

Another limitation on RTFs may require that the farm engage in good agricultural practices as a condition to protection under the RTFs. However, “good practices” is not usually a defined term. Perhaps further developments will clarify this dialogue.

Nuisance actions are considered a supplement to regulation and litigation under the environmental laws. Nuisance actions may be precluded if Congress intended an environmental statute to be the exclusive remedy for a particular offensive use or condition, or if the alleged nuisance has received (or is eligible for) a state or federal permit to operate.

### Zoning Issues

Zoning is another issue for those who raise livestock. Some communities concerned with the development potential of existing agricultural lands can, and have, adopted zoning laws that are designed especially to protect open tracts of land. This may affect individuals trying to sell their property.

For example, a community may adopt a large lot zoning structure that requires minimum lot sizes to be at least ten to 25 acres per housing unit. There may be other protections such as mandatory cluster design, open space residential design, and transfer of development rights.

Other zoning issues may arise when

communities restrict the type or number of animals allowed on a property. It may be unlawful to picket livestock or allow livestock to roam in close proximity with residences or commercial buildings where foodstuff is prepared, kept, or sold.

In addition, some city zoning may not allow roosters, may bar swine, and may limit the number of animals that may be raised as food, such as chickens and rabbits, within the city limits.

### Other Issues

Many legal issues arise as a result of factory farming and some are now just beginning to be explored. These issues include, but are not limited to, the demand for organic and locally produced livestock and produce, concern over heavy use of antibiotics fed to livestock (about 70 percent of antibiotics sold in the United States are given to healthy livestock), and disease outbreaks. From this arises a host of legal issues, including nutrition, conservation, genetic engineering, food safety, animal cruelty, insurance policies for farmers, school lunch programs, water quality, cloning, organic farming, and much more.

This may be a rapidly changing area of law in the coming years. Before he was elected president, Barack Obama talked about the need to change agribusiness, boost organic farming, and promote local and regional food systems. President Obama appointed Tom Vilsack, the former governor of Iowa, to be secretary of agriculture. Vilsack has talked about reducing subsidies to megafarms and supports better treatment of farm animals.

### Conclusion

In the end, no agricultural operation should ignore good neighborly relations, adequate buffers from neighboring residences and setbacks from boundary lines and water sources (creeks, wells, and ponds), humane animal husbandry, the health consequences of their actions, and compliance with all environmental laws. The manner in which CAFOs attend to these issues (or fail to do so) will likely be a subject of increasing interest for the legal community in the years to come. **GPSOLO**



## GARNER ON LANGUAGE & WRITING

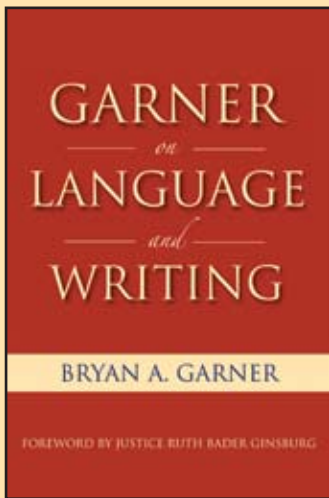
By Bryan A. Garner

Since the 1987 appearance of *A Dictionary of Modern Legal Usage*, Bryan A. Garner has proven to be a versatile and prolific writer on legal linguistic subjects. This compilation of his essays shows the great breadth of his scholarship, covering subjects as wide-ranging as learning to write, style, persuasion, contractual and legislative drafting, grammar, lexicography, writing in law school, writing in law practice, judicial writing, and all the literature relating to these diverse subjects.

Some have called Garner a controversialist, and he doesn't shrink from controversy here: he engages legal academia, at word-bungling law reviews, at writers who intersperse citations within the main body of their writing, at judges who use extremely arcane words, and at the many conventions that tend to mire legal writing in perpetual mediocrity.

There are moving tributes to Professor Charles Alan Wright, Judge Thomas Gibbs Gee, and Sir Robert Megarry (whose last book Garner finished). There are piquant book reviews that damn the work of some famous writers, such as Lynne Truss (*Eats, Shoots & Leaves*) and the linguist Stephen Pinker, as well as enthusiastic recommendations of books that Garner finds meritorious. In her preface, Justice Ruth Bader Ginsburg declares the book to be a "must read" primer for her law clerks. Anyone with a lively interest in language, writing, and law will find this book hard to lay aside.

Bryan A. Garner is editor in chief of all current editions of *Black's Law Dictionary* and the author of many books and articles on legal writing, including *The Elements of Legal Style*, *Legal Writing in Plain English*, *The Redbook: A Manual on Legal Style*, and *The Winning Brief*. His 879-page usage guide, *Garner's Modern American Usage*, is widely considered the leading authority on general English usage today.



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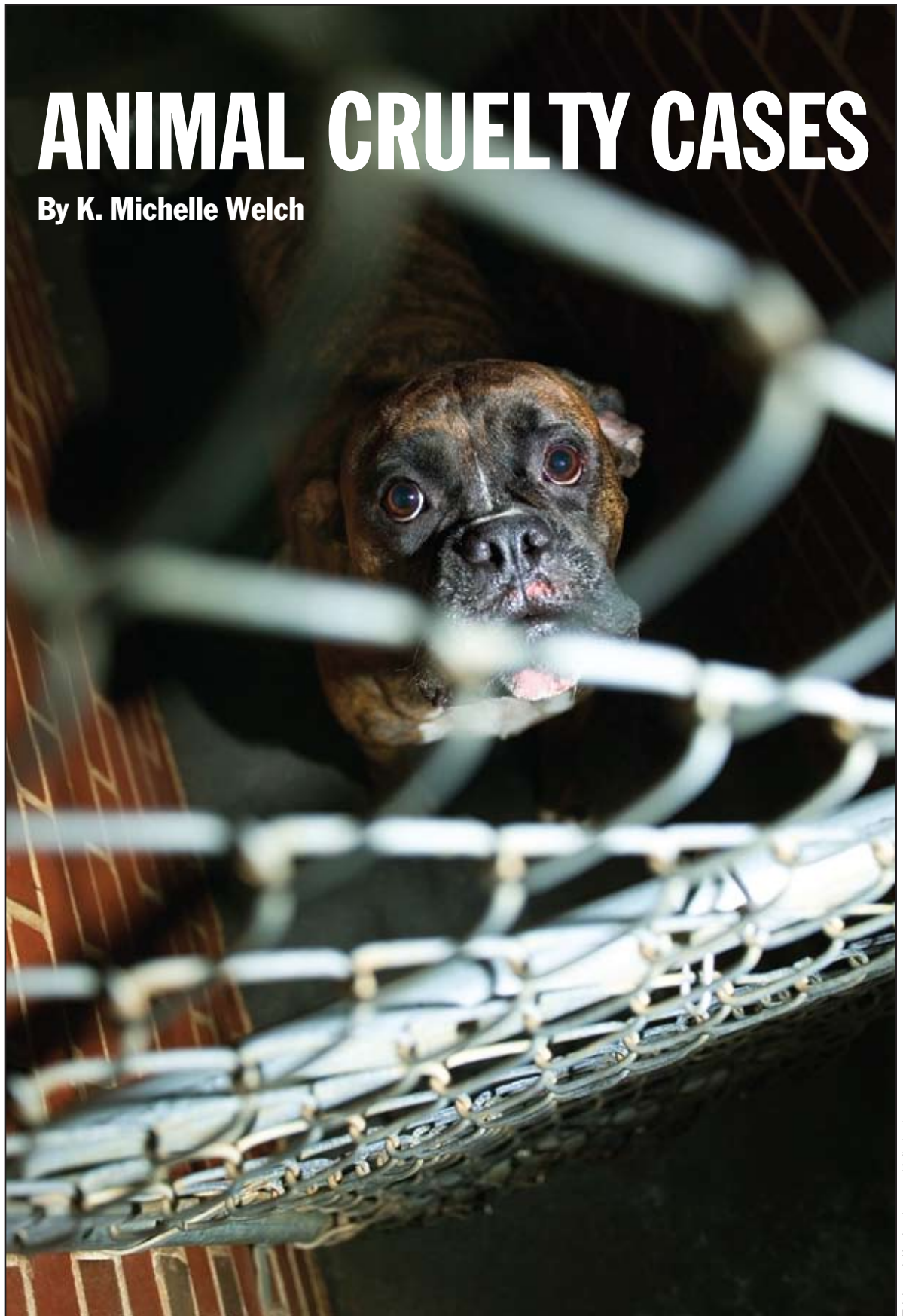
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# ANIMAL CRUELTY CASES

By K. Michelle Welch



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In the last two years, following the much-publicized dogfighting case involving pro football player Michael Vick, animal cruelty has taken center stage in the press. For those of us on the front lines of these issues, it hearkened a new era. Our neighbors and colleagues began talking about the issue of animal abuse frequently. I used to say that animal cruelty was like pornography, “you know it when you see it.” But sadly that is not true. The Vick case and various puppy mill cases demonstrate that many people do not know animal cruelty when they see it. In fact, the most frequent questions I am asked center on the treatment of a neighbor’s dog. This article is not meant to be an overview of every state’s animal cruelty laws, but simply an overview of what cruelty toward animals entails in a basic case.

### **Neglect**

To talk about cruelty cases, we have to start with neglect. Neglect is usually a lesser included offense of cruelty involving the duties of care for the animal. Neglect statutes often set minimal “standards of care or adequate care” requirements when caring for an animal. No one has a constitutional right to own an animal. Animals in most states are considered property, but if you decide to own an animal, you have certain duties to it. You can’t just starve or beat an animal to death because you own it. Neglect statutes often contain “shall” language and list certain standards of care that must be maintained. Most relevant statutes outlaw the deprivation of food, water, shelter, or adequate veterinary treatment.

An animal owner’s duties are usually defined. Prime examples are adequate feed and water. Adequate feed usually means that you must provide food that is appropriate for the animal. You can’t feed kitchen scraps alone as a diet for your dog. Your animal must be able to reach the food. If the dog is chained and can’t reach the food, then you are violating the

neglect statute. The food can’t have mold growing on it or have pests (larvae and such) infesting it. In many puppy mills, food is often contaminated with maggots and fungi. This is just one example of how puppy mills violate many of the provisions of neglect statutes. Adequate water has to be potable and clean. It can’t have green slime in it, and the animal has to be able to reach it. If a goat or calf can’t reach the bottom of a bucket lined with an inch of water, then the animal does not have adequate water.

Additional provisions deal with adequate shelter. For the shelter of a dog, many states require a clean, solid surface, resting platform, or pad that is large enough for the animal to lie on in a normal manner. Puppy mills are notorious for violating these provisions. In many puppy mill cases, the animals have been warehoused in wire-bottom cages, used because of ease of waste disposal. Many states prohibit wire-bottomed cages; they cause injury to the outer surfaces of dogs’ paws and between the paw pads.

Most provisions mandate that the shelter be properly lighted and that it enables each animal to be clean and dry. Animals can’t be left in feces-encrusted cages or shelters that have excessive amounts of feces and urine. In one case in Virginia, horses were left standing in two feet of feces. Puppy mill dogs live out their lives in dark containers where they suffer urine scalds from lying in their own urine and feces.

Other provisions require shelter to be suitable for the species, age, condition, size, and type of each animal. In one case, a Rottweiler was left in a crate that was two sizes too small for him. He died in that crate. A shelter also must be safe and protect each animal from the elements. A tree is not adequate shelter.

Neglect provisions also mandate adequate space to allow the animal to easily stand, sit, lie, turn about, and make all other normal body movements in a comfortable, normal position. Securing a dog with a chain so short that the animal can’t move freely would violate this provision.

The final mandate of all neglect statutes is for the provision of veterinary care when needed or to prevent suffering or disease transmission. Many neglect or cruelty cases

**No one has a constitutional right to own an animal.**

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## The withholding of veterinary care can turn a neglect case into a cruelty one.

involve animals who suffer because of the withholding of routine medical treatment. If left untreated, a routine infection can linger for months until the animal becomes seriously ill or dies. Often the withholding of veterinary care is what turns a neglect case into a cruelty one.

### **Cruelty**

Cruelty cases are split into two different types. The first type is intentional cruelty. The second type is neglect to the point of cruelty. Intentional cruelty is a no-brainer. It's the adolescent torturing the cat or the abusive husband throwing a small dog against the wall to keep his wife in check. Cruelty is any intentional act, such as unnecessarily beating, maiming, or killing an animal. Intentional cruelty is harder to prove because eyewitnesses are harder to come by. Witnesses may decide not to testify because of threats. Often, there are no witnesses to the torture, and other times the abuser has left only a circumstantial trail. Some of the worst abuse cases I have seen are still unsolved. For instance, every Halloween there would be a ritualistic killing, a beheading of a dog or a goat, or dead cats marked with pentagrams. In such horrific intentional cases, the abusers were clearly disturbed.

More common are cases involving neglect to the point of cruelty. The cruelty is totally avoidable and usually arises out of ignorance or indifference to suffering. These are the cases that weigh on my psyche. In one typical case, a dog starved to death on a chain in the backyard. The owner just didn't feed it. During the case, the defense attorney asked me what I would have his client do. That sparked my anger, and I said, "I would have her take the dog to the shelter instead of slowly and painfully starving it to death on the end of a chain." In this case, the owner had fed her Rottweiler but didn't feed the other dog. Her defense: It wasn't her dog. While common, this defense is not credible; most states define an owner to include a custodian or harborer.

Like starvation, deprivation of veterinary care (particularly "emergency" veterinary care) is among the most common types of cruelty cases. The term "emergency veterinary treatment" is defined

broadly as veterinary treatment to stabilize a life-threatening condition, alleviate suffering, prevent further disease transmission, or prevent further disease progression. The catchall here is the phrase "alleviate suffering," which captures a range of behavior.

My very first animal cruelty case was one in which the owner had not sought veterinary care for her dog for a very long time, and the animal had to be euthanized. Maggots had set into a pressure point on the dog's chest. The vet could testify that the maggots had been in the wound for at least three days, and the dog had been ill for at least two or three weeks. The defense claimed that the dog had eaten and had been running around on the morning of the day that the owner sought treatment for the animal. The state vet, however, determined through his necropsy (animal autopsy) that it was impossible for the dog to have been mobile that morning. Because maggots had erupted on the animal's dead skin, the wound was analogous to a bed sore; the dog had been down on his chest for days, even weeks. There was also no food in the animal's stomach. Typical for such cases, the abuser did not seek veterinary care until the animal was in such bad shape that it had to be euthanized. This is the frustrating part of prosecuting these cases: You know that the animal suffered immensely, but the defendant was indifferent to that suffering.

Many dogfighters violate cruelty statutes by injuring their dogs in a dogfight and then not seeking professional treatment for the wounds. Sometimes, dogfighter will treat the animals themselves, using veterinary drugs they keep on-site. They do other medical operations as well, such as docking a dog's ears. These procedures are frequently botched and performed without anesthesia.

Hoarders fall into their own unique category of animal cruelty. A hoarder is a person who collects or hoards large numbers of animals. Often, they are living in the same filthy environment as their animals. Hoarders start out with the best of intentions, but they go awry. They want to save an animal, then another, then two leads to ten. Hoarders are mentally ill



and they need mental health treatment. In many instances, the plea agreement in this type of case hinges on allowing an owner to keep some of the animals. We have learned over the years to let hoarders keep two or three animals so they can have the companionship they seek. But hoarders have to be monitored. Many will get in trouble again if not watched. In many instances, the best result for this type of defendant is to draft a plea agreement restricting their animals and making sure the owners get some mental health treatment. Many judges are reluctant to order the mental health treatment on the prosecutor's motion but will agree to it in a plea agreement.

It is critical that the hoarder get psychiatric treatment. In one particular case, the hoarder was standing barefoot in inches of feces. Hoarders of animals also will hoard other things, such as newspapers. In one case, the newspapers were stacked, touching the ceiling, with a circular pathway leading to a corral of Cairn Terriers. Hoarders can often be charismatic and manipulative. In one case, the hoarder defendant talked a vet into giving her back one of her dogs.

### **Animal Fighting**

Dogfighting and animal fighting statutes run the gamut, but the trend across the country is for tougher laws outlawing the fighting itself or the gambling on it. Certainly, the publicity surrounding the Michael Vick case has played a role in this trend. What the Vick case brought to light for the average person is the brutality of these events, even after a dog leaves the ring. Fights often last hours—two to three hours is the norm. Dogs fall down, only to have their owners put them back into the ring. Afterward, the losing dogs face beatings or even execution. This is why we say that dogfighting is a death sentence.

Until last year, Virginia had an adequate dogfighting law but allowed cockfighting as long as observers did not gamble on the fight. Today, in the wake of the Vick case (which was prosecuted by the federal authorities), Virginia has one of the best animal fighting laws in the country. The statute is historic because it applies to everyone who goes to an ani-

mal fight. Attendance of any kind is now illegal. Organized animal fighting of any kind is illegal, particularly cockfights and dogfights. Gambling on the fight and possessing paraphernalia of animal fighting or training dogs to fight are felonies. Having minors attend or participate in any way is illegal. Enhancing an animal's ability to fight is illegal.

All the components of an animal fight are now criminalized so that law enforcement can target the heart of an animal fighting ring and act upon any scenario. For instance, suppose police roll up on a dogfight in a backyard and everyone scatters. The police find a bloody basement floor, two torn-up dogs, and other paraphernalia of dogfighting. In this instance, they can charge under the paraphernalia statute. In addition, prosecutors usually try to add collateral charges of animal cruelty in case they can't prevail on the animal fighting charges. Chances are the perpetrators did not take the animal to the vet to treat fight-related injuries or other conditions demanding veterinary treatment.

### **How You Can Help**

People frequently ask me what they should do if they see animal neglect, animal cruelty, or animal fighting. The short answer is call the local animal control department. If you don't know that telephone number, call your local law enforcement department and they will direct you. I would urge you to act. There is no reason to sit idly by when an animal is suffering. Most people are good caretakers of their animals, but for those who are not, please take action for the sake of the animal. I am hopeful for the future for animals in our country. The outrage sparked by recent high-profile cases is a good barometer of people's attitudes toward animals. Animals give so much and ask so little. They deserve to be cared for so they can live well. [GPSOLO](#)

**There is no reason to sit idly by when an animal is suffering.**

# Pets in the Office

By David Leffler

Being solo often means being alone, and some solos address this situation by having a pet in the office. I was curious about those solo attorneys who kept the company of furry things at work, so I sent out a request on SoloSez (the ABA's Internet discussion forum for solos) to hear about some of these experiences—the good, the bad, and the ugly.

I received some great responses (too many to list all of them here) from lawyers keeping a wide variety of pets in their place of business, everything from a Doberman Pinscher to an African Grey Parrot (and that's just one lawyer). Both offices outside and inside the home are included in this article.

## The Bark Association

Lisa Runquist, a California not-for-profit lawyer and author of several books on the topic, the most recent being *Guide to Representing Religious Organizations* (ABA 2009), has three Standard Poodles, Charlie, Jazzy, and Zippy. Lisa says that they are great at keeping her company, letting her know when someone has arrived, and letting her know when she has worked enough. Sounds like a typical solo attorney—she might work into the night if the dogs didn't show up with leash in mouth to let her know that it is time to go. Lisa is the only lawyer reported on here who blogs about her dogs. Learn all about her dogs' agility training at <http://runquickpoodles.blogspot.com>.

Bruce Cameron of Mazeppa, Minnesota, is the lawyer with the menagerie. Bruce doesn't have an office yet but plans to open one in his town this summer, and when he does, he will be bringing along three dogs—a Doberman Pinscher named Dakota, a Rottweiler/Labrador named Jasmine, and a Doberman/Beagle named Caruso—plus an African Grey Parrot named Merry. Write to us, Bruce, when you make the move to let us know how it all works out.

Carolyn Elefant, with an energy regulatory law practice in Washington, D.C., is the author of the well-regarded blog [myshingle.com](http://myshingle.com), which focuses on the challenges of operating solo and small law firms. Her

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much-loved Old English Sheepdog, Francesca, provides great companionship, but Francesca also enjoys sitting under Carolyn's desk amidst computer wires, which sometimes results in unplugging the computer, and she also will try to climb on to Carolyn's lap. When I read that last piece of information in Carolyn's e-mail, I immediately checked Wikipedia for the weight of a female Old English Sheepdog, which is anywhere from 66 to 88 pounds (males can be anywhere up to 100 pounds). Then I tried to imagine this Wookiee of a dog trying to get up on Carolyn's lap, and I only could visualize disaster as her chair went backward and the mouse clutched in Carolyn's hand pulled her computer to the floor.

Deborah Matthews, who has a trust and estates practice in Alexandria, Virginia, and is on several ABA committees, including being the Chair of the GP|Solo Division's National Solo & Small Firm Conference, has a Welsh Springer Spaniel named Bailey and had another one named Hannah that recently passed. Deborah tells me that in Old Town Alexandria "dogs are part of the community" and are welcome in most places. At the bank the teller has one basket of lollipops for children and another basket of biscuits for dogs. Deborah says that "A dog personalizes and warms up the office." She particularly remembers Hannah giving great comfort to a dying client at an estate planning meeting. Deborah is thinking about putting a photo of Bailey up on her website. Well, all of the *Being Solo* readers know about it now, Deborah, so you better get to it—we'll be checking!

Marion Browning-Baker, who practices family law in Stuttgart, Germany, keeps a Great Dane in the office. Her first was Abby, and her second is Anna. I'm thinking she sticks to Great Danes because it must make bill collecting easier. She didn't say anything about that, but she did say that dogs know just how to make you feel better and that there is always a feeling of protection when the dog is in the office.

Jeremy Vermilyea of Portland, Oregon, has his hands full with two Boston Terriers. In case any of you readers are considering getting a dog for your office, don't get any dog that has the word "terrier" in its name. As Jeremy, who has a construction and business law practice, explains it, "They want to go outside and fetch the tennis ball (otherwise known as the Boston's version of crack) ALL THE TIME." All terriers are like this. They were bred to hunt and kill rats, which they do by grabbing the rat by the neck and shaking it back and forth until it is dead. While they may be fun as pets (and for keeping your home free of rats), a terrier is not suitable for most law offices. In fact, Jeremy only brings his terriers into his office about once a week when, he says, "we're about half-productive as normal." I imagine the rest of the week he spends recovering from the visit.

Melanie Morgan, who has a mediation practice in McKinney, Texas, has three cats and a dog who keep her company in her home office. Pet hair is a problem, as are what she calls "technical issues"—cats walking on the keyboard and the dog getting tangled up in the computer wires. I'm amazed at the tolerance that people have for their pets. Those fur balls are lucky that they're so adorable. I can just see the cats finishing up a brief by walking over the keyboard while the dog is howling under the desk because he is all tangled up in the wires. Still, Melanie says that she doesn't want to get a "real" office because she would miss her "little herd" too much.

Kevin Veler of Alpharetta, Georgia, who has a construction and business law practice, is a certified volunteer dog handler and always has a dog in training with him. This means with him at the office, client conferences, court appearances, and state government meetings. Kevin has a different dog every week or two, and so he has to establish "office manners" to restrict play areas (oh, those pesky computer wires) and prevent chewing on phone lines (but they taste so good). This man has my complete admiration; he manages to go through this with a new dog every week or two and still keep his sanity. I think that he could provide some stiff competition to Cesar Millan of the popular *Dog Whisperer* television show.

John Thrasher wins the prize for the most animal-centric law office. His office in Rupert, Vermont (a very rural area with a population of 704), is located in the same building where his in-laws have a veterinary practice. John says that there is "a surprising amount of referrals between our businesses." He brings his dog Haley to the office where his staff loves him. John reports that benefits also include being able to "take some mental health time by taking her for a walk on the rail trail that runs behind my office." And if he is meeting with a client who is not dog friendly, he simply sends Haley over to the veterinary office.

Gina Madsen, who has a business law practice in Las Vegas, Nevada, has seven dogs in her home office. She writes in her e-mail, "They're all curled up at my feet as I

type this." While that might seem a bit overwhelming to some, Gina says that she "can't help but calm down when I see them all sleeping around me." The only downside? Barking while she is on the phone, which she controls with the phone's mute button, although they rarely do bark.

Jan Matthew Tamanini has a business law practice in Harrisburg, Pennsylvania, and refers to her two retired racing Greyhounds, Pen and Sabrina, as her "two valued legal assistants." "Being able to have them close by to ground and entertain me as I go about my business makes me a better lawyer."

Marc Stern, a bankruptcy lawyer in Seattle, Washington, who is co-chair of the GP|Solo Division's Bankruptcy Committee, has a 130-pound Newfoundland named Loganberry, who comes to the office every day. He says that not only does the dog calm clients down (which we all know is not always an easy thing to do), but when he meets with a prospect at his office, she is also "a good barometer of whether I want the client."

Robert Robertson, with a family law practice in Austin, Texas, says that his office cats like to leap onto the keyboard and step on the sequence C: format \*.\* , which would wipe out the entire contents of his hard drive. I guess the important question is whether they step on the letter "y" when the computer asks if he is sure that he wants to do this.

## In Conclusion

So what can you learn from reading about all of these experiences? Having a pet in your office can be a beneficial experience. They can calm you down, calm your clients down, and make your office a more enjoyable place to work. But if you want your computers to work, your phone lines to remain intact, and your computer keyboard to avoid receiving random feline entries, remember the Boy Scout motto: Be prepared. **GPSOLO**

# Pets and Mental Health

**By Hugh Grady**

**W**hen I was first asked to write this article, I thought that I wasn't qualified to do so. But as I thought about the topic and my experiences as the director of a lawyers assistance program and as the owner of a certified pet therapy dog, I decided to accept the request. It's important to this article that I disclose some things about myself so that the reader can have some understanding of my perspective. Although I am going to write about my experiences with a dog that also happens to be a pet therapy dog, my experiences and research tell me that the improved mental health benefits of having a pet of any kind are significant.

I am a recovering alcoholic and drug addict with a history of depression. I practiced law, primarily civil litigation, for 18 years until my addiction became so powerful that I had to resign my license. I am not a licensed mental health therapist but was a certified alcohol and drug counselor. Last, and probably most importantly to this article, my wife and I were the owners of a wonderful, big, friendly, and loving Bouvier des Flanders named Bix.

Bix came into our lives shortly after we moved from Oregon to Des Moines, Iowa, where I took up the position of director of the Iowa Lawyers Assistance Program. He and his brother, Cody, were offered to us by a breeder after the dogs both had bad experiences with their first owners. We eventually decided to adopt Bix. He was about 18 months old at the time, and I decided that it would help me with my own stresses and my depression to train him as a pet therapy dog. Those of us who are in recovery are frequently confronted with our own issues of self-centeredness, and we know that one of the best ways to get away from that is to get outside ourselves. To work with another recovering alcoholic is the antidote to self. My experience with Bix was similar. By working with him, training him, and then using his skills as a pet therapy dog, I found a resource to help me with both my alcoholism and depression.

My first life lesson from Bix was to learn patience and tolerance. Bouviers were bred as Belgian cattle-herding dogs. They are also large and powerful and were used to pull carts. They almost became extinct during World War I because they were used to help cart bodies from



Photos.com/Jupiter Images Unlimited

the battlefields. They are proud, intelligent, and sometimes stubborn dogs, and as a puppy Bix was a handful. On one occasion while I was teaching him to stay and come, I made a very poor decision. We were at a local park near a pond, and I had him off the leash. There were some ducks swimming around on the pond, and I could see Bix eyeing them, then looking at me, and then eyeing them again. I knew then that I had made a mistake. He took off and headed for the pond, not knowing that you can't walk on water. He ran down the dock right into the water and to his utter shock and dismay sank immediately to the bottom. I didn't know whether to be mad or to laugh. I opted for the laughter, which I don't think he appreciated as I dragged him from the pond. He was soaking wet and covered with algae. It was a good lesson for me as well as for Bix. He learned that a dog can't run on top of water, and I learned a little more patience and experienced the benefits of a good laugh.

I believe that dogs, by nature, love their owners unconditionally and are always eager to serve and to please. After we finished obedience school we started pet therapy training and received our proper certifications. The certifications gave us the ability to go into hospitals, hospices, and nursing homes. We began our time together in that role. He loved it, was always willing to go, and was particularly happy when small children stood up to his height and looked him in the face. Their usual reward was a wet tongue washing.

It gave me a great deal of joy to see Bix accept the attention and affection of children and older adults with no preconditions. I think that he knew he was making

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people happy; that made him happy and in turn helped me more than one might imagine.

It always made me feel better whenever he was with me, not only in his role as a pet therapy dog but as a companion. I work from an office at home, which is a change for me. I had always worked in a law office or in a treatment center as a counselor, surrounded by people. There is a significant adjustment to working alone, and Bix provided me the company I missed. That, and he never talked back, sassied me, or got into an argument with me.

No matter the context, pets have a positive effect on the mental health and well-being of their owners. This might be particularly important for lawyers, who experience high rates of alcoholism, drug dependence, depression, stress, burnout, and other mental health issues. In a study reported in the *International Journal of Law and Psychiatry* in 1990, researchers surveyed a sample of Washington state lawyers. The study showed that as many as 19 percent of these lawyers suffered from depression and 18 percent were drinkers, nearly double the rate for U.S. adults (as determined by the National Clearinghouse for Alcohol and Drug Information). A full 26 percent of the attorneys said they had used cocaine at some point in their lives, compared with 12 percent in the general population. The same research group found similar results from a previous study, which was conducted among Arizona lawyers, indicating the rates may not be dependent upon jurisdiction within the United States.

Two of the most common issues within the legal community are stress and burnout. Continued high levels of stress over a long period of time, without adequate coping strategies, can lead to burnout, a form of depression characterized by apathy, negative feelings about the job, declining productivity, and increased illness. In some instances it may lead to an increase in substance abuse.

I am receiving more and more calls from lawyers who feel overwhelmed and confused and who do not have the coping skills to deal with these issues.

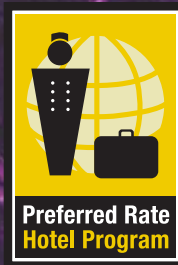
To combat these problems, there are many resources available to lawyers, such as exercise, meditation, counseling, and group therapy, just to name a few. But the positive returns one gets from owning a loving pet are unique. The therapeutic benefits of pet ownership are supported by a large body of scientific research. There are social and emotional benefits to loving and caring for another creature and having that affection returned.

Scientific research also supports the benefits of animal-assisted therapy, the use of animals, such as my Bix, in formal therapy sessions. The presence of a friendly animal helps ease a patient's anxiety. This involvement can also improve social interactions and decrease aggressive behaviors. An increasing number of dogs are being trained to help individuals with a range of disabilities other than psychiatric issues. Some of them include seizure disorders, Parkinson's Disease, and heart disorders.

I thought I'd conclude this article with a section of Walt Whitman's poem "Song of Myself," which I found apropos:

*I think I could turn and live with animals, they're so placid  
and self contain'd,  
I stand and look at them long and long,  
They do not sweat and whine about their condition,  
They do not lie awake in the dark and weep for their sins,  
They do not make me sick discussing their duty to God,  
Not one is dissatisfied, not one is demented with the mania  
of owning things,  
Not one kneels to another, nor to his kind that lived thou-  
sands of years ago,  
Not one is respectable or unhappy over the earth. **GPSOLO***

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# Animal Law and Your Practice

By Pamela Alexander

**M**ichael Vick. Hurricane Katrina. Pet food recall. These events have magnified the gap between how the legal system treats animals and the significant role that animals play in people's lives. As a result, more and more attorneys are using their legal expertise to close this gap in the rapidly emerging field of animal law.

During the past several years, animal law has gained a stronger foothold in the mainstream legal arena. This shift is reflected both in academia and in legal practice. For example, in 2000 there were only nine animal law courses being offered at ABA-accredited law schools. Currently there are more than 100 such courses. Similarly, in 2000 there were 12 Student Animal Law Defense Fund (SALDF) chapters. Currently, there are more than 140 SALDF chapters across the United States and Canada.

Not only has there been a surge in the interest in animal law at the academic level, but attorneys are now finding ways to incorporate animal law into their legal practices. This relatively new phenomenon highlights the ways in which animal law intersects with "traditional" areas of the law, such as tort, contract, criminal, and constitutional law. Examples of this intersection include animal custody disputes in divorces or separations; veterinary malpractice cases; housing disputes involving "no pets" policies and discrimination laws; damages cases involving the wrongful death or injury to a companion animal; and enforceable trusts for companion animals.

At first blush, this overlap may not appear obvious, but one need only reflect on the cases that have made the headlines during the past few years to realize that the complex and dynamic field of animal law is here to stay. The intersection of animal law with other areas of law, along with the recognition of the special bond between humans and animals, provides a vast array of opportunities for making money while practicing animal law. The following examples suggest ways in which animal law can be incorporated into a legal practice:

- **Estate planning.** Animal lovers or not, most Americans

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most likely shared a similar reaction when they learned that Leona Helmsley had left \$12 million to her dog, Trouble. This was an extreme example of estate planning for companion animals, but more and more clients are looking for ways in which their non-human loved ones can be taken care of after their passing. Currently, 38 states and the District of Columbia allow for companion animal trusts. This area of the law offers a unique opportunity to provide cutting-edge legal advice and expertise to your new and existing trust and estate planning clientele.

- **Custody disputes.** Another area of practice with enormous potential for providing animal law expertise involves custody disputes over companion animals. With the divorce rate on the rise, statistics show divorcing couples are willing to invest time and resources to negotiate over who gets custody of Fido or Fluffy. In fact, courts are increasingly ruling on what should happen to companion animals in divorce cases, including which partner should get custody.
- **Tort claims.** An increasing number of companion animal guardians are bringing tort claims against those who either intentionally or negligently harm their beloved family members. These cases include, but are not limited to, claims against veterinarians, groomers, kennel operators, neighbors, and police officers who shoot dogs. Although such claims have not yet yielded the high-dollar judgments seen in human tort claims, progressively more judgments are being made in favor of companion animal guardians.
- **Free speech cases.** First Amendment free speech cases for animal activists who have been denied the right to protest or leaflet present another avenue for practitioners to offer their legal services. Both the federal and state laws have attorney fees provisions. (See 42 U.S.C. § 1988; Cal. Code Civ. Proc. § 1021.5.) Moreover, attorney fees can be negotiated as part of a settlement. These cases have the potential to offer a stable source of income for legal practitioners.
- **Animal law courses.** Of the 200 ABA-approved law schools in the United States, more than 100 currently offer animal law classes and seminars. These classes are taught mainly by adjunct professors—usually prominent animal law practitioners from the local community. If you live reasonably near one of the remaining 100 law schools, you have an opportunity to teach animal law.

The above examples are not meant to be exhaustive, and with the growth in animal law showing no signs of stopping, there will be increasingly more opportunities to engage in this dynamic and cutting-edge area of the law. Additionally, for lawyers who feel saddened, frustrated, and outraged when confronted with headlines such as those involving Michael Vick, Hurricane Katrina, or the pet food recall, practicing animal law offers a unique and meaningful way to merge your profession with your passion for animals. **GPSOLO**

## MEETINGS AND TRAVEL

thompson