

# NEW JERSEY LAWYER

## Magazine

August 2005 / No. 235



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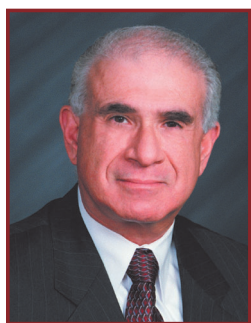
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# PRESIDENT'S PERSPECTIVE

STUART HOBERMAN

## Responding to Changing Times



**T**his issue of *New Jersey Lawyer Magazine* is devoted to issues in animal law. The impetus for the general topic came from the NJSBA's Animal Law Committee, a relatively new committee but one with dedicated and energetic

members. The committee has been active in monitoring legislation and in sponsoring seminars focusing on current developments in animal law that impact on the humane treatment of animals.

The presence of an Animal Law Committee within the NJSBA is an example of how the practice of law tends to expand to include a variety of heretofore novel areas of practice and interest. To an extent this has always been the case. The roster of NJSBA committees, as well as the issues we address, illustrate this development. The 1950 NJSBA Yearbook, for example, lists an interesting mix of committees, including the Americanization Committee (with sub-committees in every county), the Labor Relations Committee, and the Committee on Legal Service to the Armed Forces. While important in their day, such committees have long been replaced by those reflecting the interests of a 21st century bar. So, in addition to the Animal Law Committee, the NJSBA in recent years has added committees on diversity; class actions; security law and regulatory enforcement; and gay, lesbian, bisexual and transgender rights.

The change in focus of NJSBA committees reflects broader

nationwide trends. As Dean Roscoe Pound once said: "Law must be stable, but it cannot stand still." In New Jersey at least, the same has been true for our respected court system. This state, in particular, has been a laboratory for reforms in court administration and dispute resolution.

Within the past 30 years, the county courts, the county district courts and the juvenile and domestic relations courts were eliminated, and jurisdiction was transferred to superior court. A family part of the Chancery Division was approved by the voters, and a new tax court was created. The judiciary divided the superior court into divisions, and has experimented with new ways to handle particular types of cases, including drugs, mass torts, and environmental matters. Case management systems have been introduced and standardized across the state.

The NJSBA, along with the business community, is currently engaged in efforts to create a business court in New Jersey. Such a court would provide specialized treatment for commercial cases and would be better able to serve all businesses—both large and small, entrepreneurs and consumers—in the prompt resolutions of their disputes.

New Jersey is an economic powerhouse that lies at the epicenter of the nation's largest business corridor. According to the New Jersey Department of Commerce, we rank seventh among states in direct foreign investment, eighth in gross state product, and 12th in exports. We are home to thousands of businesses, from multinational corporations to local family-owned storefronts. Both New York and Delaware have business courts to meet the needs of commerce in those states. We believe that New Jersey should have such a specialized court as well. ☺

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**New Jersey Lawyer Magazine** (ISSN-0195-0983) is published six times per year. Permit number 380-680. • Subscription is included in dues to members of the New Jersey State Bar Association (\$10.50); those ineligible for NJSBA membership may subscribe at \$60 per year. There is a charge of \$2.50 per copy for providing copies of individual articles. • Published by the New Jersey State Bar Association, New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey 08901-1520. • Periodicals postage paid at New Brunswick, New Jersey 08901 and at additional mailing offices. POSTMASTER: Send address changes to *New Jersey Lawyer Magazine*, New Jersey State Bar Association, New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey 08901-1520. • Copyright ©2005 New Jersey State Bar Association. All rights reserved. Any copying of material herein, in whole or in part, and by any means without written permission is prohibited. Requests for such permission should be sent to *New Jersey Lawyer Magazine*, New Jersey State Bar Association, New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey 08901-1520. • *New Jersey Lawyer* invites contributions of articles or other items. Views and opinions expressed herein are not to be taken as official expressions of the New Jersey State Bar Association unless so stated. Publication of any articles herein does not necessarily imply endorsement in any way of the views expressed. • Printed in U.S.A. • Official Headquarters: *New Jersey Lawyer Magazine*, New Jersey State Bar Association, New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey 08901-1520. 732-249-5000 • Advertising Display 215-348-7769.

## MESSAGE FROM THE SPECIAL EDITOR

**N***ew Jersey Lawyer* is proud to present its first edition on animal law. Containing 17 articles, this issue is perhaps our largest ever.

The concept of an animal law edition was first initiated by the editorial board at a meeting a year ago. One of the board's goals at that meeting was to consider and develop themes of significance for the magazine's 2005 publication schedule. As lawyers, we considered compelling evidence that animal law is a rapidly evolving and growing area of legal practice, including:

- New Jersey's recent development of a task force on animal protection;
- The New Jersey State Bar Association's recent creation of a successful Animal Law Committee of legal practitioners;
- The Institute for Continuing Legal Education's recent development of a successful animal law forum, which is now hosted on an annual basis.
- A series of recent news reports in the mainstream media relating to animal cruelty. In particular, an assault by teenagers upon geese at the Popcorn Park Zoo in Ocean County so enraged the public that the story attracted national attention (as did the ultimate sentencing of the culprits).

Accordingly, the board green-lighted the project, and I have had the honor of serving as editor. In this capacity I had the opportunity to meet and associate with multiple lawyers who advocate for animal protection, and who are incredibly passionate about their work on behalf of their clients. Many of these noble attorneys have served as authors for the articles in this edition. Others have simply offered input and suggestions. The end



LAWRENCE R. JONES

result, however, is this publication, which hopefully can serve as an important reference tool for years to come.

On a personal note, last year I attended a township meeting in Toms River for reasons unrelated to animal law. Coincidentally, on the agenda that evening was the potential closing of an animal shelter in town, and the opportunity for public comment. The room was packed with citizens, shelter workers and animal enthusiasts from neighboring towns who came in droves to support the shelter and its ongoing work. Most impressive, however, were the number of high school students who appeared and spoke in support of the shelter, and protection of animals in general. In an era when America's youth is often labeled as apathetic and disconnected from government issues, the subject of animal protection struck a definite chord with these teenagers to the point where they came to town hall, constructively injected themselves into the process of local government and zealously argued their points with passion and conviction.

The results were astounding. After each teenager spoke, the crowd erupted in an ovation of applause. By the end of the evening, the mayor announced that he would make every effort possible to save the shelter. As for the teenagers who publicly and successfully advocated for a cause that night and made a difference, there is little doubt that some will likely join us in the future as fellow members of the New Jersey bar.

**Lawrence R. Jones**, a Toms River attorney, is a member of the New Jersey Lawyer Magazine Editorial Board.

# Balancing Society's Progress with Environmental Protection and Animal Rights

by Frank R. Lautenberg

During the last century, the expansion of human society and its industrialization has profoundly altered the way we interact with our environment and the other animal species that share our planet. Society's impacts, usually made in the name of progress, have degraded the ecosystems and resources that provide the foundation of the U.S. economy. At the same time, we have encroached upon the habitat of thousands of species. Society continues to grapple with how to reduce its detrimental impacts on the delicate ecosystems upon which we rely and still foster economic growth and improvement.

**D**uring my tenure in the Senate, I have sought to balance these competing needs while supporting legislation that honors the existential rights of our non-human neighbors and their right to be treated humanely. We humans sometimes forget that we are not simply the inheritors of the Earth and its rich resources—we are also its stewards. Far too often, decision-makers within economic sectors focus solely on the next quarterly report, or at most, the cycle of years during which they plan to recoup an economic investment. Only an enlightened minority of business interests has the farsightedness to make decisions that impact the planet with a view toward our grandchildren and their grandchildren.

## Protecting Rights of Animals in Nature

The extinction of a species can be the ultimate evidence of an indifferent society. Habitat loss and degradation are primary causes of extinction. Decades of research has documented that many ecosystems are in a precarious state of balance, and that once some unknown threshold is breached, they can spiral into a state from which recovery is very difficult, even impossible. The unprecedented rate at which species now go extinct illustrates our current state of imbalance.

Renowned Harvard biologist E.O. Wilson, who coined the term “biodiversity,” has written dozens of books—two of them Pulitzer Prize winners—on the loss of species and is one of the recognized experts on species loss. Using two internationally accepted models, Wilson predicts that by the year 2100, an astounding 50 percent of all species will be either

extinct or teetering on the brink of extinction. Many of these species are unseen but nonetheless indispensable, such as microscopic soil bacteria. Imagine living on a planet where the leaves that shower down each fall no longer decompose because the requisite bacteria have disappeared.

I have been a staunch supporter and defender of the Endangered Species Act (ESA)<sup>1</sup> in the Senate. While not perfect, scientists tell us the ESA has, in fact, been effective at preserving species; only two species on the Endangered Species List have gone extinct, while over 600 species not on the list have gone extinct during the same period.

Unfortunately, in recent years House Republicans have orchestrated repeated efforts to erode many ESA protections. Since 2001, the average size of critical habitat designated for species protection by the U.S. Fish and Wildlife Service (FWS)

has been cut in half, yet habitat protection is the first line of defense against extinction. Since 2001, reductions in the size of habitat have been justified 69 percent of the time by using what I believe to be highly questionable cost/benefit analyses. Under the previous administration, cost/benefit analysis was used to support a reduction in the size of the habitat just one percent of the time.

The 109th Congress will most likely reform the ESA. Changes are needed, but the basic law has worked and should remain mostly intact. As a member of the Subcommittee on Fisheries, Wildlife, and Water of the Environment and Public Works Committee, which will consider reform legislation, I will be closely monitoring these developments.

In 2003, the Department of Defense (DOD) won a statutory exemption (in the National Defense Authorization Act)<sup>2</sup> from designating critical habitat on military land, despite the fact that scores of protection plans have successfully been negotiated between the FWS and the DOD. I offered an amendment to reduce the damage to endangered species that DOD's language could cause. Though it narrowly passed in the Senate, my amendment was removed during the House-Senate Conference on this bill. In an effort to counter similar steps, in 2003 I also led a successful effort to press the FWS to drop its proposal to allow commercial imports of endangered species and their products.

Perhaps the most public campaign to reduce wild habitat is the relentless call for drilling in the Arctic National Wildlife Refuge, which was set aside by President Dwight Eisenhower in 1960, "for the purpose of preserving unique wildlife, wilderness and recreational values." This pristine environment is one of the last unspoiled wildernesses in America, and home to endangered species such as polar bears and caribou. I have visited the Arctic Coastal Plain

and can attest to its profound and silent beauty. The introduction of an oil-drilling infrastructure could cause irreparable harm to this fragile ecosystem, for what the U.S. Geological Survey reports may provide as little as six- to 12-months worth of oil.

America needs a farsighted, visionary, and environmentally responsible energy policy that will make us less dependent on foreign sources of oil. I am convinced that desecrating the Arctic Refuge need not be a part of that policy. Economic analyses have established that the benefits from investing in additional energy conservation measures, vehicle fuel economy, and renewable energy sources would far outstrip the most optimistic gains from drilling in the Arctic. These policies would push the country in an important new direction for our energy future.

### Protecting Rights of Animals

People also interact with animals in very direct ways. We hunt animals, domesticate them for agricultural purposes, keep them as pets, and even use them in medical experiments. Experience has shown that these interactions must be regulated to prevent abuse.

Hunting is an old and established custom in the United States, and one that I support; yet perversions of this sport are being practiced that are shocking to animal rights advocates as well as many hunters. The barbaric and unsporting practice of *canned hunts* is one example, in which a hunt takes place on private land under circumstances that virtually assure hunters of a kill. The *hunt* occurs within a fenced enclosure, leaving the animal—typically an exotic species—no chance for escape. For a fee, an animal can be killed in violation of the basic *fair chase* tenet of traditional hunting. The U.S. Humane Society estimates that there are more than 1,000 canned hunt facilities in operation in at least 25 states.

In 2004, I introduced the Captive Exotic Animal Protection Act (S-2731), which 13 senators have cosponsored. This bill would prohibit the transport, transfer, or possession of a confined exotic (non-native) mammal for the purpose of killing or injuring that animal for entertainment or for the collection of a trophy. I am confident in the ultimate success of this bill. Several states have already banned canned hunts of mammals, demonstrating that the idea of a nearly defenseless animal being killed to provide entertainment is, at the least, distasteful to many Americans.

Animal fighting is another brutal, uncivilized practice that continues to thrive in some parts of America. In a typical fight, animals can be starved and drugged to heighten aggression, and forced to continue fighting even with injuries such as pierced lungs and gouged eyes—all for the amusement of handlers and spectators, and to serve the purpose of illicit gambling. These ghastly practices are terribly inhumane; they also have human health and economic impacts. Cockfighting was linked to the introduction of the exotic Newcastle disease in California in 2002, which cost U.S. taxpayers nearly \$200 million to eradicate; the poultry industry lost millions more. For these reasons, I am a cosponsor of the Animal Fighting Prohibition Enforcement Act (S-736), which would establish felony-level jail time for violators of the animal fighting provisions of the Animal Welfare Act, and would prohibit interstate and foreign commerce in tools designed specifically for animal fighting.

I am also a cosponsor of the Downed Animal Protection Act (S-1298), which requires livestock too sick or injured to walk to be euthanized. Under current law, these animals may continue through the slaughtering process, experiencing prolonged and unnecessary suffering, potentially infecting other livestock, and ultimately ending up on our dinner tables. Both the animal's



well-being and the human health implications are problems we must address.

Many of us enjoy animals as companions. Pets have been considered a member of many human families for millennia, and in the U.S. they are protected under both state and federal laws. In 1999, a gap in their protection was brought to my attention; in response, I sponsored the Safe Air Travel for Animals Act (S-1193), which ultimately became law.

Over 500,000 animals are transported by their owners on airplanes every year. Yet, between 1994 and 1999, 2,500 cases were documented in which dogs and cats were harmed during air travel, or even died. Some pets were left on the tarmac on extremely hot days, stuffed into cargo holds where they suffocated, or crushed by cargo piled onto their cage. In 1999, I was surprised to learn that the liability of airlines to owners for the loss, injury, or death of their pet was equivalent to that of a lost suitcase. I introduced an amendment to the Federal Aviation Administration Authorization bill to establish a measure of accountability for the airlines' neglect or mistreatment of pets. The bill established a reporting requirement that gives consumers the right to know about an airline's record with regard to the treatment of pets.

Humans share a long history with the animals. Of course, we humans *are* animals, and like other species require a healthy environment to thrive. Being the *superior* species, we have a responsibility to future generations and to protect and conserve the planet's resources. We also have a responsibility to respect the existence of other species. We must not let partisan blinders and ideological entrenchment seep into this issue. Our commitment must be to leave our nation's resources and *all* its inhabitants in a better condition when we leave than when we arrived. 🌱

2. P.L. 108-136.

**Frank Lautenberg** is a United States senator representing the state of New Jersey.

## Endnotes

1. 16 U.S.C. 1531 *et seq.*

# An Inside Look at the Animal Welfare Task Force

by Judith Lieberman

When Governor James McGreevey created the Animal Welfare Task Force, he said, “The time has come to take a proactive step toward designing a new future for animal welfare in New Jersey.” Indeed, while New Jersey had been a leader in initiating reforms intended to help animals, there had not been a comprehensive review of and plan concerning animal welfare in the state. The governor, therefore, charged the task force with evaluating the current status of animals in the state and making recommendations for a comprehensive plan.

McGreevey recognized that animal cruelty cases and animal welfare issues, such as overpopulation, euthanasia and sheltering, are matters about which the state should be concerned. Despite the efforts that had already been made on these fronts, substantial problems remained. Two years prior to the creation of the task force, the State Commission of Investigation (SCI) issued a report that highlighted problems with the Society for the Prevention of Cruelty to Animals’ (SPCA’s) enforcement of the state’s animal cruelty laws.<sup>1</sup> This was a significant finding, since the SPCA received upward of 5,000 complaints of animal cruelty each year.

The finding was even more significant against the backdrop of a documented link between animal cruelty and domestic violence. Indeed, it has been well-documented that individuals who commit crimes against animals are considerably more likely to commit violent crimes against humans; that domestic violence and animal cruelty are often closely linked; and that children who are exposed to animal cruelty are inclined to commit violent crimes in the future.<sup>2</sup> The public’s need to address animal cruelty issues was thus inherently related to the public’s need to address domestic violence issues.

Furthermore, the SCI identified substantial problems with the management and oversight of animal shelters. The SCI specifically called for the Department of Health and Senior Services to enhance its oversight concerning the functioning

of animal facilities and the care and treatment of the animals housed by them. Despite landmark programs initiated by the state, in 2000 130,000 animals entered New Jersey’s shelters, and over 40 percent were euthanized.<sup>3</sup>

The governor thus directed the task force to recommend reforms concerning animal abuse and neglect, animal population control and animal welfare; the manner in which the animal cruelty laws are enforced throughout the state; and the status of population control and the animal shelter systems in the state.

When it was first created, some commentators characterized the task force as little more than a group of idealistic animal activists who would establish a set of unrealistic proposals designed solely to benefit animals, regardless of the cost to the state’s citizens. Rather, the task force was comprised of serious, dedicated, professional and realistic thinkers. They included academics, representatives of humane organizations, animal caregivers, shelter operators, government officials and employees, lawyers, law enforcement officers, breeders and veterinarians, and public health professionals, and, as such, had diverse experiences, perspectives and priorities. They vigorously debated and analyzed each issue from various perspectives in order to determine its impact on government operations, state and local government budgets, and private citizens, as well as its impact upon animals.

There can be no question about the members’ commitment to their charge. Most traveled significant distances to

attend regular meetings that, given the breadth and complexity of the issues, would often last three or four hours. As the task force neared its deadline, meetings were held on a weekly basis, and conference calls, emails and supplemental meetings helped to get the work done. The members worked for over 18 months at this rate, devoting hundreds of hours of personal time to the project.

In addition to its dedicated members, the task force benefited from presentations by and meetings with experts from the state and around the country, including representatives of law enforcement and local government associations; veterinarians; breeder organizations; environmental societies; lawyers and experts in matters pertaining to psychology, law enforcement and shelter practices. The task force also examined other states' practices in order to identify best practices that could properly be implemented in New Jersey.

Moreover, the task force held four open meetings around the state where members of the public were invited to present their concerns and suggestions for reform. Over 200 citizens attended these meetings and offered their insights and advice. In addition, the task force solicited and received numerous letters and phone calls from members of the public. Many of these citizens had considerable experience with, and had spent substantial time and resources addressing, animal issues. The practical, first-hand experience of the public was exceptionally valuable.

All of the above coalesced in a report that addresses a broad set of issues and provides recommendations for meaningful, and reasonable, reforms. Steps have already been taken that may implement some of the proposed reforms; other actions may yet be forthcoming. It may not be possible for each recommendation to be implemented in the near future. At a minimum, however, the report opens the door for further

discussion and debate, and will hopefully prompt meaningful developments that will advance the state's response to issues that impact animals and the citizens that care for them.

## **Recommendations**

The task force's recommendations address a myriad of issues that are integral parts of any comprehensive scheme to address animal welfare issues. Following is a summary of the task force's recommendations, taken in part from the executive summary of its report.

### ***Update the Animal Cruelty Laws***

The task force provided an historical analysis of the state's animal cruelty laws, noting that they for the most part date back to the 1800s, and until the last few years received minimal legislative attention. Consequently, they are largely not in line with contemporary needs, values and contexts. The task force thus concluded that these laws need to be updated to address current animal cruelty issues and written in clear language utilizing modern statutory criminal law terminology. They also should be contained in Title 2C, the statutory volume containing most of New Jersey's criminal laws, rather than Title 4 (concerning agriculture), where they are currently located. Additionally, sanctions should be upgraded where appropriate, and, in addition to other amendments, new remedies should be provided.

The task force prepared a draft revision of the cruelty laws proposing these changes. Among the specific proposed changes, the task force concluded that the law should more clearly and uniformly address animal abandonment and neglect, which contemplates the provision of reasonable minimum care. The proposal also contemplates that the neglect law could be further refined to address particular situations in which failure to provide appropriate care leads to a physical manifestation of abuse,

such as an embedded collar, which could constitute a *per se* violation. Current law does not explicitly address the above concepts; the proposed revisions would provide substantial guidance to pet owners without imposing unreasonable or inappropriate burdens upon them.

In addition, the draft legislation contains provisions concerning excessive chaining or tethering of dogs as a form of neglect; establishes specific provisions and enhanced penalties for animal fighting and baiting; prohibits the use of guard dogs on commercial property without human supervision; enhances penalties generally in order to provide greater general and specific deterrence; and provides for additional remedies tailored to needs that arise specifically in animal cruelty cases, including but not limited to animal forfeiture, counseling and cost of care bonding.

The proposed legislation would also establish a duty to report animal cruelty or neglect, with protections including immunity provided when reports are made in good faith. This provision would be in line with existing provisions that impose a duty to report acts of abuse or violations of the law.<sup>4</sup>

### ***Improve the Enforcement of Animal Cruelty Laws***

In the 1800s, the Legislature authorized private citizens (the SPCA) to enforce the state's animal cruelty laws—and to do so using weapons and the power to search, arrest and commence legal actions—all without any oversight by government. This system, which the SCI recommended should be repealed, remains in place today. The task force concluded that, rather than eliminate the SPCA's law enforcement authority, the current system should be revamped to maximize the potential that animal cruelty cases will be addressed while responding to the concerns raised by the SCI and others about reliance upon a private entity for the provisions of law



enforcement services.

Noting that “there is enough cruelty to go around,” and therefore it is vitally important to utilize appropriate resources, the task force recommended that humane officers working with the SPCA continue in an enforcement role. It concluded, however, that their power to arrest and carry weapons should be repealed, and they should be subject to new, mandatory prerequisites, including but not limited to certification by the state, state-mandated and -controlled training and reporting requirements, and general oversight by the attorney general.

The task force recommended that police and sheriffs’ officers play a more prominent role in handling these cases. Also, because current law requires that each municipality provide animal control services, the task force recommended that each municipality utilize animal cruelty investigators, that is, animal control officers who are trained and authorized to enforce the criminal laws protecting animals. Currently, a small number of municipalities have enlisted the aid of these individuals, who have an enhanced understanding and training in animal cruelty matters and play a vital role in their towns’ law enforcement efforts. Also, all officers, as well as prosecutors and judges, should receive training specific to issues involving animals and the criminal law.

In order to insure a consistent transition to a newly structured law enforcement system and enhance our utilization of existing resources, the task force recommended that sheriff’s officers could be utilized as point officers responsible for maintaining records concerning complaints and responses throughout the country and providing assistance to local law enforcement when necessary or desired, by way of specially trained officers.

Finally, the task force recommended an equitable sharing of fine revenue.

Currently, the SPCA receives the bulk of fine revenue, regardless of its involvement with the investigation and prosecution of a case. In order to compensate government law enforcement entities, as well as provide an incentive, the task force recommended that fine revenue go to the entity that handled the case.

The task force concluded that these recommendations would best serve the interests of the state and the state’s animals, striking a balance that would allow for dedicated and qualified humane law enforcement officers to supplement the efforts of municipal, county and state law enforcement officers. Under this proposal, SPCA officers would be incorporated into government by way of new training, certification and oversight systems. Government law enforcement officers, subject to ever-increasing responsibilities attendant to homeland security and other pressing matters, would benefit from the additional manpower, thus enhancing the overall response to animal cruelty and neglect cases. Specialized training for all officers would provide for a detailed understanding of the matters peculiar to cases involving animals, thus facilitating responses to complaints. As noted, this is believed to be vitally important, not only because these cases should be investigated and prosecuted in their own right, but also to help prevent future crimes against people and society.<sup>5</sup>

### ***Establish Best Practices to Prevent Overpopulation***

The overpopulation of dogs and cats in the state is a significant problem that contributes to the needless killing of homeless animals every year. Aggressive efforts are needed to address the cause of the problem, which is unchecked reproduction. The task force, therefore, recommended that any comprehensive response to this problem should include well-designed and implemented trap, neuter, vaccinate, return and monitor

programs for feral cats; low-cost sterilization programs for dogs and cats; sterilization of animals prior to adoption or sale; and the use of micro-chipping for identification. Aggressive adoption programs and other practices, including those that may be achieved by way of public-private partnerships, would substantially aid shelters as they attempt to obviate the need to euthanize animals in their charge. The task force also stressed that euthanasia should not be considered a solution of first resort in response to overcrowding at shelters when alternate responses are available.

### ***Create Additional Shelter Space and Improve Facility Operations and Animal Control Services***

Currently, there are not enough animal shelters to provide for the basic needs of the homeless, stray and abandoned animals in the state and to provide each citizen appropriate access to an animal facility. The task force recommended that creative measures be employed in an effort to develop sufficient shelter space so that all regions of the state have access to shelters. By way of analogy, New York City requires a full-service animal shelter in each borough. Low-cost financing would assist in getting these needed facilities built; uniform construction standards would guarantee that they adequately serve their functions.

To ensure that conditions within shelters allow for the proper and humane care of the animals housed there, shelters need to be subject to proper regulation and oversight. The task force recommended that this be facilitated through the establishment of uniform standards of care and best practices, and thorough inspection and enforcement of the current laws governing animal facilities. The state Department of Health and Senior Services (DHSS) and local health departments should ensure that inspections are con-

ducted regularly and properly. Specific training in animal facility inspections and issues relevant to the welfare of animals housed in these facilities should be available, and the current statutory cap on the amount of fines that can be levied should be increased.

With respect to animal control services, the task force found that although each town must provide animal control services, the manner in which these services are provided is not uniform, and that some private animal control agencies contract with multiple municipalities and are not able to fully serve each town. As a result, there is a lack of consistency in the nature, scope and manner that animal control is provided, and some municipalities may not be receiving the services for which they paid. In addition, some towns use uncertified personnel although this is expressly prohibited by statute. The task force concluded that animal control services would benefit from licensing and continuing education requirements, and state oversight, to ensure the proper provision of services.

#### ***Provide Humane Education in Schools***

The task force determined that humane education would substantially aid in any effort to prevent animal cruelty and promote proper care and treatment of animals. Currently, New Jersey law permits, but does not require, humane education to be taught in schools. The task force recommended that humane education be made mandatory with the core curriculum established by the New Jersey Department of Education, in consultation with school districts and appropriate interested parties.

#### **Outcome and Work Yet to be Done**

Pursuant to Governor McGreevey's directive, the task force concluded its mission when it issued its report in November 2004, thus it does not have

continuing authority. Consequently, it will be up to legislators, government entities, private organizations and citizens to implement the task force's recommendations. To date, substantial efforts have taken place in this regard. Some prime examples follow.

#### **Department of Health and Senior Services, Office of Animal Welfare**

The DHSS created the Office of Animal Welfare (OAW) in July 2004 in response to the SCI report that called for greater involvement by the department in matters pertaining to animal facilities. The new office reports directly to the deputy commissioner for public health protection and emergency preparedness, and one of its primary responsibilities involves conducting regular inspections of pet shops, kennels, pounds and shelters, pursuant to current law that grants the DHSS oversight over these facilities. To date, the OAW has inspected over 100 facilities, and has made plans to inspect the remaining facilities (approximately 500) during this year.

Additionally, the OAW has begun to address the recommendations contained in the task force report concerning issues that should be developed, regulated, monitored and/or implemented by DHSS. The office has convened an advisory group that meets regularly to review all existing regulations governing the sanitary operations of pet shops, kennels, pounds and shelters, and to draft amendments, which will be published in the *New Jersey Register*. The OAW also plans to examine the current regulations governing animal control officers and animal cruelty investigators.

#### **Public-Private Partnerships**

Much of what was recommended by the task force can be accomplished by way of public-private partnerships, with private citizens providing their services

to, and working in conjunction with, the state or local governments. Gordon Stull, a veterinarian and task force member, is working with the Burlington County Freeholders and the county health department to institute a county-wide trap-neuter-return program for the county's estimated 30,000 feral or wild cat. Currently, the cats are trapped by animal control officers and taken to the county shelter. Most are not adopted and are ultimately euthanized, at a reported cost of \$75,000 to the county.

The program would involve trapping the cats, vaccinating and neutering them in order to prevent the spread of disease and further reproduction, and installation of a microchip containing the animal's medical history. (Private veterinarians have offered their services at a reduced cost.) The Geraldine R. Dodge Foundation has provided a \$50,000 grant for this initiative, which has the support of the county health department. Ordinances authorizing the program are being sought in the county's municipalities.<sup>6</sup>

#### **Emerging Issues**

The task force acknowledged, but did not address, issues that will likely emerge for practitioners. As noted in its report, the legal characterization of the relationship between humans and animals is an issue with substantial social, legal and practical implications. A core question is whether animals should be considered *property* belonging to human owners, or whether a preferable characterization may be found in the concept of *animal guardian*. Throughout the country, the legal status of animals is the subject of current debate both in and out of the courts, attracting the attention of legislative bodies as well. Some courts have determined that the traditional notions of property should not be applied to domestic animals, while certain governing bodies have amended the terminology in their laws

or ordinances from animal owners to guardians, to reflect a conceptual change in the legal nature of the human/animal relationship. This issue had generated substantial public debate and support on both sides.

Although obviously an issue of significance, the task force's mission did not call for it to delve into this topic and, therefore, it did not address it substantively in its report. The task force noted, however, that this and related issues, including whether a person having custody of an animal should be entitled to non-economic damages when that animal is subjected to cruelty or neglect inflicted by another person, may shape the future of animal cruelty jurisprudence and other animal welfare issues in the future.

## Conclusion

The task force report has been well received, and it appears that it will be useful as responses to the myriad of issues affecting animals in the state are debated and fashioned. Given that the task force members represented diverse interests and perspectives, its proposals should provide a firm foundation as legislators, government officials, organizations and private citizens continue in their efforts to address these matters. ♪

## Endnotes

1. The State Commission of Investigation's report concerning the SPCA can be accessed online at <http://www.state.nj.us/sci/spca.sht>
2. See e.g., Flynn, C.P. (2000). Why Family Professionals Can No Longer Ignore Violence Toward Animals, *Family Relations*, 49, #1, 87-95; Beirne, P. (2002). Criminology and Animal Studies: A Sociological View, *Society and Animals*, 10, 4, 381-86; DDAF (2002). A full discussion of this phenomenon is found in the task force report at Section II D. The report can be accessed online at

<http://www.state.nj.us/animalwelfare/taskforce/report.pdf>.

3. This trend continued; in calendar year 2003, over 126,000 animals entered New Jersey impoundment facilities (which are not all of the facilities in the state). Over 50,000, or 40 percent, were euthanized.
4. A duty to report suspected abuse or exploitation currently exists in the following contexts: N.J.S.A. 9:6-8.10 (children); N.J.S.A. 30:6D-17 (residents of community residential facilities for the developmentally disabled). The subjects of these laws are vulnerable to exploitation or abuse, and may not be in a position to protect themselves from victimization. The laws imposing a duty to report provide a mandatory duty for those whose jobs bring them into situations in which they will be in a position to directly observe such acts of abuse. They also provide for immunity for the reporter and may allow for additional protections, such as retaliatory action by an employer.
5. The task force's recommendation concerning the SPCA is in line with other stats that have successfully incorporated "humane law enforcement officers" such as the SPCA into their law enforcement systems. The task force's recommendation is modeled in part after these programs, which are detailed in the report.
6. The task force is aware that numerous other private citizens and organizations have endeavored to undertake similar programs, either on their own or in conjunction with government entities.

**Judith Lieberman** is the chair of the Animal Welfare Task Force.

# The Role of New Jersey's SPCA

by Harry Jay Levin

While the state is fortunate enough to have several significant organizations like New Jersey's Associated Humane Society, which protects animals through its animal care shelters, animal welfare zoos and adoption services, only one animal-related organization in New Jersey—the Society for the Prevention of Cruelty to Animals (SPCA)—is empowered by the state Legislature to perform law enforcement activities prosecuting those who violate N.J.S.A. 4:22, *et seq.*

**T**he statute not only creates the SPCA, it also gives the society unprecedented power. Search as one might through the history of legislative initiatives, it would be difficult to find other examples where broad-based authority similar to that delegated to the SPCA is granted. Duly authorized officers of the SPCA are permitted to make arrests, with or without a warrant, under N.J.S.A. 4:22-44, and in furtherance of law enforcement actions, qualified members are authorized to carry weapons, under 2c:39-5. Like traditional law enforcement members, SPCA officers are by statute insulated from civil liability, under 4:22-56.

While there is a dearth of case law interpreting the statute generally, there has been some activity examining the status of SPCA officers workers. One example is the case of *Mesgleski v. Orbani*,<sup>1</sup> where the court held that SPCA officers were considered law enforcement personnel while performing their statutory duties. This was a monumental holding in that the court acknowledged both the existence of the SPCA and the status of the organization as a pseudo-government entity.

Interestingly, the statute also speaks to the pecking order of the SPCA vis-à-vis governmental law enforcement, placing law enforcement in the position of assistant to the SPCA.

The police forces of all places where such organizations exist, shall, as the occasion may require, aid the society, its members, officers or agents, in the enforcement of all laws enacted for the protection of dumb animals.

This pervasive responsibility for the state SPCA is available to the individual county societies upon the granting of a certificate of authority by the president of the state SPCA. In fact once established, the county society has all of the statutory powers, and other than the right of revocation by the president, county societies currently operate with complete autonomy.

This singular status allows the SPCA to straddle the private and public line. For purposes of structure, the society functions as a private entity, yet while performing law enforcement duties the SPCA enjoys most of the privileges afforded municipal police departments. While this status is unique, so is the performance of the state SPCA, which maintains a spotless record carrying out its law enforcement duties.

The private aspect of the SPCA also carries over into the financial arena, since the SPCA does not receive tax-based funding; instead, all of its operating revenues come from a fine-sharing arrangement. Each time the SPCA successfully prosecutes a statutory violation resulting in a fine, the financial penalty is shared with the municipality where the violation occurred. This revenue stream is complemented by donations of both money and time invested by volunteers.

## Heightened Interest in Animal Law

While there are no examples of abuse within the SPCA, the society's broad powers are the reason why the organization has faced some criticism. Proponents of drastic restriction of SPCA power argue that the world is a much different place

then when the SPCA was created in 1868.

As this article was going to press, the law related to animal enforcement was poised to undergo an unprecedented evolution, as Assembly bill 3186 began making its way through the Legislature with broad bipartisan support. The proposed legislation reaffirms the law enforcement authority of the SPCA, continuing to recognize its inherent expertise in handling animal cruelty complaints. It also heralds a more well-defined relationship with traditional public law enforcement on the county and municipal levels, and provides a clearer line of authority between the state and county SPCAs.

What's causing this new attention to the field of animal welfare? In recent years many of the state's nonprofit animal welfare organizations have faced criticism claiming that such groups were not keeping with the times. Few had computerized information systems or effective internal controls reminiscent of similarly situated private corporations.

Concerns were first expressed in *Sussex County SPCA v. New Jersey SPCA* by Judge Reginald Stanton in his unpublished opinion in 1982. *In dicta* the court was critical of the breadth of the powers delegated to the SPCA. Stanton reasoned that there was an inherent danger in affording what is ostensibly a private organization public law enforcement status. Even though he was unable to point to a single event of malfeasance, he nonetheless hypothesized that there were potential problems associated with private persons having such power.

More recently, criticism was formally embodied in a series of reports from the State Commission on Investigations (SCI), a legislatively created body authorized to investigate a broad array of organizations. These reports were designed to bring two of the state's leading animal welfare organizations under the microscope.

While few would argue that the reports incorporated stale and inaccurate information, they did serve as a wakeup call. To their credit, the targets, including the SPCA, reorganized to more effectively deliver services to the public. As a consequence, the SPCA underwent a complete makeover. The administration, which was the subject of criticism, was changed, and a full panoply of internal operations and financial controls were implemented.

In the pending matter of *Rhodes v. Bergen County SPCA*,<sup>2</sup> the president of the state SPCA revoked the certificate of authority of the county society for its failure to comply with reporting and law enforcement standards. Judge Travis L. Francis, in response to an order to show cause initiated by Bergen County, affirmed the revocation, holding that the president of the state SPCA not only had the power to revoke, but had valid cause to do so. The matter is now on appeal.

The SCI was not the only governmental body focusing on the animal welfare community. Shortly after his election, Governor James McGreevey created a Task Force on Animal Welfare. The task force's mission was to assess the current state of affairs in the animal welfare community. In the author's opinion, the task force's report suffers from the absence of balance. This deficiency is attributed primarily to the makeup of the task force, which failed to incorporate major animal welfare groups. Critics of the task force are quick to point out that the membership comprised special interest advocates. The credibility of the report was not helped by the decision of the New Jersey Department of Health to hire two of the private committee members, even before the report was issued. While its validity may be subject to fair criticism, the existence of a task force contributed to the self-analysis many of the state's largest animal welfare

groups embraces.

The proposed legislation also addresses some of the concerns raised in both the SCI and task force reports. Institutionalized safety training will be mandated, as will more formalized reporting requirements. The SPCA's funding mechanism is maintained, keeping it off the public payroll. Most notably, the bill imposes strict compliance with the Police Training Commission's standards on weapons, ensuring those who carry weapons have adequate training and are certified by experienced law enforcement professionals.

The bill puts to rest the cry from some factions that all animal welfare shelters and law enforcement efforts should be brought exclusively within the government's grasp; for example, that all law enforcement would be performed by municipal police departments. This idea received a cool reception from the police, who have indicated that they do not have the resources to take over the state's animal law enforcement responsibilities. There is widespread support for the legislation, and proponents suggest the Legislature should be applauded for addressing the situation in a sober and prudent fashion. ♪

## Endnotes

1. 330 N.J. Super. 10 (App. Div. 2000).
2. 376 N.J. Super. 405 (App. Div. 2005).

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## KINDNESS CROSSES THE HUDSON

# Another Look at the SPCA

by Debora M. Bresch and Stephen Zawistowski

Henry Bergh, a prominent New York philanthropist and diplomat, founded the American Society for the Prevention of Cruelty to Animals (ASPCA) in New York City on April 10, 1866. The New York State Legislature granted a special charter to form the organization, and followed on April 19 with an expanded anti-cruelty law that granted the ASPCA enforcement powers.<sup>1</sup>

**B**ergh and his designated agents were soon actively prosecuting a wide variety of cases that included the mistreatment of trolley horses, farm animals brought into the city for slaughter, turtles for the restaurant trade and animals employed in blood sports such as dog fighting.<sup>2</sup> Bergh quickly became well known for his activities, and was often both praised and lampooned in the popular press.

In addition to his anti-cruelty efforts in New York, Bergh worked to encourage the formation of SPCAs in other parts of the country. Erie County (Buffalo, NY) was the home of the second SPCA, formed in 1867, followed by the formation of SPCAs in Philadelphia and Boston in 1868. Each of these societies was independent in its organization, finances and functions. While this likely simplified the rapid organization and spread of the effort to protect animals, it also likely contributed to the confusion and lack of consistency often seen in the enforcement of animal cruelty laws. Indeed, the current controversy swirling around the various New Jersey SPCAs is due in no small part to this fragmentation, and the

perceived panoply of problems it has caused.

The New Jersey SPCA was born soon after the formation of the ASPCA, when Bergh turned his eye to the other shore of the Hudson River and launched a letter-writing campaign to encourage its establishment. Bergh was especially concerned about the need for an SPCA in New Jersey, since it appeared that his vigorous enforcement of the anti-cruelty law in New York was driving a number of miscreants across the Hudson to continue their pursuits. John Taylor of Jersey City was a prime example. Considered one of the best “wing shots” of the day, he frequently demonstrated his prowess in competitions using live pigeons as targets. While Taylor attempted to test Bergh’s mettle and the efficacy of the anti-cruelty law in various New York State venues, he and his colleagues were able to carry on their sport without fear of interference in New Jersey.<sup>3</sup> Similarly, in what may have been the most colorful and egregious demonstration of a contrived blood sport in New Jersey, two imported wild boars were killed on the Elysian Fields in what was billed as a wild boar “hunt” by Hoboken impresario Charles Kaegebehn in April 1868.<sup>4</sup>

The years 1866 through 1867 saw a blizzard of correspondence between Bergh and prominent New Jersey individuals and politicians, including Edwin A. Stevens, Antoinette Otto, and Archibald Russel.<sup>5</sup> Bergh also fired off a series of missives to New Jersey politicians Henry Clay Fish, James L. Hays and Walter Rutherford, encouraging the passage of a new anti-cruelty law and the formation of a state SPCA.<sup>6</sup> Ultimately, the terrible mistreatment of a single horse, in April 1868, crystallized the need for such a society and law.

The horse had been used to pull nine tons of coal from Hoboken to Jersey City. On April 11, it fell during a fierce snowstorm and was unable to stand, so the owner beat it severely before abandoning him to die. Bergh was contacted about the fate of the horse, and he sent off several letters by personal messenger to various Jersey City officials demanding that someone provide appropriate care for the

animal, or at least have the decency to end its suffering by humanely killing it. Among those Bergh contacted was Major Pangborn, editor of the *Jersey City Evening Journal*. He also contacted the police captain, who incensed Bergh by rebuffing his requests as interference in a local matter.

The fate of the horse is not known; however, the animal's very public suffering was one link in a chain of events that would lead to the formation of the New Jersey SPCA. Through the encouragement and prodding of Henry Bergh, the SPCA was formed in New Jersey on April 21, 1868.

Specifically, the state Legislature incorporated the New Jersey SPCA "for the purpose of the enforcement of all laws which are now or may hereafter be enacted for the protection of dumb animals."<sup>7</sup> The Legislature vested the society with general corporate powers—including the power to elect and appoint officers and agents for carrying on its business and establish bylaws or regulations for its governance—as well as an array of law enforcement powers such as the authority to conduct investigations, make arrests with or without a warrant, petition a court for the confiscation and forfeiture of any animal, and carry firearms.<sup>8</sup> Given the relative scarcity of police forces in post-Civil War New Jersey, the Legislature also directed "the police in all places in this state where police organizations exist" to aid the SPCA in its statutory mandate, thereby allocating primary authority over cruelty law enforcement to the SPCA and a supportive role to the police.<sup>9</sup>

Five years later, in 1873, the Legislature also authorized the creation of district (county) societies to be organized under a certificate of authority issued by the president of the state SPCA, with the same rights, powers and privileges as the state SPCA, including the power to elect officers and agents to conduct business

and establish bylaws and regulations for their governance.<sup>10</sup> It is, in part, this codified fragmentation of the cruelty law enforcement authority among a multitude of private entities that drew intense criticism from the New Jersey State Commission of Investigation (SCI) in a December 2000 report examining the societies' indiscretions and future prospects. Noted the commission regarding the 1873 incorporating act and subsequent laws modifying the societies' powers:

The result is 17 separate and distinct societies whose volunteer members dictate who may join, how they operate and how they enforce the cruelty laws. Consequently, there is no uniformity in operation or consistency in enforcement of the laws, but many opportunities for abuse.<sup>11</sup>

According to the SCI, fiscal improprieties, inappropriate use of firearms, and animal cruelty had become standard practice among the SPCAs. Indeed, based on its investigation, the SCI recommended the immediate repeal of the statutes authorizing animal cruelty law enforcement by the SPCAs, reasoning that "law enforcement is a public function and thus a responsibility not to be placed with a group of self-selected private volunteers, no matter how devoted they might be to animal welfare."<sup>12</sup> Instead, the SCI advised that the enforcement function be placed squarely with government, as it would be the only way to ensure "adequate funding and resources, including manpower, to enforce the animal cruelty laws in a professional, uniform and responsive manner."<sup>13</sup>

Of course, as the New Jersey Task Force on Animal Welfare noted in its November 2004 report, the "assumption underlying the SCI recommendation is that there will be adequate public resources available to properly enforce our animal cruelty laws."<sup>14</sup> In fact, the

task force, formed by Governor James McGreevey in 2002 to study, among other things, New Jersey's cruelty law enforcement scheme, chose not to bet on this assumption. Instead, observing the precept that "there's plenty of cruelty to go around," the task force has envisioned a system that utilizes already existing enforcement resources accompanied by "additional layers of scrutiny, oversight and accountability to promote greater effectiveness."<sup>15</sup>

Optimally, in the task force's view, state and county SPCA officers would continue to enforce the animal cruelty laws, along with the police, county sheriffs, and municipal animal cruelty investigators (ACIs). While animal control officers (ACOs) are authorized by state statute only to enforce the animal control laws, they may also function as ACIs if trained in humane law enforcement and asked to serve in this capacity by their respective municipalities.<sup>16</sup>

Thus, the task force has proposed not eliminating the enforcement authority of SPCA humane officers in favor of a wholly governmental enterprise, but rather instituting an "inclusive system that brings to bear all available public and private enforcement resources... entail[ing] a high degree of coordination and cooperation between various State, county and local governmental and private entities."<sup>17</sup> A "system in which there are more personnel than may be needed to handle cruelty complaints is preferable to a system in which there are more cruelty complaints than there are personnel that can handle them,"<sup>18</sup> observed the task force.

In the wake of the SCI report, the state SPCA took matters into its own hands, reconstituting its board and electing a new president. It also sought to revoke the charters of five county SPCAs, including the Bergen County SPCA, the Burlington County SPCA due to alleged insufficient staffing, and the Hunterdon County SPCA for failing to

prosecute former NBA star Jayson Williams for allegedly fatally shooting his dog in anger after losing a bet. This effort was stymied, however, by a recent Appellate Division decision prohibiting the SPCA from revoking, in particular, the Bergen County SPCA's charter and authorizing the Bergen County Prosecutor to supervise the chapter's enforcement of New Jersey's cruelty laws. The court gave particular weight to the prosecutor's broad statutory authority to supervise the exercise of law enforcement powers in the county, as well as his written agreement with county SPCA members to satisfy specified training requirements.

In addition, the state SPCA has taken high-profile positions on a range of animal welfare issues, joining, for example, with a broad coalition of humane organizations (e.g., the American Society for the Prevention of Cruelty to Animals, the Humane Society of the United States, and the Farm Sanctuary), farmers, veterinarians, environmental and consumer groups in a lawsuit against the New Jersey Department of Agriculture (NJDA). Specifically, the suit alleges that the NJDA failed to establish humane standards for farm animals as required by the New Jersey Legislature when in 1996 it directed the development of "standards for the humane raising, keeping, care, treatment, marketing, and sale of domestic livestock."<sup>20</sup> According to the plaintiffs, the NJDA's regulations instead sanction many existing inhumane farming practices, such as:

1. Gestation crates, which confine breeding pigs for months on end in an enclosed area too small to allow them to turn around. The crates are banned in Florida and several European nations.
2. Tethering and confining veal calves until slaughter. The regulations also permit restricted diets that often result in anemia in veal calves.

3. Sharply limiting the amounts of food and water given to laying hens. This practice is called forced molting, and is intended to increase the hens' egg production.

Further, the plaintiffs assert that the regulations not only expressly permit these practices, but, in fact, also exempt all "routine husbandry practices" from compliance with the standards. Moreover, due to a provision in the 1996 enabling statute, farming operations deemed compliant would be exempt from liability under state animal cruelty laws, making the outcome of this lawsuit especially significant.

According to Rhodes:

These new regulations, if allowed to stand, would greatly diminish our ability to enforce humane standards for the proper treatment of domestic farm animals. That is why we have joined in this action.

Both state and county SPCAs are due to metamorphose again with the anticipated enactment of legislation that would, among other things: 1) mandate the placement of several county SPCA members on the state SPCA board of trustees; 2) require the submission of an annual financial audit and report to the attorney general detailing the SPCAs' law enforcement activities; 3) restrict the number of county SPCA agents who may carry firearms; and 4) require that all agents empowered to carry firearms be trained in their use. A. 3186, sponsored by Herb Conaway, Robert Smith, and John McKeon, passed the Assembly on June 30th. Identical bill S. 2636 has been introduced by Senator Raymond Lesniak and will be considered by the Senate Economic Growth Committee, which he chairs, in the fall.

The constant evolution of the New Jersey SPCA system reflects the dynamic nature of the animal welfare field in New Jersey over the last century. From one-

person battles to eliminate the most glaring animal abuses to more sophisticated campaigns seeking integrated cruelty law enforcement and improved farm animal welfare, the pursuit of kindness toward New Jersey's animals has been, and promises to remain, a vibrant area of law and public interest. ♪

## Endnotes

1. Zawistowski, S., "The American Society for the Prevention of Cruelty to Animals," in M. Bekoff and C. Meaney (eds.), *Encyclopedia of Animal Rights and Animal Welfare*, Westport, CT: Greenwood, 1998, pp. 9-12.
2. ASPCA, First Annual Report, 1867.
3. Buffett, E., *Bergh's War On Vested Cruelty*. ASPCA archival notes.
4. *Jersey City Argus*, April 9, 1868.
5. Buffett, E., *Bergh's War On Vested Cruelty*. ASPCA archival notes.
6. *Id.*
7. P.L. 1868, c.335, § 1, codified at N.J.S.A. 4:22-1.
8. New Jersey State Commission of Investigation, *Report on the Societies for the Prevention of Cruelty to Animals*, December 2000, p. 5; *Animal Welfare Task Force Report*, November 2004, p. 31.
9. P.L. 1868, c.335, § 4, codified at N.J.S.A. 4:22-4; Task Force Report, *supra*, p. 31.
10. Task Force Report, *supra*, p. 31; SCI Report, p. 5.
11. Task Force Report, *supra*, p. 34.
12. *Id.*
13. *Id.*, citing SCI Report, p. 159.
14. *Id.* p. 34.
15. *Id.* p. 40.
16. *Id.* p. 32.
17. *Id.* p. 40.
18. *Id.*
19. Jayson's Local SPCA in Doghouse Over Pet-Shooting," *Daily News*, October 11, 2004. Retrieved: November 30, 2004, from [http://www.nydailynews.com/front/breaking\\_news/story/241021p-](http://www.nydailynews.com/front/breaking_news/story/241021p-)

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20. P.L. 1995, c. 311, § 1, codified at N.J.S.A. 4:22-16.1.

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# Animal Law: Yesterday and Today

by Robin Bernstein

What is animal law? While there is no unanimity in its definition, by all accounts animal law is a growing field requiring knowledge of many different areas of law.

An attorney practicing animal law might have the following caseload: a plaintiff animal protection group trying to stop a bear hunt from taking place or trying to come up with a way to sue a factory farm that is violating anti-cruelty laws; a couple who wants to draw up their wills to ensure that their animals are cared for after their death; a defendant whose dog knocked over or bit someone; a plaintiff who is suing for veterinary malpractice; or an animal rights activist accused of using terrorist tactics in protesting against a corporate animal user. As the topics within the field of animal law vary, so do the ways in which animal law is taught in the increasing number of law schools across the country that are adding animal law to the curriculum.

Today, animal law is taught at 40 law schools in the U.S. The Animal Legal Defense Fund (ALDF), founded in 1979, now has student chapters known as SALDFs in over 50 law schools, and hopes to have chapters in all of the 186 accredited law schools within 20 years. There are also independent student groups on law school campuses, such as the Rutgers Law Students for Animal Rights.

The focus of animal law classes varies from the philosophical to the pragmatic, from the rights of the animal to the rights of those who use animals. The teaching of animal law might include such topics as the philosophy of animal rights as compared to the philosophy of animal protection; or an exploration of the differences in the treatment of animals raised for food versus animals that share our homes; or a discussion of fundamental procedural legal issues that impact

animals, such as the crucial, and often frustrating, question of who has standing to sue when an animal is harmed in a way that violates the law. It may involve the discussion of what constitutes legal cruelty, or how to deal with the growing recognition of the connection between violence against animals and other forms of domestic violence, such as the implementation of cross-reporting by child welfare workers and the Society for the Prevention of Cruelty to Animals (SPCA) of child abuse and animal abuse. Additionally, it may involve discussions of how to defend the free speech rights of animal activists or how to best represent the business interests of those who use animals in the production of food, entertainment, clothing or research.

Two of the most prominent leaders in the field are located in New Jersey.

While many credit Professor Peter Singer, currently the Ira DeCamp Professor of Bioethics at Princeton University's Center for Human Values, as being the father of the modern animal movement, most credit Rutgers's Professor Gary Francione as the father of animal law. In 1995, Francione wrote *Animals, Property and the Law*, widely viewed as the seminal work discussing the ramifications of the role of animals in the legal system—as property. The majority of, if not all, animal law classes either teach animal law from this viewpoint or use it as the point from which to diverge.

In the 1980s, Francione, then a professor at the University of Pennsylvania Law School, began to instruct students on the legal status of animals as part of his course on legal theory. In 1989, he left his tenured position at Penn to move to Rutgers-Newark, and in 1990, he and Anna Charlton founded the first law school animal law clinic. Although the Rutgers Animal Rights Law Clinic ran with success for many years, Francione became convinced early on that significant social change would come not from within the legal system, which he claimed “is unlikely to provide any meaningful protection for animals as long as they are property.”

Francione describes animal law as divided into two camps: Those who think the goal should be “better regulation of animal slavery and those who believe that the slavery should



end.” As an abolitionist, Francione states that the goal of the animal lawyer “should not be an additional inch of space in the egg battery cage or the amendment of anticruelty laws,” which, he contends, do very little. Rather, the animal lawyer should be “representing and defending animal advocates who are using nonviolent means to educate all of us about the need to abolish institutionalized animal exploitation. Once there is a change in social thinking, legal change will follow.”

Animal law professors often discuss their classes in terms of whether they teach “animal rights law” or “animal law.” For example, Bruce Wagman, who teaches at UC Hastings College of the Law and is a co-author of the only animal law case book currently available,<sup>1</sup> says, “The thrust and focus of my classes is definitely an objective survey of the law as it is affected by the biological, psychological or special nature of animals qua animals. It is not about animal rights activism, although notions of animal rights logically come into the discussion as a natural consequence. I don’t teach veganism or vegetarianism or activism—I try to treat it just as any other law school course—analyzing cases and laws that affect or are affected by animals.” While Wagman acknowledges that notions regarding what constitutes humane treatment or cruelty inevitably come into play, he insists “the focus is on the law. The rest follows.”

Professor Kathy Hessler, who teaches at Case Western Reserve University School of Law, makes clear that “the one thing my class is not is an animal rights class. My focus is locating the animal movement along the spectrum of other social justice movements.” Hessler believes this approach gives the students not only the ability to understand the importance of the issues, but to compare tactics and arguments “from the well-farists to the violent abolitionists.” Within this theoretical framework, Hessler

deals with “how the courts and legislatures address reform issues, and whether they are doing a good job at what they are attempting, without worrying first about whether it’s the right thing.”

On the other hand, Professor William Reppy, at Duke Law School, takes a very different approach. Reppy teaches “animal law as a very practical course, hoping to groom the students into being excellent advocates for animals. Thus, I am teaching creative use of tort law, or contract law, or trusts law, etc. The thrust of my class is to assist the student in becoming a smart and clever advocate. It is not at all philosophical.”

Similarly, Professor Paul Waldau, who teaches at Boston College School of Law, has taught at both Harvard and Yale, and is currently the director of the Center for Animals and Public Policy at Tufts University School of Veterinary Medicine, sees “animal law expanding dramatically in the coming decades. I think most of the expansion will be through non-rights vehicles (such as work in trusts, perhaps new torts, greater enforcement of anti-cruelty laws, and new legislation limiting the right of humans to own or harm certain nonhuman animals).” Thus, Waldau points out, the focus of his course “is directed to seeing the basic nature of today’s legal system (which I hold to be speciesist in the extreme), and then seeing the possibilities for effective, fundamental protections for some or all nonhumans. I emphasize that the law has many tools other than rights, and is, in reality, a very flexible system when it is freed from its humanocentric bias.”

Steven Wise, one of the pioneers in teaching animal law and the first to teach at Harvard, makes clear that he teaches animal rights law, while practicing animal law, or, as he provocatively refers to it, “animal slave law.” Thus, while the current practice of law is based on a legal system that treats non-human animals as slaves, the course he teaches

“discusses the jurisprudential and philosophical problems of where legal rights come from, who should have them, and which ones should they have—in other words, the animal law of the future.” In Wise’s opinion, this approach “implicates the most sacred and powerful legal values.”

While the starting point of animal law for all of these professors, no matter what their techniques, tends to be how far they are willing to delve into animal rights theory, as opposed to sticking to practical applications, there are also animal law professors who see the strength of their work in providing what they consider to be an even-handed approach to presenting the treatment of animals within the legal system, whether a particular animal plays the role of food, research subject, object d’art, entertainment or companion. While Professor Jerrold Tannenbaum, who teaches animal and veterinary ethics and law at University of California at Davis, agrees that animal law classes should include discussions of whether animals should be given standing, or “be categorized as legal persons” he objects to the “radical positions” of some who teach animal law and points out that “[m]any law students are interested in animals and in helping and defending those who use and deal with animals.”

David Wolfson, a partner at Milbank, Tweed, Hadley & McCloy, LLP, who has taught animal law at Harvard, Yale and Cardozo, and will be teaching at Columbia in the fall, teaches his course from a philosophical basis, giving background in the history and philosophy of animals in the legal system, their capabilities, how they are treated in general and how they are treated in their specific uses, such as in farming and scientific research. While he acknowledges that in his class “the goal is to show that the legal system for animals doesn’t work, and that it should be changed,” he points out that the challenge is to “portray all

that, without making it propaganda.”

Wolfson, like many others in the field, notes that his classes usually include a wide variety of viewpoints, from animal activists, to dog breeders, to farmers, and points out that his purpose is not to convert his students into vegetarians, but to teach them how the legal system deals with animals and allow them to come to their own conclusions. Indeed, Professor Waldau notes that he finds it “best if there are some skeptics in the class—they are educational opportunities of the first rank (in two senses—they argue the ‘other side’ more fully and articulately, and they also can be impressed with the deep value of the course).”

Whether, or to what extent, law courses should be taught from an advocates’ perspective, or, instead, should constitute a balanced presentation that offers the status quo as equally legitimate to alternative visions of the future, is a question familiar to those who were involved in legal education during the early years of other legal activist movements, such as the civil rights movement and movements advocating for the rights of women, children, etc. While one point of view holds that teaching from an advocates’ perspective is unbalanced, others argue that teaching that supports the status quo, merely because it is the status quo, is just as biased, and, more importantly, fails to benefit the students, the legal system or society by refusing to seriously examine cultural and legal values and norms.

This is a question with which Professor Taimie Bryant, at UCLA, has struggled. “Oddly,” Bryant points out, “a student who would never question whether we should have corporations while taking corporations or a student who would never question whether we should protect children in the context of a class on advocacy for children, nevertheless will use disproportionate amounts of time trying to keep a people-first hierarchy in place throughout

the animal law class.” While Bryant does focus on current controversy, her approach is more philosophical than practical. She focuses on philosophical, and, in particular, feminist approaches to understanding the role of animals in law and society. “If you teach a student how a particular case is/was handled, you haven’t given them as much as you have if you have given them theories through which they can define meaningful projects and stay the course when demands to compromise are made.”

### **Animal Law: Why Now?**

In the early years of animal law in the law schools, the course was frequently started because of the efforts of one dedicated professor, such as Gary Francione at Rutgers. Taimie Bryant points out that her interest in animal law predated the students’ interest, but adds that it’s the students’ interest that has kept it going for the last nine years. Bryant insists that she teaches animal law, “not because I believe that law is the most effective vehicle for changing social practices and attitudes toward animals.” Instead she teaches animal law because she cares about “how society treats and views animals, and I was a law professor at the time I decided I couldn’t just stand by without doing something about my strong belief that the treatment of animals in this society falls short of the threshold of decency.”

More and more, however, the arrival of an animal law course on a law school campus is the result of student interest, which seems to reflect a growing concern among the general populace about the way animals are treated in our society and whether the law is doing enough to protect them. Just this year, Columbia, New York University and Stanford have decided to add classes, all as a result of student requests.

In addition to animal law courses, there are other signs on law school campuses of the growing importance of this

field. Ten years ago, students at Oregon’s Lewis and Clark College of Law started the field’s first scholarly journal, *Animal Law*. Now, a second one is starting up at Michigan State University College of Law under the tutelage of Professor David Favre, a long-time scholar and teacher of animal law and editor of the *Animal Legal & Historical Web Center*.<sup>2</sup>

One of the most important aspects of the effort to establish animal law both on campuses and in the real world is the development of law school clinics that will help train students to take on actual cases involving animals and introduce them to some of the special issues that arise in this field. During its decade of operation, the Rutgers Animal Rights Law Clinic, which is presently on hiatus, trained students using a variety of cases that included opposing deer hunts and wild horse round-ups and representing students opposed to dissection. Currently, an increasing number of schools are allowing students to do externships in animal law and are preparing to create animal law clinics.

In the meantime, just this year, the Environmental Law Clinic at Rutgers–Newark, directed by Professor Robin Greenwald, started to take on animal law cases in addition to its environmental caseload. By networking with the New Jersey Bar Association’s Animal Law Committee, the clinic has been reaching out to the New Jersey legal community, and is now working on a number of cases with animal law attorney and committee member Isabelle Strauss. Working with community lawyers, especially in conjunction with the growing number of bar association committees devoted to animal law, is a model that shows promise and is being used at several law schools.

Another important new project at the law schools is the National Center for Animal Law (NCAL), which has been run by Laura Ireland since her graduation from law school in 2001.

Ireland says, "I went to law school for animal law at Lewis & Clark Law School, and while there I was the co-director of the SALDF chapter and was editor in chief of the Animal Law Review. As a student, I realized there were no organized resources for future and current law students. In addition, while Lewis & Clark Law School has been a pioneering law school in animal law, the effort had always been student-driven. While students are still the driving force, the center provides institutional memory for law students and a resource to develop a program in animal law." The center's goals are to draw, train, and support animal law students, and provide them with training for them to be effective advocates for animals in the legal system. While located at Lewis & Clark, the center works with law students and administrators in law schools around the nation "to promote legal education for animal advocacy."

One of the projects the center has taken on is the National Animal Advocacy Competitions, including the annual moot court and closing argument competition in animal law, which draws students from around the country. This year's competition, like last year's, will be held at Harvard Law School. Additionally, there will be a legislative drafting and lobbying competition to be held at George Washington School of Law.

NCAL also holds a yearly conference in Portland on topics of interest to students who are either taking animal law, or are interested in the topic but attend a school where a course has not yet been introduced. In addition, this year a three-day conference sponsored by ALDF, titled The Future of Animal Law, was held at Yale Law School, drawing students, as well as practicing lawyers, from around the world.

One of the most important developments over the last three years in the growth of animal law is the influx of sig-

nificant funding for such programs. Most notably, Bob Barker, the host of the daytime game show "The Price is Right," and a longtime advocate for animals, has focused on animal law as an important area for attention. Not only was Barker one of the silent donors of the first animal rights law clinic at Rutgers-Newark, but he continues to donate generously to law schools nationally.

Three years ago, Pearson Television, in honor of and at the request of Barker, gave Harvard Law School a \$500,000 endowment to teach animal rights in law. As recently reported in *The New York Times*, Barker has also established \$1 million endowments for the study of animal rights law at Stanford, Columbia, Duke, and the University of California in Los Angeles. Furthermore, it is speculated that he will continue to add other schools to the list.

### **Animal Law: Tomorrow**

So what will the current, and future, generations do with their knowledge of animal law when they graduate? While there are still students who take animal law courses for numerous non-career track reasons, *e.g.*, because they love animals, because their parents are farmers, because they are wondering what the fuss is all about, or because they are hoping for an easy A, there are more and more students going into law specifically to practice animal law. What will these students be doing? Despite progress in the law schools, and some signs that animal law is gaining ground as its own practice area, the practice of animal law still remains essentially a field for the jack-of-all-trades, cobbled together from what are now considered very disparate types of cases, rather than a recognized specialty in its own right.

Moreover, animal law, as a new practice area, is frequently not given the respect it deserves, and often necessitates that the lawyer practicing it expose

him or herself to situations in which animals have been treated with significant cruelty, which can be particularly emotionally trying for those who care about animals. Professor Taimie Bryant is focusing on these problems as she explores the stress, damage, etc., of working in a legal area that is not only emotionally challenging but, to a large extent, socially unaccepted. Bryant, who is attempting to create strategies for legal advocacy that address these limitations, might have her finger on one of the most important factors in the growth of animal law. You can train lawyers to work in animal law, but how can you keep them there?

According to Joyce Tischler, executive director of the ALDF, the opportunities for animal lawyers to do cutting edge work are increasing. "I see more and more cases, and a growing level of sophistication in the handling of those cases" said Tischler. Still, she adds, "It's hard to guess how many practitioners will be able to make a living at animal law."

According to David Wolfson, one of the factors leading to increasing recognition of animal law as a legitimate area of practice is the increased interest on the part of legal scholars, and prominent lawyers in other fields. "The participation of renowned experts from other legal fields into the discussion of animal law—Martha Nussbaum, Cass Sunstein, Laurence Tribe—has changed the debate. It has made it a little less radical, making it more achievable. Their presence changes the discussion from whether animals have rights to, to what extent they have rights." As a result, Wolfson noted, there is now "more focus on what having legal rights entails and how to make them meaningful, and less discussion of abolition and property status."

The presence and interest in the field of such prominent legal minds is helping to bring animal law into the

mainstream. Suddenly, it is not just animal lawyers but constitutional law scholars such as Laurence Tribe discussing animal rights in terms of slavery; and Cass Sunstein discussing not whether animals have rights or should have rights, but whether they have sufficient rights under the current legal system. The participation of these individuals shifts the starting point of the discussion, which will inevitably shift the end point.

Another exciting development is the burgeoning number of bar associations that have animal law committees. In addition to the New Jersey Bar Association, which was among the first to create a committee devoted to this practice area, 17 state and local bar associations now have animal law committees. Moreover, the American Bar Association, clearly recognizing an important trend, has recently added an animal law committee to its torts and insurance practice section.

Clearly, on all fronts, animal law is an idea whose time has come. Students, as well as practicing lawyers, are learning about animal law in law school animal law classes, in animal law clinics, and through bar association committees and continuing legal education programs. Inevitably, this will mean changes for the law that will result in changes in the way animals are viewed and treated in society. Many would say it is a development that is long overdue. ♪

#### Endnotes

1. Frasch, Waisman, Wagman & Beckstead, eds., *Animal Law Casebook*, 3d ed. (Carolina Academic Press, 2004).
2. [www.animallaw.info](http://www.animallaw.info).

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## WINNING WEBSITES

#### [www.asPCA.org](http://www.asPCA.org)

The website of the American Society for Prevention of Cruelty to Animals (ASPCA), whose mission is to provide a means for prevention of cruelty to animals throughout the United States through humane education, public awareness, government advocacy and animal placement.

#### [www.hsus.org](http://www.hsus.org)

The website of the Humane Society of the United States, which champions causes of animal protection throughout the United States and offers a wealth of information for individuals interested in animal protection and advocacy.

#### [www.associatedhumanesocieties.org](http://www.associatedhumanesocieties.org)

The website of the Associated Humane Societies and Popcorn Park Zoo, providing information on the largest animal sheltering system in New Jersey. The Popcorn Park Zoo is a federally licensed, nonprofit zoo of rescued animals located in Forked River.

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## ENFORCING THE ANIMAL CRUELTY LAWS

# Good Laws, Bad Results

by Sherry Ramsey

New Jersey—with third- and fourth-degree felony cruelty laws on the books—has some of the strongest animal cruelty laws in the country. In addition, there are bills pending in the Legislature that would further enhance and strengthen the animal cruelty laws.

**A**lthough these are impressive animal cruelty laws, they are not worth the paper on which they are printed without aggressive and consistent enforcement, prosecution and sentencing of the abusers. Herein lies the problem. Many people correctly complain that abusers are not adequately punished for violent and cruel acts against animals. Indeed, the most violent animal abusers often end up in municipal court, and are merely fined or placed on probation. Even if an act of felony animal cruelty is appropriately charged, it is often downgraded to municipal court, where it is ultimately handled as a minor offense. If the crime is sent up and actually stays in superior court, it is frequently treated as the incidental charge, and is often dismissed as part of the plea agreement.

In fact, some dedicated humane officers opt to downgrade an obvious felony act of cruelty to municipal court in an effort to at least make sure that it does not end up being dismissed, or disposed of in a manner that does not allow for the appropriate sanctions, or, as often is the case, in the Pre-trial Intervention Program. Accordingly, a plea to animal cruelty of any degree and a disposition that protects the animal victim(s) is often the most realistic option for those who prosecute animal cruelty.

Irrespective of punishing the abuser, there are specific sentencing requests that are often most important in an animal cruelty conviction, such as forfeiture of the animal at issue or other animals in the defendant's care, orders to prohibit possession of future animals or ordered cooperation with follow up inspections and restitution for animal care or veterinarian expenses. Restitution in some cases can be quite extensive. For humane officers, these animal care considerations must often take priority over other sentencing options designed to punish the defendant. This is particularly true if the crime is not handled vigorously by the prosecutor.

Further, the animal cruelty conviction is important in and of itself. Without it, there will be no record of a prior crime against animals. This is important for a number of reasons. A conviction for animal cruelty carries mandatory counseling for juveniles and an enhanced penalty for a repeat offender. It disqualifies a person from serving as an animal control officer, and may serve to keep an abuser from working with animals in the future. Also, given the well-known and documented statistics on the correlation between animal abuse and serious violent offenders, without a conviction there is no record of the crime to serve as an indicator or red flag.

These and other problems that exist within the system hamper effective and appropriate prosecution and sentencing of animal abusers. Further, the confusion and lack of knowledge of Title 4 and the animal cruelty laws often results in dismissals or in convictions being overturned on appeal. This results in good laws being largely ineffectual and inadequate in protecting animals and punishing abusers.

### History of the Cruelty Statutes

New Jersey's animal cruelty laws date back to the 1800s. At that time, the Legislature authorized the Society for the Prevention of Cruelty to Animals (SPCA) to enforce the cruelty laws. This authority still exists today. Of course the authority of the SPCA in no way abrogates police and sheriff's officers



(who are authorized to enforce *all* the laws) of their responsibility to enforce the animal cruelty laws. Police, sheriff's officers, SPCA enforcement officers and animal cruelty investigators are all part of the scheme of officers who enforce the animal cruelty laws in New Jersey.

Over the years, the state's animal cruelty laws have remained relatively similar to the original cruelty laws enacted over a century ago. Minor changes were made along the way, but most of the original language that was written in the 1800s remained intact. N.J.S.A. 4:22-17 was amended somewhat in 1995. In 2000, the law was amended to add to the list of animal cruelty offenses leaving an animal unattended in a vehicle under inhumane conditions adverse to the health or welfare of the living animal or creature.<sup>1</sup>

The biggest change, however, came in 2001, when certain cruelty offenses were elevated to the status of a fourth-degree indictable crime. Specifically, the law made it a fourth-degree crime to purposely, knowingly or recklessly "torment, torture, maim, hang, unnecessarily or cruelly beat, needlessly mutilate, or cruelly kill a living animal or creature," or "cause or procure any such acts to be done."<sup>2</sup> Further, the new law mandated mental health counseling for juveniles adjudicated delinquent of the animal cruelty.

In January 2004, the law was further amended to clarify that a fourth-degree animal cruelty crime included poisoning an animal, and went further to establish a third-degree crime if an animal is "cruelly killed" or dies as a result of such an act, or if the violator had a previous conviction for animal cruelty in violation of N.J.S.A. 4:22-17(b). These recent upgrades were most likely in response to the disturbing trend of horrific animal cruelty incidents. The sponsors of the legislation cited numerous examples of horrendous animal abuse. Another possible reason for these seri-

ous upgrades in the cruelty laws is the numerous studies that now show a strong link between animal violence and human violence.

### **Animal Cruelty Leads to Human Cruelty**

The FBI was the first major governmental agency to identify the link between human violence and animal violence in the 1970s, when, in analyzing similarities in serial killers, they noted that over a third of these defendants reported killing and torturing animals during childhood, and nearly half reported doing so as adolescents.<sup>3</sup> Other well-known mass murderers and serial killers, such as Ted Bundy, Jeffrey Dahmer, and Albert DeSalvo (the Boston Stranger), also were reported to have tortured and killed animals as juveniles.<sup>4</sup>

In New Jersey, a recent study by the New Jersey Division of Youth and Family Services examined families under investigation for child abuse. Abuse of their companion animals was documented in approximately 60 percent of the families. In most cases, the parent killed or injured the animal. Psychiatric evaluations of troubled juveniles also ask about cruelty to animals. Animal cruelty is also prevalent in domestic violence cases. In fact, some domestic violence risk assessment surveys ask if there is animal abuse as a standard question. It is believed that if there is animal abuse, there is a higher risk of serious harm to the domestic violence victim.

One study on animal cruelty found that people who abuse animals were five times more likely to commit violent crimes against people.<sup>5</sup> In 2004, the Humane Society of the United States launched the Animal Cruelty IS Family Violence national initiative to raise awareness of the evidence linking animal abuse and family violence. This recognized link should be an important reason to take cases of animal cruelty seriously, independent of an individ-

ual's concern for animals. In evaluating these studies it appears that reducing animal abuse may well lead to a reduction of violence against humans.

### **Problems With Prosecution, Sentencing and Title 4**

Part of what causes inadequate handling of animal cruelty cases may well be the fact that the cruelty laws are currently housed in Title 4 of the New Jersey Statutes. Even crimes of a third degree that can carry a sentence of three to five years, with a fine of up to \$15,000, are often treated as minor offenses by police, prosecutors and judges, since many of them are not as familiar with Title 4. This is most likely due to the misconception that Title 4 crimes are not as serious as crimes contained in Title 2C.

That being said, there is no reason why these laws should not be placed in Title 2C, where the majority of criminal laws have been consolidated into a single volume of the New Jersey Code. Placing the cruelty statutes in Title 2C would make the laws more accessible, and would likely result in these crimes being handled more effectively by law enforcement and judges. The governor's Animal Welfare Task Force also came to this conclusion, and released recommendations that included moving the animal cruelty laws into Title 2C.<sup>6</sup> There is currently legislation pending that if passed would move the animal cruelty laws into Title 2C.

### **Prosecutorial Problems**

The Pre-trial Intervention Program (PTI), pursuant to N.J.S.A. 2C: 43-12, poses another major problem in effectively prosecuting animal cruelty. Many animal abusers are accepted into the PTI program, a diversionary program that if successfully completed can result in the indictment being dismissed. If dismissed, the individual can then have the record expunged after six months,

effectively eliminating his or her record of animal cruelty. This program is intended for first-time offenders of non-violent and *victimless* crimes, which should disqualify most animal cruelty defendants.

Often the decision is made in a vacuum by a prosecutor who does not object to an offender being accepted into the program and by case management recommending a defendant to the program. Humane officers are often not notified until after the decision to allow a defendant to enter the PTI Program has been made. By then it is too late to voice an objection. The aforementioned confusion over Title 4 crimes may be to blame for these violent crimes being treated differently from other violent crimes against *human* victims.

Similarly, sometimes prosecutors arbitrarily dismiss the animal cruelty charge without contacting the humane officer who filed the complaint. This is true even though, pursuant to N.J.S.A. 4:22-45, the SPCA is to be notified whenever an arrest is made for animal cruelty. The law further mandates that no magistrate can hear a case without proof that the SPCA has been notified. This statute is rarely followed, and is unfamiliar to many police officers, prosecutors and judges.

It seems logical that the statute is designed so the SPCA can be treated as the victim in the case, since the victim's voice cannot be heard. (This is analogous to the court assigning an advocate for a child or incapacitated person.) Thus, where the victim would be notified prior to any court appearance or disposition, the SPCA officer, or the animal cruelty investigator should also be notified prior to any disposition. This allows for there to be someone in court to speak for the animal victim. This is of particular importance when there is no guardian for an animal because it is a stray or is lost or abandoned, or if the defendant is the animal's guardian.

### **Mens Rea Confusion**

The animal cruelty laws contain both crimes of commission and crimes of omission, and yet these elements are not adequately defined under the statute. Cruelly torturing an animal by beating it would have an intentional element, while allowing a dog to remain outside without food or water is most often an act of negligence. Most animal cruelty crimes are those of neglect, and yet they are the most problematic under the statute. Humane enforcement officers receive numerous calls concerning animals tied outside without adequate food, water or shelter. These are crimes of animal cruelty specifically addressed in the cruelty statute. These crimes are crimes of neglect or crimes of omission. Additionally, one of the most recent additions to the cruelty statutes which states that leaving an animal in an unattended vehicle under inhumane conditions is meant to cover this negligent or reckless act. Although this may seem to be common sense, there exists confusion that can and does result in an abuser being acquitted. Because the cruelty statute does not distinguish between crimes of commission and crimes of omission, cases are sometimes dismissed or overturned on appeal because of confusion over the applicable *mens rea*.

In a 2000 animal cruelty case against ISE Farms,<sup>7</sup> the defendants were charged with animal cruelty for discarding live chickens in a barrel of dead chickens. The municipal court judge found the defendants guilty of animal cruelty, noting that the live chickens could have lingered and suffered for days. The case was appealed, and the superior court judge ruled that although the case was correctly brought and did not apply under the Right to Farm Act,<sup>8</sup> nor was it a minor or incidental violation, the case should be overturned and the defendant found not guilty. The judge ruled that since no mental state is mentioned in the statute, the appropriate mental state

would be "knowingly" pursuant to N.J.S.A. 2C: 2-2(c)(3). The judge stated that the state had not proved beyond a reasonable doubt that the defendant knowingly violated the cruelty statute.<sup>9</sup>

How can the SPCA possibly prove that the defendant in that case knowing left live chickens in a dead pile without providing care, and further, why should that matter? In municipal court the judge correctly noted that leaving live animals in a pile of dead animals is "wrong." He further ruled that the company should better train their employees and "get somebody who knows the difference between a live chicken or a dead chicken."<sup>10</sup> The lower court focused on the act of the defendant, while the superior court focused on the defendant's intent in committing the act.

Under the theory of the superior court, virtually no cases could be brought for any of the crimes of omission listed in the cruelty statutes. How can the state prove that a defendant is knowingly violating the cruelty law when he or she doesn't feed a dog? This act may be negligent but it should be criminal under the intent of the cruelty laws, which specifically state that failing to provide food and water is a violation of the law. Certainly the law was not intended to only cover an individual who deliberately starves a dog to death.

Most cases of failing to provide care or food and water or proper shelter are negligent crimes. If someone forgets to feed a dog or negligently forgets a dog has been left out in freezing weather, under the *ISE Farms* rule, the defendant might not be found guilty since he or she did not knowingly commit an act of cruelty. Obviously, most judges would not subscribe to this reading of the animal cruelty statutes, and judges convict defendants of these crimes consistently all over the state; however, the *ISE* case is not an isolated one. As these cases are prosecuted more frequently, this issue will likely continue to cause confusion

until legislation is passed to clarify the intent of these statutes.

The governor's Animal Welfare Task Force commented on this issue, and the recommendations of the task force would, in fact, solve much of this confusion with the cruelty laws.<sup>11</sup>

### Reliance on Outdated Cases

Further problematic are the annotations cited in Title 4, which cite to cases that are old and outdated, and do not adequately reflect the intent of many of the newer laws. The annotations in Title 4 under the Cruelty to Animals section, still cite to cases from 1859, 1913, 1929, 1942 and 1966, while current cruelty laws have been updated numerous times since these cases were decided and newer cases have been decided with greater relevance for the correct application of these laws.

In a 2002 case, *State v. Reistrom*,<sup>12</sup> a defendant was found guilty in municipal court of needlessly killing kittens at a shelter in violation of N.J.S.A. 4:22-17, under the "needlessly kill" provision of the statute. However, on appeal to the Monmouth County Superior Court, the judge relied, in part, on cases cited in the annotations of the cruelty statutes. Specifically, the judge cited to *SPCA v. Board of Education*,<sup>13</sup> which dealt with scientific research in a school and focused on the school's compliance, specifically with N.J.S.A. 4:22-16a, which creates a presumed exemption for scientific experiments.

In evaluating the charges of cruelty under these circumstances, the court in the board of education case noted:

Therefore, these characteristics of wantonness and cruelty and lack of any redeeming quality were probably intended to be included within the meaning of the broader prohibited act of unnecessary cruelty and needless mutilation. Accordingly, educational and scientific achievements might well

represent the redeeming quality that would constitute the justification for inflicting pain or suffering on animals—to render the cruelty not unnecessary or the mutilation not needless.<sup>14</sup>

Certainly, this is an old case, from 1966, with considerably different circumstances and charges. In fact, N.J.S.A. 4:22-17 was amended numerous times since this case was decided.

The superior court judge in the *Reistrom* case quoted language from the *SPCA* case stating that "Cruelty is the unjustifiable infliction of pain with the act having some malevolent or mischievous motive. There must be something willful or wanton about it." However, the applicable section of the cruelty statute states "needlessly" killing an animal is a violation of the law. Needlessly would seem to adequately describe the crime; which is to kill an animal for no legitimate reason. To add the additional burden to prove that the defendant must have mischievously *and* needlessly killed the animal misses the point of the statute, and makes a conviction much harder to sustain. If the defendant mischievously killed the animal, the crime would likely be covered under the intentional part of the felony cruelty statute. Here, an additional offense is defined in the statute for someone who needlessly kills an animal. Why he or she killed the animal should not be the issue under this provision of the statute.

As provided under N.J.S.A. 4:22-17, a person is guilty of a disorderly persons offense of animal cruelty if he or she does "needlessly kill a living animal or creature." It is worth noting that changes were codified in this statute in August 2001, which changed the structure of the statute, taking out "needlessly mutilate" and inserting "needlessly" before kill. Prior to this change, the sentence was worded, "or needlessly mutilate or kill, a living animal or creature." This change made needless mutilation a

fourth-degree crime, yet kept needlessly killing as a disorderly persons offense.

As previously mentioned, one of the most recent additions to the cruelty laws is the almost *per se* violation for leaving an animal in a car. Specifically, this provision was enacted to address instances where someone leaves a dog in a hot car. This statute was certainly not enacted to punish only those who maliciously take their dogs and leave them in hot cars. This statute was meant to punish negligent or reckless behavior.

Further, as noted in the *ISE* case, pursuant to N.J.S.A. 2C:2-2(c)(3), since the cruelty statutes, except in the most recent felony provisions, contains no specific culpability element, the element of "knowingly" should be applied.<sup>15</sup> Therefore, the author believes that unless otherwise stated in the statute, the *most* that should be required in an animal cruelty case is a *knowing* standard, and accordingly, these old cases that require a malevolent or mischievous motive are no longer applicable to the current cruelty laws.

As previously noted, since many jurists and attorneys have somewhat limited familiarity with the specific nuances of the animal cruelty laws and Title 4, there is an increased potential for incorrect verdicts. Since judges are not aware of current precedent, they consequently still rely upon these outdated cases. However, the problem would be easily remedied if the annotations to the animal cruelty statutes were simply updated.

Unfortunately, annotations are only of published cases, which creates a Catch 22, since most cases are handled in municipal court, and while often handled correctly there, if appealed they are often reversed based strictly on attorney briefs using old cases as a standard. These reversals are based on confusion over the required *mens rea* of the crime and on old case law that is inapplicable to the spirit and intent of the

amended cruelty statutes. Since the state or the SPCA acting as the state, cannot appeal these reversals, the confusion and problematic decisions are never resolved. Accordingly, newer and appropriate case law is seldom created.

One case that was an exception was *State v. Spano*.<sup>16</sup> In *Spano*, the court affirmed the conviction of a defendant for needlessly killing under the cruelty statute for the fatal shooting of two dogs the defendant said was justified because he did so in self defense when they became aggressive toward him, as well as his belief that they were “worrying” his person and property. The court affirmed his conviction and found that the defendant should not have shot the dogs under his theory that they were worrying his person and property. In reading the opinion it appears that the court was not concerned with his mental culpability, but his specific actions. There was no mention in the appeal of a required malevolent or mischievous motive.

### Punishment for Abusers

Many people believe the penalties for animal abuse are not severe enough, and fail to appropriately punish those who abuse animals. Judges and prosecutors will admit that animal cases often produce the largest number of letters and phone calls to demand justice. Television and newspapers cover these stories as high-profile cases. Still, penalties are often not proportional to the punishments provided for other violent crimes. New Jersey legislators have responded and continue to respond to citizen requests for tough anti-cruelty laws. Enhancing criminal penalties may be one way to help. However, these enhanced penalties will only help if prosecutors follow through by aggressively prosecuting and seeking tough penalties, and judges sentence violators accordingly.

Perhaps the best way to ensure these

goals is to offer specific training to prosecutors and judicial organizations on the animal cruelty laws. Once these laws become more familiar and accessible, they will be more aggressively used to protect animals. Moving these laws into Title 2C would help in making them more accessible and familiar.

In the same way domestic violence was once treated as a minor offense before we learned the serious implications of this crime, with similar focus and education the animal cruelty laws can be effectively enforced to better protect animals and society as well. ♪

### Endnotes

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6. See Task Force Report page 20.
7. See *State of New Jersey v. ISE Farms, Inc.* Transcript of Sup. Ct. Warren Co., March 8, 2001.
8. See N.J.S.A. 4:1C-1.
9. See Municipal Appeal, Warren County Superior Court, March 8, 2001, page 49.)
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pp. 57-58.

12. See transcripts of the Red Bank Municipal Court dated April 10, 2003, and municipal appeal, Monmouth County Superior Court, dated February 6, 2004.
13. 91 N.J. Super. 81, 91 (Law Div. 1966).
14. *Id.*
15. See *State v. Demarest*, 252 N.J. Super. 323 (App. Div. 1991).
16. 328 N.J. Super. 287, 745 A.2d 598, 2000 N.J. Super. LEXIS 76 (N.J. Super. Ct. App. Div. 2000).

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# Representing the Animal Rights Activist

by William Strazza

In many ways, representing an animal rights activist, or an activist organization, is no different than representing any other client. Obviously, professional obligations and responsibilities do not change just because the client holds a particular set of beliefs. However, representing an activist is also a very unique experience. Two specific examples come to mind.

**T**he author once represented an activist in municipal court charged with numerous disorderly persons offenses. Due to her history of similar convictions, a county jail sentence was a certainty if she were convicted at trial, and based on the evidence in the case a conviction at trial was very likely. The state offered a deal where the client would plea to one count, as downgraded to a township ordinance, and all other charges would be dismissed. The state, as part of the deal, would recommend the imposition of fines, but no probation, and no community service. The client rejected the offer and went to trial because she believed her incarceration would do more for the animal rights movement, and in turn, more for the animals, than would pleading guilty and paying a small fine.

In a civil case, the author's clients were sued in federal court. In its complaint, the plaintiff sought both injunctive relief and substantial damages. The plaintiff presented a settlement offer where it agreed to dismiss all claims for damages if the clients would agree to

certain time, place and manner restrictions for future protest activity. The clients rejected the offer, and risked having a judgment imposed against them in excess of \$1,000,000. Here again, the deciding factors were the best interests of the movement and the best interests of the animals. The cost-benefit analysis regarding their personal finances was never a consideration.

These examples are not meant to suggest that all animal rights activists are the same; however, the examples are typical. An attorney who chooses to represent an activist will often find that the best interests of the client, from a strictly legal standpoint, will often conflict with the client's belief about what is in the best interests of the movement. Nine times out of 10, the client will put the interests of the movement ahead of his or her own.

In representing activists for the last six years, the author has observed two constants, and one noteworthy trend, all of which raise significant legal issues. The first constant is that animal rights activists will identify a target, and will organize protests against that target. The second constant is that at these

protest events, activists will be arrested and charged with crimes. The trend involves the targets of protest. Increasingly, protest targets, especially corporate targets, will respond by filing civil suits against activists.

## Activists and Organizing a Protest Event

Most protest events organized by activists or activist organizations involve the use of public land, be it streets, sidewalks, parks, or entrances to facilities. The use of such land is regulated by permit.

It is important to quickly identify who owns and/or regulates the public land the activist intends to use. Every municipality in New Jersey has a permit process. However, often the land, although located in a particular township, is county owned, and the permitting is regulated by a county agency. For example, a client who is organizing a protest in a park in Somerset County might find the land is owned and regulated by the county, with the permitting process administered by the Somerset County Parks Commission. Alternatively, the public land might be owned and



regulated by the state of New Jersey, and therefore the permitting process would be administered by a state agency or commission.

Early identification of the proper public entity is important for two reasons. First, permit applications invariably have timing requirements. For example, typically an application must be submitted at least 30 days before an event. Second, in the event of a denial, it is important to have the defendant properly identified before filing suit to compel the issuance of the permit.

Generally speaking, permit applications require the payment of an administrative processing fee. Applicants must also identify: 1) the time and place of the event, 2) the approximate number of participants, and 3) a contact person or persons organizing the event. The requirement that a permit be obtained has long been sustained by the courts, and is not considered an improper prior restraint on free speech. However, this is not to suggest that government's right to regulate such events is unfettered.

For example, many public entities have tried to require that the applicant obtain insurance. Such requirements have routinely been rejected by courts across the nation as an unconstitutional burden on free speech, and illegal prior restraint. The reasoning underlying this line of case law stems from the fact that insurance requirements are particularly onerous prior restraints because they drive indigent or poorly financed speakers out of the marketplace of ideas. In addition, insurance requirements are inherently content-based because insurance companies will take into account the nature of an event and charge more to insure unpopular speakers whose message may be more likely to cause a disturbance. This is the precise sort of "heckler's veto" that the United States Supreme Court forbid in *Forsyth County v. Nationalist Movement*.<sup>1</sup>

As stated above, there are many

examples of courts rejecting insurance requirements. For example, in *Eastern Connecticut Citizens Action Group v. Powers*,<sup>2</sup> a protest event was to take place on an abandoned railway bed and the state department of transportation attempted to impose a \$750,000 insurance requirement "to avoid the loss to the State of Connecticut from any and all claims made as a result of plaintiffs' activities."<sup>3</sup> The court held that the insurance requirement was an unreasonable restraint on the First Amendment because there was no basis for requiring such a large amount of insurance, and because there was no evidence that existing civil and criminal laws were insufficient to address the state's concerns.<sup>4</sup>

In *Wilson v. Castle*,<sup>5</sup> an insurance requirement of \$100,000 to \$1,000,000 was ruled unconstitutional because the court held there were other less restrictive methods of satisfying the government's interest. In *Pritchard v. Mackie*,<sup>6</sup> a \$1,000,000 insurance requirement was held unconstitutional because it disproportionately burdened poorly financed and unpopular groups. And in *Collin v. O'Malley*,<sup>7</sup> a \$10,000 to \$50,000 insurance requirement was held unconstitutional where the record reflected that the plaintiff and similar speakers could not obtain insurance.

Recently, the New Jersey Supreme Court also made clear that such insurance requirements are impermissible.<sup>8</sup> In *Green Party v. Hartz Mountain*, the Court examined the constitutionality, under the New Jersey Constitution, of a \$1,000,000 insurance requirement imposed by a shopping mall upon leafleters. In striking down the requirement, the Court did not even apply strict scrutiny.<sup>9</sup> Nevertheless, the Court held the insurance requirement to be an unreasonable restriction on the right to free speech, even considering the "extremely broad powers" malls have to regulate speech on their property.<sup>10</sup> In other words, in New Jersey the insur-

ance requirement has been rejected even when imposed for use of private property.

Generally, activists will employ traditional public forums for their protest activities where First Amendment rights are at their zenith.<sup>11</sup> Since New Jersey has rejected the insurance requirement when imposed by a private property owner, such a requirement is *a fortiori* impermissible in a public forum where strict scrutiny applies.

If a client opposes a condition in the permit application (such as an insurance requirement), or if the permit is denied, the attorney has a cognizable federal cause of action for violation of the client's civil rights. However, be sure to check the applicable regulation for an exhaustion of administrative remedies requirement before filing the action.

### Arrests at a Protest Event

Where there are protests, inevitably, there are arrests. For the most part, arrests at protest events result in summonses being issued for disorderly persons or petty disorderly persons offenses. Therefore, the bulk of the work in defending activists in New Jersey will necessarily take place in municipal court. In the author's experience, the charges most commonly filed are for defiant trespass and harassment. There are constitutional defenses that should be asserted regarding each charge.

With respect to defiant trespass, it is a defense that the defendant's purpose for being on the property was the exercise of constitutionally protected rights of speech and assembly, and that the property is significantly given over to public use.

The seminal case in this area is *State v. Schmid*.<sup>12</sup> The rule of law derived from *Schmid* is that the more private property is devoted to public use, the more it must accommodate the rights of individual members of the public. *Schmid* involved the distribution of leaflets and

political material at Princeton University. The fact that the property was home to an institution of higher education was a key fact in the court's reasoning to overturn the conviction for trespass.

*Schmid* was later extended to support this defense when the defendant was accused of trespass in a shopping mall parking lot.<sup>13</sup>

Regarding harassment, there is no question that the statute has survived arguments that claim its defining sections are unconstitutional.<sup>14</sup> However, even where purpose to harass is established beyond a reasonable doubt, there may well be cases where the statute cannot be applied without violating the First Amendment.<sup>15</sup>

Apart from the strictly legal issues that arise in representing an animal rights activist who has been arrested, there is a particularly important practical issue that will arise if bail is set beyond a client's means. Although not true of all animal rights activists, many are vegetarian or vegan. In either case, it will be difficult, if not impossible, for the client to eat while in custody, as almost nothing offered on the jail menu will fit their dietary lifestyle, yet there is no question the client has the right to vegetarian or vegan food.<sup>16</sup>

### The Increased Use of Civil Litigation

In 1994, the United States Supreme Court held that the National Organization of Women could maintain an action alleging civil Racketeer Influenced and Corrupt Organizations Act (RICO)<sup>17</sup> violations against anti-abortion protestors.<sup>18</sup> Although the Court later modified its decision, its first decision in *Scheidler v. National Organization for Women* opened the door for targets of animal rights protests. In fact, the first activist that came through the author's door in 1998 was there because he and his organization were sued by a furrier under a civil RICO theory.

Since that case, there has been a dra-

matic increase in the number of civil actions filed by the targets of animal rights activists. Invariably, the plaintiffs in these actions initially proceed *ex parte*, and obtain a temporary restraining order that imposes time, place and manner restrictions on continued protest activity. The complaint itself alleges, among other things, invasion of privacy, tortious interference with business, and civil trespass.

There are many issues that arise from such litigation. However, the one that has most consistently arisen is the issue of the activists' Fifth Amendment privilege during civil deposition. In many instances, a civil action filed by the target of a protest will be accompanied by a parallel criminal investigation. Therefore, it will often be in a client's best interest to assert his or her privilege against self-incrimination when responding to discovery demands in the civil case. However, assertion of the privilege against self-incrimination comes with a high price. In a civil action, a fact finder is permitted to draw a negative inference against a defendant who asserts the privilege. Fortunately, there is a strategic way around this problem.

Instead of asserting the Fifth Amendment privilege against self-incrimination, consider advising the client to assert his or her First Amendment privilege of privacy connected with expressive association. Undoubtedly, this is a lesser-known right. However, it is not spun from whole cloth. There is a line of case law that supports such a privilege,<sup>19</sup> which was applied by an Illinois Appellate Court in the context of civil discovery.<sup>20</sup> Indeed, the concept has also been applied, albeit in a different context (newspaperman's privilege) in a case in New Jersey.<sup>21</sup>

In this line of cases, *NAACP v. Alabama* warrants the most attention. In *NAACP v. Alabama*, the petitioner, NAACP, challenged the constitutionality of a civil contempt order for failure to

turn over membership lists.<sup>22</sup> The NAACP advanced the theory that the order arising from state litigation that compelled the production of membership lists "trespass[ed] upon the fundamental freedoms protected by the Due Process Clause of the Fourteenth Amendment."<sup>23</sup> More specifically, the NAACP argued that the "effect of compelled disclosure of the membership lists will be to abridge the rights of its rank and file members to engage in lawful association in support of their common beliefs."<sup>24</sup>

The government action at issue in *NAACP* was a court order, which "although not directly suppressing association, nevertheless carries this consequence," and therefore "can be justified only upon some overriding valid interest of the State."<sup>25</sup>

Writing for a unanimous Court, Justice John Marshall Harlan announced the Court's holding:

We hold that the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment. And we conclude that Alabama has fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of the membership list is likely to have.<sup>26</sup>

Several aspects of the Court's analysis are relevant and useful when asserting this privilege on behalf of an activist. Initially, the Court noted that "effective advocacy [of controversial points of view] is undeniably enhanced by group association," and that earlier case law recognized "the close nexus between the freedoms of speech and assembly."<sup>27</sup>

Therefore, any state action that “may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”<sup>28</sup>

The Court also noted that “the fact that [the state] has taken no direct action to restrict the right of petitioner’s members to associate freely, does not end inquiry into the effect of the production order.”<sup>29</sup> Indeed, many of the Court’s decisions recognize that abridgment of liberties “even though unintended, may inevitably flow from varied forms of governmental action.”<sup>30</sup>

The Court deemed it self-evident that “compelled disclosure of affiliation with groups engaged in advocacy” may constitute impermissible restraint on association,” and that privacy in one’s association “may... be indispensable to preservation of [associational rights], particularly where a group espouses dissident beliefs.”<sup>31</sup>

Based upon these principles, the Court found the production order likely to have a “substantial restraint upon the exercise by petitioner’s of their right to freedom of association.”<sup>32</sup> In drawing this conclusion, the Court relied on uncontroverted facts of record showing that the petitioner’s members, once identified, had been subjects of threats, economic reprisals, loss of employment and other manifestations of public hostility.<sup>33</sup> If asserting this privilege, it is important that the attorney be prepared to make such a showing.

## Conclusion

The issues that arise when representing an activist are as diverse as the activists themselves. The issues discussed in this article are just the tip of a very large iceberg. ❧

## Endnotes

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6. *Pritchard v. Mackie*, 811 F. Supp. 665 (S.D.Fla. 1993).
7. *Collin v. O'Malley*, 452 F. Supp. 577, 578-79 (N.D. Ill. 1978).
8. *Green Party v. Hartz Mountain Industries, Inc.*, 164 N.J. 127 (2000).
9. *Id.* at 146-47.
10. *Id.* at 157-58.
11. *Perry Educ. Assn. v. Perry Local Educ. Assn.* 460 U.S. 37, 45 (1983).
12. *State v. Schmid*, 84 N.J. 535, 564-569 (1980).
13. *State v. Gertsman*, 198 N.J. Super. 175, 178-79 (App. Div 1985).
14. *State v. Hoffman*, 149 N.J. 564 (1997).
15. *State v. Finance American Corp.*, 182 N.J. Super. 33, 38 (App. Div. 1981).
16. *See*, N.J.A.C. 10A:31-10.4(b) and *Office of Inmate Advocacy v. Fauver*, 222 N.J. Super. 357 (App. Div. 1988).
17. 18 U.S.C. 1961, *et seq.*
18. *Scheidler v. National Organization for Women*, 510 U.S. 249 (1994).
19. *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982); *Bates v. City of Little Rock*, 361 U.S. 516 (1960) and *NAACP v. State of Alabama ex rel Patterson*, 357 U.S. 449 (1958).
20. *Crocker v. Revolutionary Communist Progressive Labor Party*, 533 N.E. 2d 444 (1st Dist. 1988).
21. *In re the Petition of Margena Burnett*, 269 N.J. Super. 493 (Law Div. 1993).
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24. *Id.*
25. *Id.*
26. *Id.* at 466.
27. *Id.* at 460.
28. *Id.*
29. *Id.* at 461.
30. *Id.*

31. *Id.* at 462.

32. *Id.*

33. *Id.*

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# Deciding Custody of Rover

by Alan J. Cornblatt

For years, divorce lawyers have exchanged anecdotes about divorcing couples who settled all issues except who would get to keep the family pet. These stories have been treated as representing irrational behavior of litigants who are unable to give up the fight even though the serious issues had been resolved. Judges have expressed indignation toward counsel who have brought questions involving custody of, or visitation with, domestic animals into the courtroom. Nevertheless, these issues continue to arise, and there may be legitimate reasons why they do.

Professor Gail F. Melson, in her book, *Why the Wild Things Are*,<sup>1</sup> suggests:

Many writers have depicted the postmodern family at the end of the twentieth century as its own heartless world, driven by violence and cobbled together by bonds too fragile to withstand the combined force of internal and external pressures. Amid the national angst over the lost Eden of domestic tranquility, pets seem the one uncomplicated family tie. To human sensibilities, the identities of these “companion animals” offer a blessedly simple contrast to our multiple jangling and discordant roles. Their *raison d’être*, after all, is only to be companions, to give and receive love. Our relationships with our pets fulfill our most ardent fantasy: pure, unconditional, mutually flowing love. In contrast to our messy domesticity, pets can exist for their owners Platonic ideals of loyalty, affection, and playfulness. Both tensions in contemporary childrearing and a sentimental stance toward pets make them islands of constancy for our children. We can count on these animal companions to dispense affection, relieve childhood isolation, and give our offspring the quality time that we are too exhausted or distracted to provide.

Prior to the upheaval in family life, which began around 1970, the question of who got the family pet rarely came into the courtroom. In *Akers v. Sellers*,<sup>2</sup> in 1944, the Indiana Court of Appeals affirmed a decision that gave a Boston bull terrier to the wife, based upon the trial court’s finding of fact that the husband had given the dog to the wife during the marriage.

The appellate court observed:

Whether the interests and desires of the dog, in (the divorce proceedings) should be the polar star pointing the way to a just and wise decision or whether the matter should be determined on the brutal and unfeeling basis of legal title is a problem concerning which we express no opinion. We recognize, however, the tragedy of the dog’s consignment to the wife if, in fact, his love, affection and loyalty are for the husband.

In 1960, a California appellate court<sup>3</sup> reversed an award of a Pekingese to a husband on the basis that the wife had successfully proven that the animal was not community property subject to distribution. Her un rebutted testimony had been that she purchased the dog with her personal funds, and that it had, at all times, been registered to her.

Having made its findings pursuant to California law then in effect, the court added to its decision, gratuitously. “It is immaterial whether the dog was community property or the separate property of plaintiff.”

If the California appellate court did not find community property standards to be material, was this decision based upon consideration of what was in the best interests of the dog? Absolutely not, said the Iowa Court of Appeals, in categorically rejecting this notion. Its determination in *Matter of Stewart*,<sup>4</sup> involved review of a trial court decision holding that “custody” of a dog should be vested in the husband. After pointing out that the use of the term “custody” was inappropriate as applied

to an animal, the higher court said firmly in 1984 that a dog is personal property, and while courts should not put a family pet in a position of being abused or uncared for, "we do not have to determine the best interests of a pet."

The Supreme Court of Florida used more definitive language in 1995, pointing out in *Bennett v. Bennett*:<sup>5</sup>

Our courts are overwhelmed with the supervision of custody, visitation, and support matters related to the protection of our children. We cannot undertake the same responsibility as to animals.

Those of us who have been taught common law concepts of personal property would agree with the legal rationale for the *Bennett* and *Stewart* decisions. Real people, however, are disagreeing with these legal theories as applied to the disposition of family pets upon divorce.

In 2000, the *Lewis and Clark Law Review* published an essay that questioned whether the time had come to take notice that people were viewing domestic pets as being more than simply chattel. The author, Barbara Newell, argued that the law should recognize a legal status for companion animals that reflected these changing social values.<sup>6</sup>

Since 2000, there has been a quiet, but ascertainable, expansion of interest in the idea that there should be a legally enforceable cause of action to determine custody of companion animals.

- In 2001, Rhode Island created, by statute, the category of guardian of a domestic pet. By definition, this encompasses any person who has title to or an interest in, harbors or has control, custody or possession of an animal and who is responsible for an animal's safety and wellbeing. By adopting this term, Rhode Island became the first state to establish, as a matter of law, that an individual is

the guardian of a companion animal, not merely the owner of the animal.<sup>7</sup>

- In 2002, the *Wichita Eagle* reported that the previous November a judge had awarded joint custody of a pair of retrievers to a Memphis couple after a lengthy and contentious trial. The order provided for weekly exchange of the dogs, for visitation, to be made through a neutral kennel. The same article stated that a Colorado Springs judge had granted a request for the payment of \$40 per month dog support. The basis for the ruling was that the children were attached to the dog, upset over the divorce, and needed the pet's continuous companionship. The *National Enquirer* picked up the story and dubbed it "dogimony."<sup>8</sup>
- The Supreme Court of Alaska modified an agreement in 2002 that had been incorporated into a 1993 divorce agreement, for shared ownership of the parties' dog, Coho. The trial court apparently accepted the husband's argument that it would be in the best interests of Coho that the agreement be modified to provide that he have sole custody. The Supreme Court approved the award of full legal and physical custody of Coho to the husband, with the wife receiving "reasonable visitation rights as determined by" the husband. The Court further affirmed the trial court ruling that the husband would not be required to consult with the wife prior to making medical treatment decisions concerning Coho.<sup>9</sup>
- The Associated Press circulated, on July 14, 2004, a story that a Cleveland jury had awarded custody of a bull mastiff to a man after litigation with his former live-in girlfriend.<sup>10</sup> The successful plaintiff was quoted as saying: "I've never had kids. Maynard is like a kid to me."
- The *London Sunday Times* reported in 2004 that a county court had grant-

ed joint custody to former lovers who were living 200 miles apart.<sup>11</sup>

- In January 2004, Worcester Massachusetts Judge John P. Connor Jr. ordered one former domestic partner to turn over a bichon frise to the other by January 16th or face contempt proceedings.<sup>12</sup>
- Recently, in Monmouth County, John DeBartolo, a distinguished and knowledgeable former chair of the Family Law Section, had settled all issues involved in the dissolution of a marriage of 39 years except which party would keep their boxer. The trial court had set a hearing date when, as a last ditch alternative, the disputing couple agreed to private, binding arbitration. This approach resolved the matter, at a cost of approximately \$10,000, including experts, panelists and attorney fees.

## Conclusion

That our pets are important to us is, in part, reflected by a survey taken in 1966, which revealed that Americans spend 20 billion dollars each year on pets.<sup>13</sup>

According to Professor Melson, animal presence in children's lives is a significant factor in child development. She quotes a sample of households in which 80 percent of pet owners identified their pet as a "very important" member of the household. Professor Melson describes the phrase, "part of the family" as being a familiar refrain.<sup>14</sup>

Rutgers was the first law school in the United States to offer a course on animal rights as part of the regular academic curriculum. Other law schools, including Harvard, Yale, Duke, Georgetown and UCLA, offer law classes that include sections dealing with custody. This is an emerging trend.

Paul Waldau, is a former trial lawyer, now a professor at Tufts University School of Veterinary Medicine. Recently he was asked to comment upon the increasing use of courts to resolve issues



of pet custody and visitation. "Although polls suggest the majority of owners consider these animals full-fledged family members," Professor Waldau said, "legal theory hasn't caught up."<sup>15</sup>

To what extent should we expand our legal theories to apply custody and visitation concepts to pets? The problems, enunciated in the *Stewart* and *Bennett* decisions cited above, would seem to be insurmountable. Yet we are emotionally bonded to them. They are, by definition and classification, chattel, yet they are different from non-sentient property. They are afforded some rights by law: You may break your chair leg with impunity, but serious legal consequences attend your breaking your pet's leg.

It appears that these matters are destined to proliferate, either in the courts or by alternate dispute resolution. Standards for their resolution must be considered.

In 2002, Laura W. Morgan, a nationally prominent lawyer and consultant, proposed the following:<sup>16</sup>

Once it is determined that the family pet is marital property or that the court has the authority to award the family pet to one party or the other, then the court may consider who would better care for the pet and who has the greater attachment to the pet. This is really no different from the many cases that award a particular piece of property to the party that asserts a greater sentimental value to an item of property.

These cases will not be limited to legal issues. High emotions will be involved. Binding arbitration—perhaps with a panel including a mental health professional—may be the key to assisting the parties in reaching a workable solution. ☺

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# Resolving Animal Ownership Through Arbitration

by John F. DeBartolo

“I’m leaving, and I’m taking the dog with me!”

“No you’re not, she’s just as much mine as she is yours!”

Such an exchange can occur between separating spouses, domestic partners,<sup>1</sup> siblings, college roommates, business partners, or any other coupling of individuals. A dispute between competing pet owners can be as emotional and stressful as any other litigated matter in the civil courts. But overcrowded dockets and restrictive legal standards<sup>2</sup> can make the courthouse an unfriendly and ineffective venue for resolution of disputes between pet owners. Fortunately, efficient, effective, and economical alternatives to court exist and can be employed. This article explores the use of one such alternative—final and binding arbitration—as a resolution method.<sup>3</sup>

Arbitration has long been used in the commercial setting to resolve contractual disputes between builders, architects, subcontractors, suppliers, labor unions, owners and governmental entities. Arbitration can take place between individuals who do or do not have a legal contractual relationship with each other. Arbitration has the advantage of affording individuals a quick, economical, final, and private decision by an informed and sensitive individual. In some circumstances the fact that the decision of the arbitrator is final can be viewed as a disadvantage, but since individuals involved in animal disputes usually desire quick final decisions, the unavailability of the appellate process should be recognized as a benefit. Nevertheless, an attorney recommending or entering into an arbitration proceeding must fully disclose to the client the finality of the process.

Arbitration is a contractual relationship, and cannot begin without the express written agreement of the parties. Attached to this article is a sample arbitration agreement. The parties to the document have agreed to submit only one issue for decision by the arbitrators. The form of the agreement illustrates several aspects of the New Jersey Arbitration Act.<sup>4</sup> Among these aspects are: 1) the parties agreement to submit

the dispute to arbitration, 2) the parties’ decision to use more than one arbitrator and their procedure to choose an arbitrator if agreement is not reached, 3) the precise issue to be decided by the arbitrators and the only choice available to them. In the attached example, only one of the parties can be designated as the owner of the dog; there can be no joint custody or ownership, nor any rights to visit. That limited decision was the desire of the parties. As an alternative, the parties can vest the arbitrator with authority to make any decision. One key to successful arbitration is to carefully define the power of the arbitrator in the decision to be made, to avoid an action to vacate the arbitrator’s award pursuant to N.J.S.A. 2A:23B-23.a(4) upon the ground that the arbitrator exceeded his or her powers.

The attached sample agreement permits a majority decision, and fixes the time within which the arbitrators are to make the award. The agreement also addresses payment of the cost of the arbitration proceedings, and provides for the proceeding in which the award shall be confirmed by the court. The agreement emphasizes the finality of the award so that that there is no question in the minds of the parties.

The choice of who will serve as the arbitrator or arbitrators is essential to the successful completion of the process. An arbitrator must be free of bias (real or perceived), available to meet during convenient times, competent to conduct an orderly hearing, and able to be decisive. Although attorneys are ideal as arbitrators, the issues presented in resolution of animal ownership disputes may be better decided by persons other than attorneys, since they are inclined to apply legal principles to the resolution, when in fact the dispute is not truly about legal principles. Although there may be no best interests of the animal standard, that is probably the standard the parties want to be applied. Therefore, consider arbitrators who are animal owners, members of kennel clubs, trainers, veterinarians, animal shelter workers, and others who under-

stand the care of animals and the duties of animal ownership.

Compensation for the arbitrators must be decided in advance of the proceedings. Will the arbitrator bill on an hourly basis, on a daily basis, on a half-day basis, or at a flat fee? Will the arbitrator bill for travel time? Who will pay the arbitrator, and when will payment be made? These questions must be addressed before commencement of the hearing.

It is best, once the arbitrator is chosen, the fee agreed upon, and the agreements to serve and arbitrate have been executed, to conduct a pre-trial conference telephone call among the arbitrator(s) and the attorneys to discuss procedure. Try to agree upon the witnesses, estimated time, any documents, any pre-trial submissions, etc. Address how and when the matter will continue if not concluded in one day. Finally, decide when the arbitrator will be required to render a decision, and how that decision will be communicated.

Arbitration is a fair, economical, and speedy mechanism to resolve animal ownership issues. It can be flexible in application to meet the unique circumstances presented by each dispute.

### ARBITRATION AGREEMENT

THIS AGREEMENT made by and between Mary Jones, hereinafter referred to as the "Wife", and John Smith, hereinafter referred to as the "Husband";

### WITNESSETH:

WHEREAS, the parties hereto were married to each other on \_\_\_\_\_, and said marriage still subsists; and

WHEREAS, there is pending an action for divorce in the Superior Court of New Jersey, Chancery Division: Family Part, \_\_\_\_\_ County, Docket #FM-\_\_\_\_\_,<sup>5</sup> and

WHEREAS, the parties have been unable to settle between themselves

the ownership as between them of a certain Boston Terrier dog, "Nicky" acquired during their marriage; and

WHEREAS, the parties desire to have the ownership of "Nicky" determined by impartial arbitrators pursuant to the New Jersey Arbitration Act, N.J.S. 2A:23B-1, *et seq.*; (the "Act").

NOW, THEREFORE, the parties agree as follows:

1. The ownership of the Boston Terrier dog, "Nicky" shall be determined in a proceeding to be conducted by three (3) arbitrators<sup>6</sup> on a date and time and at a place to be determined by the arbitrators. The parties have agreed that the arbitrators shall be \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_. *OR (if agreement has not been reached by the parties as to the arbitrators; the parties shall each designate one (1) arbitrator who shall be free of any conflict of interest as that term is defined in N.J.S.A. 2A:23B-11, and the two arbitrators shall choose the third arbitrator.*<sup>7</sup>
2. The sole issue to be decided by the arbitrators shall be the ownership of "Nicky" as between the parties. Precisely the arbitrators shall be authorized solely to award ownership and possession of "Nicky" only to either of the parties. The arbitrators shall have no authority to make any other ruling. The arbitrators may make only one of the following decisions:

A. *Effective immediately, and for hereafter, sole ownership of the Boston Terrier dog, "Nicky" shall be with the Wife, Mary Jones;*

OR

B. *Effective immediately, and for hereafter, sole ownership of the Boston Terrier dog, "Nicky" shall be with the Husband, John Smith;*

3. The decision of the arbitrators may be by a 2 to 1 majority and need not be unanimous.
4. The decision of the arbitrators shall be FINAL and binding upon the parties, their heirs and assigns.
5. The decision of the arbitrators<sup>8</sup> shall be made within twenty four (24) hours of the conclusion of the hearing and submission of any summations required by them and shall be in writing and acknowledged as provided in the Act.
6. The decision of the arbitrators shall be delivered simultaneously to the attorneys for the parties by telefax and regular mail;
7. The decision of the arbitrators shall be confirmed in the Final Judgment of Divorce to be entered under docket #FM-\_\_\_\_\_ and shall be entitled to full faith and credit in all of the United States.
8. Except for the cost of his or her own attorney, costs, and expert witnesses, the cost of the arbitration and the arbitrators shall be paid equally by the parties.
9. The decision of the arbitrators shall not be subject to appeal or review by a Court or vacation except for the specific grounds set forth in N.J.S. 2A:23B-23, nor shall it be subject to modification except for the specific grounds set forth in N.J.S. 2A:23B-20.
10. The parties have freely and voluntarily entered in this agreement and the arbitration proceeding after having had ample opportunity to consult with their respective attorneys as to the legal significance of this agreement and the legal consequences.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year written below their names.

SIGNED, SEALED AND DELIVERED  
IN THE PRESENCE OF:

**ACCEPTANCE OF APPOINTMENT  
AS ARBITRATOR**

\_\_\_\_\_, of full age,  
upon his or her oath, deposes and says:

1. I am one of the three individuals chosen to serve as an arbitrator to decide the ownership of the Boston Terrier dog "Nicky" as between Mary Jones and John Smith.
2. I have no personal relationship with either party in this matter, nor do I have any financial or business relationship or interests with either attorney of record or their law firms. I have no financial or personal interest in the outcome of the arbitration proceeding.
3. I am familiar with the provisions of the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1, *et seq.* and am competent to act as an arbitrator. I am aware of no facts a reasonable person would consider likely to affect my impartiality or the impartiality of the proceeding. I am aware that I have a continuing obligation to disclose to all parties and to the other arbitrators any facts that I learn after today that a reasonable person would consider likely to affect my impartiality.
4. I willingly undertake the responsibilities of arbitrator in this matter. I acknowledge that there is only one issue to be decided in the arbitration proceeding and that issue is the ownership of "Nicky" as between the parties. Precisely, I and the other arbitrators shall be authorized solely to award ownership and possession of "Nicky" only to either of the parties. We as arbitrators shall have no authority to make any

other ruling, and we as arbitrators may make only one of the following decisions:

**A. Effective immediately, and for hereafter, sole ownership of the Boston Terrier dog, "Nicky" shall be with the Wife, Mary Jones;**

**OR**

**B. Effective immediately, and for hereafter, sole ownership of the Boston Terrier dog, "Nicky" shall be with the Husband, John Smith;**

I understand and agree that the decision of the arbitrators shall be made in writing and sent to the attorneys for the parties within twenty four (24) hours of the conclusion of the arbitration hearing.<sup>9</sup>

5. The decision made by me in this matter shall represent my best efforts to reach a fair, just, and unbiased result of the issue presented to me after having carefully listened to and considered the testimony, evidence, and arguments.

Witness: \_\_\_\_\_  
\_\_\_\_\_

**STATE of NEW JERSEY** :  
**COUNTY of** : **ss.**

**BE IT REMEMBERED** that on this \_\_\_\_ day of \_\_\_\_\_ before me, the subscriber, personally appeared , who I am satisfied is the person named in and who executed the within Instrument, and thereupon he acknowledged that he signed, sealed and delivered the same as his act and deed, for the uses and purposes therein expressed. ☞

**Endnotes**

1. N.J.S.A. 26:8A-1, *et seq.* provides for creation of domestic partnerships between same gender adult couples or heterosexual couples age 62 or

older.

2. See, Cornblatt, Custody of Rover-What Happens to Pets of Divorce?, *NJL Magazine*, August 2005.
3. The discussion herein deals with arbitration, only. The Alternative Procedure for Dispute Resolution Act (APDR), N.J.S.A. 2A:23A-1, *et seq.* is not discussed herein. It is an effective alternative to litigation as well, but since it is essentially administered as an adjunct to the court system and permits the equivalent of an appeal to the superior court, and requires written findings of fact and law, it is not the first choice, in the opinion of the author, for the final resolution of the single-issue dispute. Accordingly, only arbitration as administered and governed by the Arbitration Act is discussed herein. The APDR deserves serious consideration by attorneys and parties in those instances when the disputes between parties include items in addition to the single issue of pet or animal ownership.
4. N.J.S.A. 2A:23B.
5. If no action is pending between the parties and none is anticipated, this paragraph should be deleted and the provisions of paragraph 7 modified as well.
6. One arbitrator is less expensive; however, in consideration of the emotional nature of the dispute the parties may not wish to trust the decision to only one person. In the proceeding in which this form of agreement was used, one arbitrator was an attorney (who it was agreed could best conduct the proceedings) and the remaining two were laypeople (who it was agreed would bring their particular expertise about animal issues to the proceedings).
7. If only one arbitrator is to be used and the parties cannot agree upon

the choice, or if the parties cannot agree upon a method to choose the arbitrator(s), the act provides for application to the court for appointment. N.J.S.A. 2A:23B-11.a.

8. The only statutory grounds to avoid confirmation of an arbitration award are: procurement of the award by corruption, fraud, or undue means; evident partiality, corruption, or misconduct by an arbitrator prejudicing the rights of a party; or refusal to postpone a hearing, refusal to consider material evidence, or other conduct substantially prejudicial to the rights of a party. N.J.S.A. 2A:23B-23.
9. The provisions of this paragraph should mirror the issue as framed in the agreement to arbitrate between the parties.

**John F. DeBartolo** is an attorney in Red Bank and the former chair of the New Jersey State Bar Association's Family Law Section.



# Temporary and Permanent Arrangements for Domestic Pets Under New Jersey Law

by Elenora L. Benz

As the population ages, the only companion an elderly person may have, having outlived their family members, may be a dog or a cat. Unfortunately, unless they consider making specific plans and then discuss those plans with their attorneys, and with family members and friends who may become pet caregivers, the fate of their animal companions may be in question.

**A**s a first line of defense, clients should consider preparing short-term arrangements and temporary care instructions if they have to be away, enter the hospital, become incapacitated, or die.

The first step toward developing a pet care plan can be as simple as carrying a wallet card that puts people on notice that there are pets in the home that will need immediate care in the event an emergency, such as an accident or sudden illness, prevents the client from returning home. The basic information for a wallet alert card would include the names and contact information of the client's emergency pet caregivers. The card might also indicate that detailed care instructions can be found in the home.

Before deciding to carry a pet alert card, the client should reach an agreement with friends or family members willing to serve as temporary, emergency pet caregivers. The ideal number of temporary, emergency pet caregivers is one or two for each type of pet the client owns. For example, if a client owns three cats and a dog, two caregivers might suffice. On the other hand, if a client owns three cats, a dog, and two horses, the small animal caregivers might not be the appropriate people to provide care for the horses.

The client should provide the temporary caregivers with the keys to their home and their alarm codes; a list of the pets that live there; the pets names and what they look like; and a detailed set of instructions for the feeding and care of each pet. To cover all bases, clients should post the caregiving

instructions inside their front and back door (and in the barn for horse caregivers). The instructions should also include the name, address, and telephone number of the attending veterinarians, as well as the names and telephone numbers of any other emergency caregivers selected. In geographic areas where temperatures fluctuate to extremes, the client should also instruct the caregivers about regulating the temperature in the home.

## Creating Trusts for Domestic Pets

Once temporary arrangements have been secured, counsel can explore with the client the possibility of making long-term plans in the form of a testamentary trust under the New Jersey Probate Code section titled "Trusts For Domesticated Animals."<sup>1</sup> Until the law's passage in July of 2001, clients could only make precatory bequests for their pet's benefit and hope that the person to whom the pet and the money were bequeathed would take care of Fluffy or Spot in the manner to which the pet had become accustomed. Unfortunately, in some instances those unenforceable requests went unheeded, and the funds were diverted to uses other than the care of the orphaned animals. Some of those concerns are alleviated now that trusts for the care of domesticated animals are valid, and may be enforced by appointing a pet trustee in a last will and testament.

Obviously, the pet trustee should be someone who has agreed to serve in that capacity. And, as with the selection of all other fiduciary appointments under a last will and testament, counsel should urge clients to consider naming a successor pet trustee or trustees. The pet trustee and the caregiver may be the

same person, but it is best to select two different individuals, each with their distinct duties to the pet or pets.

If a client has no one who is willing to serve as the pet trustee, there are several pet facilities in the Northeast that, for a fee or in consideration of a bequest, will provide oversight and care for orphaned pets. An Internet search will prove helpful, but clients should be careful to investigate these facilities and obtain references regarding past performance. Under the circumstances, stability and the facility's ability to handle the potential long-term care of an orphaned pet is paramount.

### Identifying the Pet

One important note about including a trust for a client's domestic pets in a last will and testament is that the client provide an accurate, detailed physical description of the pets. With a good description in hand, even with the passage of time, it is less likely that substitute animals will replace ones that might have died during the term of the trust. The description should be included in the document. The author also encourages clients to provide photographs of their pets with a separate memorandum of instruction regarding their general care. If the pets appear different in different seasons (for instance, horses that grow longhair coats in winter), or before and after a trip to the pet groomer, clients will want to include photographs with the description that depict the various looks of the pets.

### Termination of the Trust

The statute provides for a pet trust to terminate "when no living animal is covered by the trust, or at the end of 21 years, whichever occurs earlier."<sup>2</sup> While it seems as though 21 years ought to be a long enough period, the 21-year limitation can be a problem if a client owns parrots, horses, or other long-lived pets. In that case, counsel might advise the

client to make alternative provisions for the pet's care if it survives the 21-year period. When the trust terminates, the remaining funds in the trust, if any, pass to any remaindermen named in the governing instrument. Many of the author's clients select a charitable remainderman, especially those organizations that deal with animal care, adoption, re-homing, rescue, and welfare. If a client chooses not to name any remaindermen, the statute provides that the property remaining in the trust passes to the estate of the person who created the trust.<sup>3</sup>

### Calculating the Bequest

One area of caution relates to the size of the bequest, because under the statute the court has the power to reduce the bequest if it determines "the amount substantially exceeds the amount required for the intended use."<sup>4</sup> Counsel should assist clients in formulating an itemized list of care costs for a one-year period to get some idea of how to calculate a bequest that would likely withstand a challenge. Then, the age of the client and of the pets should be taken into consideration, as well as the likelihood that the pet will survive the owner. For instance, while \$10,000 might be considered an excessive amount for a middle-aged cat or dog, for a horse that \$10,000 would be a drop in the bucket.

Depending upon the type of pet, the client should consider including in the calculation items such as food, dietary supplements, equipment (including toys), transportation costs, veterinary care, inoculations, surgery, boarding charges, pet sitters, pet walkers, obedience classes, other training classes, entry fees for competitions, show handlers, professional grooming, and dental care. Other expenses that can be very costly are associated with horse care, such as boarding and shoeing.

Clients should also consider under what circumstances euthanasia should be permitted and the governing instru-

ment would include those directions within the language of the trust as well as in a separate writing.

### Conclusion

Since September 11, 2001, when hundreds of pets were stranded or orphaned in their homes because their owners were missing or dead, pet owners are much more aware of the need to plan ahead. Attorneys have always had the opportunity to guide clients in planning for the care of their pets in the event of their absence, incapacity, or death. With the guidance of the new law, attorneys now have a more effective tool to assist clients with that planning. ♠

### Endnotes

1. N.J.S.A. 3B:11-38.
2. N.J.S.A. 3B:11-38(a).
3. N.J.S.A. 3B:11-38(c).
4. N.J.S.A. 3B:11-38(d).

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# Pitfalls for Pitbulls

## THE NUTS AND BOLTS OF THE NEW JERSEY VICIOUS DOG ACT

by Gina Calogero

When it comes to a municipal court appearance, a dog may very well need an attorney far more than a human being does, since under the New Jersey Vicious Dog Act<sup>1</sup> a dog may find itself on death row as a result of a single event.

**T**he Vicious Dog Act is little understood; the operant terms of the statute are not clearly defined, and there is a paucity of case law on the subject.<sup>2</sup> Although the act calls for a hearing in municipal court, the statute is not criminal or quasi-criminal in nature, and the standard of proof is clear and convincing evidence. The law itself is a procedural anomaly. For example, cases are not initiated by summons and complaint or by an arrest, but by impounding a dog followed by correspondence between the municipality and the dog's owner/ guardian; there is technically no *defendant*, because the action is essentially an *in rem* determination of the dog's nature and propensities; and the law carries no fines but instead imposes costly injunctive relief on the owner. These perils alone should be sufficient to convince clients to hire an attorney to defend their companion animals and not attempt to try a case under the act *pro se*.

The end result of an action brought under the statute is a determination by a municipal judge of whether a dog is vicious<sup>3</sup> or potentially dangerous.<sup>4</sup> A dog is "vicious" within the meaning of the statute if the court finds, by clear and convincing evidence, that the dog either killed or caused "serious bodily injury" to a human in an unprovoked attack. The municipality bears the burden of proving all elements, including that the dog was not provoked. Serious bodily injury under this act is as defined in N.J.S.A. 2C:11-1(b), a "bodily injury which creates a substantial risk of death or which caus-

es serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."

To sustain a finding that a dog is potentially dangerous, the municipality must prove with clear and convincing evidence that the dog caused bodily injury to a person in an *unprovoked* attack, and that the dog "poses a serious threat of bodily injury or death to persons in the future."<sup>5</sup> Bodily injury is defined in N.J.S.2C:11-1(a) as "physical pain, illness or any impairment of physical condition."

### Bizarre Beginnings: Initiation of Process

The proper initiation of an action under the Vicious Dog Act is quite different from any other proceeding in municipal court. Rather than starting with a summons and complaint, as with most ordinances and traffic violations, the first step of the statutory process is that the dog is impounded by the municipality's designated animal control officer (ACO), or in the absence of an ACO, by the chief law enforcement officer of the municipality.<sup>6</sup> A dog may be impounded if the ACO has "reasonable cause to believe" that the dog has done one of the following:

- a. attacked a person and caused death or serious bodily injury as defined in N.J.S. 2C:11-1(b) to that person;
- b. caused bodily injury as defined in N.J.S. 2C:11-1(a) to a person during an unprovoked attack and poses a serious threat of harm to persons or domestic animals;
- c. engaged in dog fighting activities as defined in R.S. 4:22-24 and R.S. 4:22-26; or
- d. has been trained, tormented, badgered, baited or encouraged to engage in unprovoked attacks upon persons or domestic animals.<sup>7</sup>

Once a dog is impounded, the ACO must immediately notify the health officer and municipal court. The next step is for the ACO to make a reasonable attempt to find the dog's owner.<sup>8</sup> Within three business days of determining the identity of the owner, the ACO must notify the owner by certified mail that the

dog has been impounded and that the owner has a right to request a hearing.<sup>9</sup> The notice also shall notify the owner that he or she must “return within seven days, by certified mail or hand delivery, a signed statement indicating whether he wishes the hearing to be conducted.” If the owner does not sign for or respond to the notice within seven days, or if the owner relinquishes ownership of the dog, the dog may be humanely destroyed. The dog will also be humanely destroyed if the owner cannot be located within seven days of the impoundment.

This unusual method of initiating process poses certain risks and problems. First, the municipal court has no way to track the case, since the court’s computer system requires a summons number. For this reason, many towns have enacted ordinances that track the Vicious Dog Act and add a procedural step of the issuance of a summons after the owner has requested a hearing. Ordinances regarding vicious and potentially dangerous dogs—as well as breed-specific legislation that attempts to regulate certain breeds of dogs—should be carefully scrutinized by defense counsel to ensure that they are not inconsistent with the act, as there is a specific preemption of all local and county laws.<sup>10</sup>

Failure to properly follow procedure will deprive the court of jurisdiction; however, because there is no statute of limitations in the act, the end result of a motion to dismiss for lack of jurisdiction will probably be a do-over. The act states no time limit between the precipitating event (injury to human, death of domestic animal) and the time when the ACO has “reasonable cause to believe” that the precipitating event occurred. Therefore, even after a matter is dismissed for lack of jurisdiction, the ACO may still impound the dog. Common sense suggests that if there is a substantial period of time between the precipitating event and the moment that it is brought to the ACO’s atten-

tion, the dog may have aged to the point where it no longer “poses a threat” to humans or domestic animals, and may not require impound after all.

The dog must be held in impound until final disposition of the case and pending appeal. The dog may not be destroyed until the appeal process has been exhausted. If the dog is found vicious or potentially dangerous at the end of the day, the owner will bear all costs of impound and/or euthanasia. Because many municipalities either have no impound facility or have facilities that are less than luxurious, many dog owners will take advantage of N.J.S.A. 4:19-19, which allows the impound in a private facility upon the agreement of the health officer and the owner; however, under these circumstances, the owner bears the full expense of impound whether or not the dog is found vicious or potentially dangerous, according to N.J.S.A. 4:19-26(a). Costs of impound can be extremely expensive, as the appeal process can take years.<sup>11</sup>

### **Trial, Defenses and Penalties**

The purpose of the hearing in municipal court is “to determine whether the...dog is vicious *or* potentially dangerous.”<sup>12</sup> The dual nature of the hearing is great cause for concern: Any dog prosecuted under the act is at risk of euthanasia because all prosecutions could end in a determination that the dog is vicious.

To sustain a finding that a dog is vicious, the municipality must prove with clear and convincing evidence that the dog: a) caused serious bodily injury or death; and b) that the dog was not provoked.<sup>13</sup> As a threshold of a finding that a dog is vicious, the municipality must also prove by clear and convincing evidence that the dog caused “death or serious bodily injury” as defined by N.J.S.A. 2C:11-1(b). The state often neglects to enter medical records or other evidence of serious injury, especially when the

injury is “severe, permanent disfigurement.” In the absence of a finding by the trial judge on the record of the severity of the disfigurement, or evidence that the scars are permanent, there can be a reversal.

To find the dog potentially dangerous, the court must be satisfied that the municipality proved with clear and convincing evidence that the dog: a) caused bodily injury; b) was not provoked; and c) poses a threat of death or serious bodily injury or death to a person or poses a threat of death to another domestic animal. A dog may also be found potentially dangerous if it is found to have been trained, tormented, badgered, baited or encouraged to engage in unprovoked attacks upon persons or domestic animals.<sup>14</sup>

The amended statute includes a specific requirement that the municipality bears the burden of proving that the dog was *not provoked*. Provocation is a required element of proof in finding a dog either vicious or potentially dangerous; however, the statute does not define provocation. Before the act was amended in 1994, the statute defined provocation in terms of the actions of the human, as follows:

A dog shall not be declared vicious for causing bodily injury...to a person if that person was committing or attempting to commit a crime or if that person *was tormenting or inflicting pain upon the dog in such an extreme manner* that an attack of such nature could be considered provoked.

The Legislature obviously rejected these extremely high standards defining provocation, and apparently also rejected the opportunity to define the provocation in human terms. The definition of the word “provoke” as set forth in *Black’s Law Dictionary*, is “to excite, stimulate, arouse” or the “act of inciting another to do a particular deed.” It can be helpful to use expert witnesses on

animal behavior to explain to the court why provocation should be defined in terms of the dog's point of view, since dogs do not think or reason, they simply react to stimuli.

An expert witness can also be useful in demonstrating that the dog does not pose a serious threat of bodily injury to humans in the future. The municipality often fails to present any proofs whatsoever on this subject, and neglects to have the dog examined by a behaviorist when it is in impound. The municipality often relies on the testimony of the ACO, who may not have sufficient expertise to testify about the nature and extent of the threat in the future.

### Consequences

A dog that is found to be vicious must be humanely destroyed after all appeals are exhausted. All charges under the act could, potentially, lead to the dire consequence of euthanasia, since the mere invocation of the act leads to a hearing at which a judge may decide whether the dog is vicious, as defined in Section 23 of the act, or potentially dangerous as defined in Section 22. The summons will not specify which section is being applied in the case.

If a dog is found potentially dangerous, it must be licensed as a potentially dangerous dog with the municipality and with the state, using a special registration number, according to N.J.S.A. 4:19-24(a). The licensing fees for registering a potentially dangerous dog may be as high as \$750 per year; in the absence of an ordinance specifying the amount of the registration fee, it is \$150. License fees alone may be so prohibitive that they encourage owners to either try the case or settle with the municipality. In addition, the statute mandates compliance with onerous measures for the housing and control of the dog. N.J.S.A. 4:19-24(a) states as follows:

1. The owner shall, at his own

expense, have the registration number tattooed<sup>15</sup> upon the dog in a prominent location. A potentially dangerous dog shall be impounded until the owner obtains a municipal potentially dangerous dog license, municipal registration number, and red identification tag;

2. to display, in a conspicuous manner, a sign on his premises warning that a potentially dangerous dog is on the premises. The sign shall be visible and legible from 50 feet of the enclosure required pursuant to paragraph (3) of this subsection;
3. to immediately erect and maintain an enclosure for the potentially dangerous dog on the property where the potentially dangerous dog will be kept and maintained, which has sound sides, top and bottom to prevent the potentially dangerous dog from escaping by climbing, jumping or digging and within a fence of at least six feet in height separated by at least three feet from the confined area. The owner of a potentially dangerous dog shall securely lock the enclosure to prevent the entry of the general public and to preclude any release or escape of a potentially dangerous dog by an unknowing child or other person. All potentially dangerous dogs shall be confined in the enclosure or, if taken out of the enclosure, securely muzzled and restrained with a tether approved by the animal control officer and having a minimum tensile strength sufficiently in excess of that required to restrict the potentially dangerous dog's movements to a radius of no more than three feet from the owner and under the direct supervision of the owner;

An option in this section is that the court "may require the owner" to procure liability insurance, separate from their homeowner's insurance, that covers all injuries by the dog and also specifically includes the municipality as a named insured. This is one of the most onerous provisions of the act, since procuring such insurance is nearly impossible.<sup>16</sup> Whatever else the defense counsel does, it is imperative to convince the trial judge *not* to impose this optional requirement.

There are additional notice requirements imposed by N.J.S.A. 4:19-28, which mandates the following:

- a. comply with the provisions of P.L. 1989, c. 307 (C. 4:19-17 et seq.) in accordance with a schedule established by the municipal court, but in no case more than 60 days subsequent to the date of determination;
- b. notify the licensing authority, local police department or force, and the animal control officer if a potentially dangerous dog is at large, or has attacked a human being or killed a domestic animal;
- c. notify the licensing authority, local police department or force, and the animal control officer within 24 hours of the death, sale or donation of a potentially dangerous dog;
- d. prior to selling or donating the dog, inform the prospective owner that the dog has been declared potentially dangerous;
- e. upon the sale or donation of the dog to a person residing in a different municipality, notify the department and the licensing authority, police department or force, and animal control officer of that municipality of the transfer of ownership and the name, address and telephone of the new owner; and
- f. in addition to any license fee required pursuant to section 3 of P.L. 1941, c. 151 (C. 4:19-15.3), pay



a potentially dangerous dog license fee to the municipality as provided by section 15 of P.L. 1989, c. 307

## Settlement

Mindful of the onerous financial burdens of trial and compliance, the Legislature amended the act in 1994 and added Section 21.1, which allows the parties to resolve the case on any terms agreeable to both. There are added benefits to settlement besides reduced cost and reduced risk: The act provides a considerable incentive to settlement, in that “no municipality or any of its employees shall have any liability by virtue of having entered into any settlement agreement pursuant to this section, or for any action or inaction related to the entry into such agreement, for any injuries or damages caused by the dog.”<sup>17</sup> The municipality may require a hold harmless agreement, but it appears to be superfluous, given the broad immunities provided by the act.

Another advantage to settling is that the alleged victim and neighbors of the dog in question can achieve better results from a settlement agreement than from a victory in court. To a neighbor whose companion animal was killed by an aggressive dog, the provisions of the act provide little comfort; moreover, vicious dog cases are more the result of irresponsible or careless owners than truly vicious or aggressive dogs. Under such circumstances, the municipality may find itself facing considerable pressure from angry neighbors who have little confidence that the dog owner will comply with the restrictions set forth in the act. These neighbors clamor for the elimination of a local menace—they want the dog gone, one way or another.

The act provides for euthanasia of the dog only in extreme cases, if the dog killed a human being or caused

serious bodily injury. Examples of creative settlement include moving the dog out of town or out of state—in one case involving four dogs in Hillsborough, the dogs were “deported” to Bulgaria—or imposing a modified list of restrictions that is less onerous than those required by Section 24 of the act. It is often more palatable to a dog owner to send a dog to live with a relative than to restrict its movements.

## Parting Thoughts and Practical Suggestions

In handling any case under the Vicious Dog Act, the practitioner should be especially mindful of the victim and sensitive to the concerns of the community. These cases are won more often on appeal than at trial; faced with an angry group of neighbors who consider the dog a menace that should be eliminated from the planet, a municipal court judge will find it very difficult to exonerate the dog from all wrongdoing. Unless the client is willing to spend a lot of money on appeals, it is wise to steer him or her and the municipality to a mutually palatable settlement that ensures public safety but also achieves a reasonable balance. ⚖

## Endnotes

1. N.J.S.A. 4:19-17 *et seq.*
2. *State v. Smith*, 295 N.J. Super. 399 (Law Div. 1996).
3. N.J.S.A. 4:19-22.
4. N.J.S.A. 4:19-23.
5. N.J.S.A. 4:19-23.
6. The animal control officer is defined as a “certified municipal animal control officer, or, in the absence of such an officer, the chief law enforcement officer of the municipality.” N.J.S.A. 4:19-18.
7. N.J.S.A. 4:19-19.
8. N.J.S.A. 4:19-20(a).
9. N.J.S.A. 4:19-20(b).
10. N.J.S.A. 4:19-36.
11. In the case of one family in Saddle

Brook, the dog was impounded for three years while the case proceeded through three trials and two appeals. Eventually, the vicious dog determination was reversed and the dog found “potentially dangerous” on appeal. In a matter involving an Akita from Haworth, the dog was housed in the K-9 facility of the Bergen County sheriff, due to a concern that the owners might abscond with the dog.

12. See N.J.S.A. 4:19-20. Emphasis added.
13. N.J.S.A. 4:19-22.
14. N.J.S.A. 4:19-23.
15. The statute was passed before the technology of microchip implants to identify dogs and cats; most municipal judges are willing to interpret the tattoo requirement as microchipping, which is more humane and relatively inexpensive.
16. See N.J.S.A. 4:19-24(b).
17. N.J.S.A. 4:19-21.1.

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# Is There Such a Thing as Veterinary Malpractice?

by Linda Sinuk

Most households in New Jersey boast at least one pet or companion animal. Using an estimated statewide population of 3.24 million households, that means New Jersey residents own at least 3.64 million dogs and cats.<sup>1</sup>

It is evident by watching the news, television programs, and even movies that animals have become a significant part of our everyday lives. As the value our society places on companion animals continues to grow, animal law becomes a more significant part of legal practice. Family lawyers are seeing more and more custody disputes over the family dogs and cats. New Jersey statutory law provides legally binding estate planning for animals, and our cruelty statutes provide fines and jail sentences for animal abusers.

Even with this growing awareness of the value society and the legal system places on companion animals, if an animal is injured or killed by the negligence and malpractice of a licensed veterinarian, there is no recourse in civil law. This gap is due to the fact that, under the law, an animal's worth is defined as its market value. So even with egregious conduct and malpractice, if the family dog was adopted from a shelter for \$25, the dog's value in civil court is \$25. As a result, veterinarians are insulated from civil litigation when their alleged negligence involves a companion animal.

With society's growing attachment to companion animals, the legal practitioner needs to be aware of the current status of New Jersey law regarding potential veterinary malpractice claims. Veterinary malpractice sounds straightforward and logical. Licensed professionals who are negligent in performing their duty, and do so below the standard of care, resulting in damages, are ordinarily, with the exception of veterinarians, subject to litigation. However, through a systemic inconsistency involving legal definitions and statutory requirements, veterinarians have escaped the responsibility other licensed professionals share, and are not susceptible to liability in a court of law for negligent conduct resulting in injury.

## The Affidavit of Merit Statute

In an effort to protect licensed professionals from frivolous lawsuits, New Jersey enacted the Affidavit of Merit Statute,<sup>2</sup> which applies to licensed practitioners, including but not limited to attorneys, physicians, and veterinarians.<sup>3</sup> The statute identifies 15 licensed practitioners held by the state Legislature to a higher standard of practice and care. The Supreme Court of New Jersey states in *Cornblatt v. Barow*:

the Affidavit of Merit Bill was intended by the Legislature to serve salutary purposes in assuring the adjudication of meritorious professional malpractice claims and, properly applied, in advancing the cause of justice.<sup>4</sup>

The legislative intent sets forth its purpose in providing relief for the aggrieved party pursuant to the judicial system, while adjudicating only meritorious claims.

## Procedural Problems Surrounding Veterinary Malpractice

Historically, under New Jersey law, animals are valued at their market value, since an animal's status under the law is property. New Jersey law does not substantiate veterinary malpractice claims for remedies including pain and suffering to the animal or loss of companionship to the family. This creates significant procedural problems, as well as denying any true or intrinsic value of companion animals. To file a lawsuit in superior court, Law Division, the case must be valued monetarily at \$15,000 or more. This relegates the majority of animal cases, excluding thoroughbred racehorses, to either the Small Claims Division or the special civil part. Small claims court is for cases with a demand in damages up to \$3,000, and special civil part is for cases with damages up to \$15,000.

Under current New Jersey property law, a veterinary malpractice case involving a family pet would be valued at approximate-

ly \$200 to \$2,000, depending on the property value of the animal and the amount of veterinary bills submitted with the complaint, which, as indicated *supra*, only allows the case to be filed in small claims or special civil part. As discussed previously, with any type of professional malpractice claim the plaintiff is required to file an affidavit of merit with the complaint, or 60 days following the defendant's answer. This, of course, applies to veterinarian malpractice cases.

The Affidavit of Merit Statute requires that the plaintiff:

provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices.<sup>5</sup>

The affidavit of merit must be written by an expert in the specific field in which the defendant practices; therefore, in a case involving a domestic companion animal the affidavit must be written by a domestic animal veterinarian. The cost to a plaintiff for retaining an expert for the sole purpose of reviewing the records and preparing an affidavit of merit will range between \$2,500 and \$5,000. This does not include the expert's time to testify at trial, prepare an expert report, or appear for depositions. It will, in most cases, cover review of the medical records, an informal opinion, and, if the expert finds malpractice, preparation of the affidavit of merit. A potential litigant is looking at the possibility of spending between \$7,000 and \$20,000 for the expert alone, if the case proceeds to trial.

Few, if any, people are willing to spend this kind of money for a case filed in small claims court or special civil part, with a damages claim capped at

\$2,000. As a result, due to the inclusion of veterinarians in the Affidavit of Merit Statute, coupled with the valuation of animals at their market value under civil law, veterinarians are rarely, if ever, sued in civil court for veterinary malpractice involving a companion animal.

### New Jersey Law and Animals

Two opinions have been published in New Jersey involving loss of a companion animal, although both cases sought damage claims of emotional distress and loss of companionship, which courts rarely even grant to a parent who loses a child. Both cases valued animals well beyond their market value and proscribed valuing animals at their market value. In *Hyland v. Borrás*,<sup>6</sup> the court declined to render an opinion with regard to an emotional distress claim. In *Harabes v. The Barkery*,<sup>7</sup> the court denied the plaintiff's claim for emotional distress and loss of companionship, not because it did not value the dog, but because:

there is no reason to believe that emotional distress and loss of companionship damages, which are unavailable for the loss of a child or spouse, should be recoverable for the loss of a pet dog...<sup>8</sup>

New Jersey courts have distinguished companion animals from other property, and have rejected the notion that a companion animal is worth only its market value.

[m]ost animals kept for companionship have no calculable market value beyond the subjective value of the animal to its owner, and that value arises purely as the result of their relationship and the length and strength of the owner's attachment to the animal. In that sense then, a household pet is not like other fungible or disposable property, intended solely to be used and replaced after it has outlived its usefulness.<sup>9</sup>

New Jersey courts do not deny the value of a companion animal to its owner, and the special relationship between pet and person. Although, courts have been reluctant, as indicated *supra*, to allow a recovery for the loss of a companion animal that a parent is not entitled to for the loss of a child. For this reason, companion animals must be considered and valued, under the law, not as children, but beyond their market value, inclusive of their intrinsic value to a plaintiff, and to society as a whole.

As a result of the way the law is structured, including the property value of animals under the law and the requirement of the affidavit of merit to file a veterinary malpractice lawsuit, veterinarians are completely insulated from litigation, and aggrieved parties are provided no recourse for injuries incurred as a direct result of a veterinary negligence. Clearly, if the Legislature included veterinarians in the Affidavit of Merit Statute, they did not intend the result to be immunity for this entire class of licensed professionals. This loophole for veterinarians in our judicial system continues unrecognized by most, and it allows licensed practitioners to practice with no recourse, while the aggrieved party has no means of being made whole.<sup>10</sup>

When these cases are filed in court, the defense is always the same. Regardless of how egregious the conduct of the veterinarian may be, the argument of no damages prevails. The primary reason plaintiffs cannot prevail in these cases is because there is no accurate category of damages for the loss of a companion animal. As indicated *supra*, the courts will not allow damages for emotional distress and loss of companionship, when these damages are not permitted for the loss of a child or spouse. Although, at the same time, it is quite clear the courts value animals beyond their market value and distinguish pets from fungible property.

## Seeking Damages Without Seeking Loss of Companionship or Emotional Distress

Under New Jersey law, personal property, with value to the plaintiff, is afforded the consideration of a separate category of damages called intrinsic value. New Jersey courts have held in favor of plaintiffs who have lost personal property, and allow plaintiffs to bring the intrinsic value of their property to the jury. For example, New Jersey courts recognize furniture burned in a fire, heirloom jewelry, and other inanimate objects as having enough intrinsic value to a plaintiff to instruct a jury regarding special value.

New Jersey courts do not deny the value of a companion animal to its owner, and the special relationship between pet and person. For this reason, companion animals should be considered and valued, under the law, not as children, but beyond their market value, inclusive of their intrinsic value to a plaintiff.

Under New Jersey law, owners of inanimate property are afforded the opportunity to bring to the jury the intrinsic value of their inanimate property, when the market value is not determinable. For example, an heirloom diamond ring may be valued not for what it would bring at sale but rather for its descent within the family. Such an item is irreplaceable at any price.<sup>11</sup>

New Jersey courts already recognize intrinsic value in fungible property. Additionally, New Jersey courts find it necessary to adapt to uncertainty in determining damages even when the factual circumstances are uncertain and the amount of damages is inexact.

[w]here a wrong has been committed, and it is certain that damages have resulted, mere uncertainty as to the amount will not preclude recovery—courts will fashion a remedy even though the proof of damages is inexact.<sup>12</sup>

In *Kozlowski*, the Court made a landmark decision in determining palimony by adapting to new facts before it and by molding its determination of damages to fit societal needs.

[w]e emphasize that our decision today has not judicially revived a form of common law marriage which has been proscribed in New Jersey since 1939 by N.J.S.A.37:1-10. We do no more than recognize that society's mores have changed, and that an agreement between adult parties living together is enforceable to the extent it is not based on a relationship proscribed by law[.]<sup>13</sup>

Similarly, society has changed in its recognition of pets as members of the family, companions, and loved ones, something well beyond an inanimate object, and well beyond its market value. There is nothing in New Jersey case law or legislation that proscribes allowing a plaintiff to include intrinsic value in ascertaining damages with regard to a companion animal.

When, however the personality is household furnishings wearing apparel and the like, where the market value cannot be ascertained, the better measure of damages and the one we find applicable in this case, is the actual or intrinsic value of the property to the owner, excluding sentimental or fanciful value.<sup>14</sup>

New Jersey courts make clear the special relationships between a human and their companion animal. In *Harabes v. The Barkery*, the court affirmed the Wisconsin Supreme Court in stating:

labeling a dog "property" fails to describe the value human beings place upon the companionship that they enjoy with a dog...A companion dog is not a living room sofa or dining room furniture. This term inadequately and

inaccurately describes the relationship between human and a dog. (*emphasis omitted*)<sup>15</sup>

When a plaintiff loses a beloved animal due to the negligent conduct and malpractice of a licensed professional, the plaintiff should not be precluded from being made whole by being limited to the market value of the animal. New Jersey courts are clear, companion animals have a relationship with their owners that cannot be limited to the value of an inanimate object.

## Allowing Intrinsic Value for a Companion Animal

Recently, in Somerset County Superior Court, Law Division, Judge Victor Ashrafi denied a defendant's motion to dismiss a plaintiff's complaint in lieu of filing an answer in a case regarding a companion animal. For the first time in New Jersey a case involving a companion animal survived a motion for summary judgment, based on the intrinsic value of the companion animal. In this case, the defendant argued the plaintiff's complaint should be dismissed in its entirety based on no damages and the value of the plaintiff's dog being nothing more than the \$200 adoption donation. The defendant further argued, because there are no compensatory damages, pursuant to the punitive damages statute, there could be no punitive damages.

Judge Ashrafi, in denying the defendant's motion, ruled:

In this case the Court concludes that the plaintiffs should be given the opportunity to prove damages other than the alleged market value of Baxter, that is the intrinsic value of Baxter to them... Because the plaintiffs may be able to prove entitlement to compensatory damages, the claim for punitive damages also should not be dismissed at this time.<sup>16</sup>

The plaintiff survived the defendant's motion to dismiss based on the court accepting the argument that a companion animal has intrinsic value beyond its market value. This type of argument can be used to allow the courts to provide a remedy for aggrieved plaintiffs whose companion animals die as a direct result of veterinary malpractice. By seeking a remedy that is recoverable under the current status of New Jersey law, a plaintiff should not be precluded from proceeding to trial. Jury instructions with regard to these cases can be determined prior to trial in the judge's chambers, just as in all jury trials. Guidelines can be taken from the criminal statutes for offenses against property, which automatically upgrade crimes against animals to a third-degree crime, with a value not less than \$500 and not more than \$75,000.<sup>17</sup>

Allowing this type of recovery bridges the gap between the legislative purposes of the Affidavit of Merit Statute and the immunity that has resulted for veterinarians by archaic definitions in the law and the statutory requirements in filing a professional malpractice case.

For animal cases, many times the law is not clear, and the road has not been paved. It is best to request relief that is established in New Jersey law, such as the intrinsic value argument, and then apply the law to the particular facts of a client's companion animal case.

Allowing this recovery will not make veterinarians more susceptible to litigation than any other licensed professional. Veterinarians are equally protected by the Affidavit of Merit Statute against frivolous lawsuits, and are given their equal opportunity to defend their case before a jury. Our judicial system allows for all parties, injured as a direct result of another's negligence, the opportunity to be made whole pursuant to civil litigation. Intrinsic value damages for veterinary malpractice, involving companion animals, brings the true value society places

on companion animals to the courtroom, while breaking down the market value barriers that have protected negligent veterinarians from civil liability. ❧

## Endnotes

1. Based on 2001 statistics, as compiled pursuant to the formula published by the American Veterinary Medical Association to determine the population of cats and dogs in a municipality.
2. N.J.S.A. 21:53A-27.
3. See N.J.S.A. 2A:53A-26 for complete list of licensed professionals subject to the affidavit of merit requirement.
4. *Cornblatt v. Barrow*, 153 N.J. 218; 708 A.2d. 401, 1998.
5. N.J.S.A. 21:53A-27.
6. *Hyland v. Borrás*, 316 N.J. Super. 22 (1998).
7. *Harabes v. The Barkery*, 348 N.J. Super. 366 (2001).
8. *Harabes v. The Barkery* at 373 (quoting *Altieri v. Nanavati*, 573 A.2d 359, 361 (Conn. Super. Ct. 1989).
9. *Hyland v. Borrás*, 316 N.J. Super. 22 at 25.
10. Pursuant to N.J.S.A. 45:16-1, a person whose animal is injured by a veterinarian is entitled to file a complaint with the Attorney General's Office. Although, this remedy does not provided for compensation and the standard of proof employed by the Board of Veterinary Medical Examiners is not the same standard of proof in civil litigation, but a more difficult standard for the aggrieved party to meet.
11. *Desiderio v. D'Ambrosio*, 190 N.J. Super. 424 (1983).
12. *Kozlowski v. Kozlowski*, 80 N.J. 378 (1979), (quoting *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (citations omitted)).
13. *Kozlowski v. Kozlowski*, 80 N.J. 378, 387 (1979).
14. *Lane v. Oil Delivery, Inc.* 216 N.J. Super. 413 (1987).

15. *Harabes*, 348 N.J. Super. 366 at 373. (quoting *Rabideau v. City of Racine*, 627 N.W.2d 795, 798 (Wis. 2001).
16. Judge Victor Ashrafi, J.S.C., Motion Hearing October 1, 2004. *Small Dog Rescue v. McKenney*, SOM -L-864-04.
17. N.J.S.A. 2C-20-2.

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# Advising Animal Rescue Groups

by Jody S. Riger

As the name implies, an animal rescue group is dedicated to helping animals in need of assistance for any number of reasons, including homelessness, neglect, or abuse. There are rescue groups for different animals; some concentrate on dogs (including breed-specific groups), some on cats, some on farm animals, and so forth.

Some groups are incorporated and some have tax-exempt status with the Internal Revenue Service, while other groups are structured less formally. The organizational structure of rescue groups is beyond the scope of this article, which will focus on the lawyer's role in helping canine rescue groups in their efforts to save and re-home unwanted, abused, and neglected dogs.<sup>1</sup> Although the focus is on canine groups, the information in this article may apply to other animal rescue organizations as well.

## Canine Rescue Groups

First and foremost, canine rescue groups find new homes for unwanted dogs that are in shelters, found as strays, or surrendered by their owners.<sup>2</sup> Many canine rescue groups are grassroots organizations started by a few people who share a love of dogs and are deeply concerned with their welfare. More often than not, these grassroots groups are run by volunteers, who devote an enormous amount of their time, energy, and money to re-home unwanted dogs.

To re-home a dog successfully, reputable canine rescue groups have three goals:

- protecting the dog;
- protecting the rescue group; and,
- protecting the potential adopter.

Preparing comprehensive and legally binding documents is the primary way an attorney can help a canine rescue group accomplish these goals. This allows the group to concentrate on ensuring the dogs available for adoption will receive not only proper shelter, food, and water, but that the animals'

socialization, behavioral, and emotional needs will be met as well.

## The Adoption Application

Usually the first written contact between the rescue group and a potential adopter, a thorough adoption application is important because it gives the rescue group a complete picture of the potential adopter and his or her home situation, and helps the group place a dog in the right home. Thus, the adoption application should request the following information:

- type of home (*i.e.*, single-family, apartment, condominium; if the applicant rents, are pets allowed, and landlord's name and contact information);
- the number of people who live in the home;
- ages of children in the home, and the ages of visiting children, if any;
- other pets in the home with a description of each (*i.e.*, dog, cat, age, etc.);
- applicant's employment information;
- how many hours a day the dog will be alone;
- yard details, and if there is a fence what type of fence and gate;
- whether the dog will have access to the outside when no one is home;
- any previous pets (to assess the applicant's experience with animals);
- how the dog will get exercise (*i.e.*, fenced yard, walks on leash, dog park);
- if the dog will be allowed off-leash and/or on a tie-out;
- applicant's familiarity with the breed (if adopting a pure bred dog);

- vacation arrangements;
- references, including veterinarian if the applicant has or had pets before;
- preferences on the dog to be adopted (*i.e.*, age, gender, color, personality, any special requirements);
- if the applicant is financially able to meet the dog's needs, which includes, at a minimum, veterinarian care, feeding, and grooming;
- if the applicant is willing to adopt a dog that may have certain medical conditions (*i.e.*, diabetes, blindness, loss of a limb, etc.);
- if the applicant or any member of the applicant's household has ever been convicted of animal cruelty.

The applicant needs to certify that he or she has answered all of the questions truthfully, and that the information is correct to the best of the applicant's knowledge. There should also be language authorizing the rescue group to contact the provided references.

## **The Adoption Agreement**

The adoption agreement is where the attorney can do his or her utmost to help a rescue group. A legally binding agreement is crucial to protect the rescue group, shield it from potential liability, and ensure as much as possible that the dog will be treated properly. Thus, the adoption agreement should contain the following:

### **General Information**

- name, address, phone number, and email of adopting party;
- description of dog (*i.e.*, name, age, gender, spayed/neutered);
- amount of donation fee;
- a history of the dog's vaccinations, medical history, and any medications the dog needs;
- the type and amount of food the dog eats;
- any and all known medical condi-

tions the dog had or now has;

- any and all behavioral issues exhibited by the dog;

### **Specific Promises by Adopting Party**

- to have the dog examined by a veterinarian within 72 hours for a post-adoption physical;
- to provide proper and prompt veterinary care, along with quality dog food, fresh water, secure exercise space, training, and shelter;
- to keep the dog on a leash or in a secure fenced-in area at all times when outside;
- to treat the dog as a member of the family and not leave the dog outside unattended for extended periods of time;
- to never neglect the dog in any way;
- to never give or sell the dog to anyone, including pet shops, pet farms, or other institutions commercially dealing in dogs;
- to keep the rescue group apprised of the adopting party's current address and phone number;
- to notify the rescue group immediately if the dog can no longer be kept, or if it appears that the dog has been lost or stolen;
- to return the dog to the rescue group if the adopting party cannot keep the dog, for any reason, at any time;

### **Disclaimers and Indemnification Provisions**

1. any illness contracted, or injury suffered, by the dog, after the dog is released to the adopting party, is the responsibility of the adopting party;
2. adopting party has been advised and fully understands that the dog may have come from an abusive or neglectful situation, and that behavioral problems and/or health problems may arise in the future that the rescue group has

no way of predicting;

3. adopting party has been advised and fully understands that the rescue group cannot guarantee health and temperament, even though it made a diligent effort to evaluate the temperament and health of the dog;
4. adopting party agrees that the rescue group and its volunteers are not responsible for the actions or safety of the dog once the dog leaves the rescue group's possession;
5. adopting party agrees to indemnify the rescue group and hold it harmless from any and all costs, expenses or liabilities that may result from any actions of the dog, and to defend the rescue group against any such claims.

### **Special Notice and Disclaimer**

If the dog has a history of unpredictable behavior, the proper notice, disclaimer, and indemnification provisions also need to be included in the adoption agreement. Suggested language includes:

The rescue group has advised the adopting party that this dog has a history of unpredictable behavior, that this dog has been known to bite, and that extra care will be required to prevent the dog from biting. Adopting party specifically acknowledges and agrees that the rescue group will not be responsible for the actions or safety of this dog once this dog leaves the rescue group's possession, notwithstanding this dog's known history of unpredictable behavior and biting. Adopting party further agrees to indemnify the rescue group and hold it harmless from any and all costs, expenses or liabilities that result from any actions of this dog, and to defend the rescue group against any such claims arising therefrom, notwith-

standing the rescue group's knowledge of such previous unpredictable behavior and/or biting.

It is also important to include a provision reserving the rescue group's right to remove and reclaim the dog that it deems has been or is being abused or neglected, or is otherwise in danger in the adoptive home.

Finally, the adoption agreement should contain venue, choice of law, severability, and liquidated damages provisions, as well as a provision in which the adopting party agrees to submit to personal jurisdiction in any New Jersey state or federal court.

### **Pet Surrender Form**

Canine rescue groups are often contacted by an owner seeking to surrender his or her dog for various reasons. A comprehensive surrender form is critical so the rescue group has a complete picture of the dog to be surrendered. Thus, the form should contain the following:

- name, address, phone, and email of the owner;
- complete physical description of animal (*i.e.*, breed, age, size, gender, spayed/neutered);
- personality and temperament description (*i.e.*, housetrained, does/does not get along with other animals and/or children, playful, affectionate, leash- and/or crate-trained, etc.);
- quantity, frequency, and type of food the dog eats;
- description of any medical problems (complete veterinarian records should be included, including rabies certificate and spay/neuter certificate);
- complete description of any behavioral problems;
- whether the dog has ever bitten or shown aggressive tendencies, and if so, a detailed description of each incident.

The surrender form should also have the proper authorization, release, disclaimer and indemnification provisions setting forth that the person surrendering the dog:

1. warrants that he or she is the owner, or authorized agent for the owner, and that the animal is in good physical condition, has no diseases, or infections, is not vicious, and does not have a history of biting, or attacking people, except as noted;
2. that he or she delivers possession, and ownership of the animal to the rescue group, and releases the rescue group from any and all claims, demands, and causes of action with respect to ownership of the animal;
3. authorizes the rescue group to locate a home for the dog, and deliver ownership of the dog to the new owner;
4. that he or she intends to convey full, complete, and unrestricted legal ownership of the dog to the rescue group;
5. that he or she agrees to indemnify, defend, and hold harmless the rescue group, its officers, agents, and volunteers, from any liability, loss, claims, demands, causes of action, or damages (including attorney fees) the person may incur, or sustain by reason of acceptance of the dog.

The form should also contain a disclaimer that it is the rescue group's policy, within reasonable limits, to ensure that each dog is placed in the most compatible home possible; that the rescue group attempts to place dogs into permanent, responsible homes, but it assumes no responsibility for the potential adopter's character or suitability as owner; and, that while the rescue group will take all reasonable precautions, the owner agrees the rescue group and its

rescuers are not to be held responsible for the safety of the dog.

Last, the surrendering party needs to certify that he or she has answered all of the questions on the form truthfully, and that the information is correct to the best of his or her knowledge.

Further, under certain circumstances, the rescue group may determine that the surrendered dog is not suitable for adoption because of temperament, behavior, or illness. In that event, the surrender form should contain several options for the owner to choose. Suggested language includes:

I understand that the rescue group will make every effort to place my dog in a responsible home. Should my dog be deemed not suitable for adoption for reasons of health or temperament, *[check one]*

☐ I understand that the rescue group will have my dog humanely euthanized by licensed veterinary personnel.

☐ I wish to reclaim my dog if (s)he cannot be placed. I will do so within 72 hours of being notified that (s)he is implacable. The rescue group has my permission to euthanize my dog if I do not reclaim him/her within 72 hours of such notification.

### **Foster Homes**

Many canine rescue groups do not have a dedicated facility in which to house their dogs. Instead, the dogs are kept in volunteer foster homes. Without these foster homes, most canine rescue groups could not survive. A foster home provides a temporary place for the dog, and the foster volunteer evaluates the dog's personality, temperament, eating habits, and adaptability. Volunteers who foster should sign a waiver stating that they will maintain the rescue group's integrity, follow the group's procedures, and release the rescue group from any and all liability associated with a fostered dog. It is recommended that these

volunteers complete a foster application containing information similar to the adoption application, and that they receive written guidelines concerning veterinary care; expenses incurred while caring for the dog; and keeping the rescue group apprised of the dog's health status, temperament, and behavior.

## Transporting Dogs

Some rescue volunteers will be transporting dogs. These volunteers should complete a transport application containing the person's name, address, phone number, driver's license information, automobile insurance information, vehicle information, and references. A transport volunteer should also sign a waiver and release stating that he or she: 1) will notify the rescue group of any unusual or aggressive behavior exhibited by the dog during transport; 2) will make every effort to keep the dog safe while it is in the transporter's care; 3) will maintain his or her driver's license and automobile insurance and registration while acting as a transport volunteer; 4) releases the rescue group from any and all liability for any injuries the volunteer may sustain while performing volunteer activities for the group; and, 5) will act in a professional manner and maintain the integrity of the rescue group.

Transport volunteers should also be given written guidelines emphasizing that the dog belongs to the rescue group, and it is the volunteer's responsibility to care for the dog properly. The guidelines should contain instructions on how to transport the dog safely. Some suggestions include:

- the dog must be kept secure at all times, including leashing the dog when entering and exiting the car and during rest stops;
- choose a suitable location—such as a rest stop or restaurant—and park away from high traffic areas, when

taking the dog for a bathroom break;

- provide the dog with fresh water (especially critical in hot weather);
- never leave the dog alone in a vehicle unattended;
- secure the dog in a crate or seatbelt harness in the rear seat;
- never transport the dog in the bed of a pickup truck.

## What the Lawyer Also Needs to Know

New Jersey has several laws concerning charitable organizations that may apply to animal rescue groups, including the Charitable Immunity Act and the Charitable Registration and Investigation Act.

### Charitable Immunity

Under New Jersey's Charitable Immunity Act,<sup>3</sup> certain nonprofit organizations, and their trustees, directors, officers and volunteers, may be immune from liability for damages to someone who has suffered from the negligent conduct of an agent of the organization, if the person injured is a beneficiary of the organization's services.<sup>4</sup> An organization qualifies for charitable immunity, "when it '(1) was formed for non-profit purposes; (2) is organized exclusively for religious, charitable or educational purposes; and (3) was promoting such objectives and purposes at the time of the injury to plaintiff who was then a beneficiary of the charitable works.'"<sup>5</sup> There is no immunity, however, for "willful, wanton or grossly negligent act[s] of omission or commission, including sexual assault and other crimes of a sexual nature...or [for] causing damage as the result of the negligent operation of a motor vehicle."<sup>6</sup>

Although a rescue group may be immune from liability under New Jersey law, it is recommended that the organization obtain general liability insurance covering the group and its volunteers

for negligent acts taking place while promoting the rescue group's objectives and purposes. A general business liability insurance policy will usually suffice.

### Charitable Registration

Under New Jersey's Charitable Registration and Investigation Act,<sup>7</sup> charitable organizations must register annually with the state Attorney General's Office, through the Division of Consumer Affairs' Charitable Registration and Investigation Section.<sup>8</sup> A "charitable organization" is defined as "(1) any person determined by the federal Internal Revenue Service to be a tax exempt organization pursuant to section 501(c)(3) of the Internal Revenue Code of 1986, 26 U.S.C. 501(c)(3); or (2) any person who is, or holds himself out to be, established for any benevolent, philanthropic, humane, social welfare...or any person who in any manner employs a charitable appeal as the basis of any solicitation, or an appeal which has a tendency to suggest there is a charitable purpose to any such solicitation."<sup>9</sup>

Therefore, if the rescue group intends to solicit funds through donations or other fundraising, it probably needs to register with the state. The registration fees range from \$0 to \$250, depending on the amount of funds raised annually by the organization.<sup>10</sup>

## Conclusion

Animal rescue groups are devoted to improving the lives of animals in need. Knowing that one's legal training and skills have helped a rescue group in this worthwhile cause is immensely rewarding. In the end, we help fulfill our commitment as lawyers by helping those that cannot help themselves. ☺

## Endnotes

1. For general information on canine rescue groups, see Joan C. Fremo, *Rescue's Adoption Fees Are Too High...*, at [www.suite101.com/print\\_article](http://www.suite101.com/print_article).

cfm/12811/90324 (last visited Nov. 20, 2004); Lilleth Toney, *Some Common Misconceptions About Breed Rescues*, [www.darkrose-bds.com/kennel/resc/rescmisc.htm](http://www.darkrose-bds.com/kennel/resc/rescmisc.htm) (last visited Nov. 20, 2004); *Animal Rescue & Adoption: Rescue an Animal in your area...*, [animal-rescue.1-800-save-a-pet.com/](http://animal-rescue.1-800-save-a-pet.com/) (last visited Nov. 20, 2004).

2. There is a growing trend to replace the term "owner" with "guardian," in recognition of the movement to elevate the status of animals as "property" to "companions." Since July 2000, over 12 cities across the country, including Wanaque, New Jersey, as well as the state of Rhode Island, have enacted legislation designating owners as guardians.
3. N.J.S.A. 2A:53A-7 to -13.1.
4. N.J.S.A. 2A:53A-7(a) & -7.1.
5. *Auerbach v. Jersey Wahoos Swim Club*, 368 N.J. Super. 403, 410 (App. Div. 2004) (citing *Bieker v. Community House of Moorestown*, 169 N.J. 167, 175 (2001)).
6. N.J.S.A. 2A:53A-7(c).
7. N.J.S.A. 45:17A-18 to -40.
8. N.J.S.A. 45:17A-20.
9. N.J.S.A. 45:17A-23.
10. For additional information on registration requirements, visit the Division of Community Affairs' web site at [www.state.nj.us/lps/ca/charhlp.htm](http://www.state.nj.us/lps/ca/charhlp.htm).

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# Pet Shop Purchases and New Jersey's Pet Lemon Law

by Isabelle R. Strauss

New Jersey ranks third in the country for pet shop puppy sales. It also boasts one of the strongest pet lemon laws, formally known as the Pet Purchase Protection Act.<sup>1</sup> In the author's opinion, however, the act fails to adequately protect purchasers, and may actually confer credibility on an inherently cruel industry.

## The Industry

Most, if not all, of the puppies sold in pet stores come from puppy mills, facilities that usually mass-produce puppies. Dogs used for breeding are often confined in cramped cages, soiled with their own excrement, exposed to the elements with little or no veterinary care, and fed the minimum needed to keep them alive. Brood bitches are bred incessantly, and since their sole purpose in life is to produce puppies, most encounter a cruel and premature demise when no longer able to reproduce, according to the Humane Society of the United States.

The United States Department of Agriculture (USDA) is charged with the job of monitoring and inspecting licensed kennels to ensure they are in compliance with the minimal standards imposed by the Animal Welfare Act.<sup>2</sup> Kennel inspections are a low priority, however, and the USDA lacks sufficient inspectors to provide adequate oversight. Facilities are rarely fined or shut down, and are permitted to operate with repeated disclosure of non-compliant items. Moreover, there are no standards regarding age of breeding or overbreeding, and even the minimal standards are inapplicable to facilities not required to be licensed—those with three or fewer breeding females on the premises, notes the Humane Society.

The greatest number of puppy mills are concentrated in a few Midwestern states—Missouri, Kansas, Oklahoma, Iowa, Arkansas and Nebraska. Missouri, home to more than 1,400 licensed commercial breeding facilities, is known as the Puppy Mill Capital of the World, while Lancaster County, PA, home to a significant and growing concentration of licensed and unlicensed facilities, is known as the Puppy Mill Capital of the East Coast.

At eight weeks of age, puppies are taken from their mothers and sold to brokers who pack them into crates for transport and resale to pet stores. In their trek from puppy mill to

broker to pet store, they travel hundreds of miles in all modes of transportation, often without adequate food, water, ventilation or shelter.

## Pet Store Puppies

The product of inbreeding, overbreeding and poor living and transport conditions, pet store puppies often fall seriously ill or die within days or weeks of purchase. They also disproportionately manifest an array of negative genetic conditions, which may fail to emerge for many months or years after purchase. As a result of these genetic and environmental factors, purchasers frequently find their puppies exhibit significant behavioral problems, according to the Humane Society.

Despite health or behavioral problems, these puppies usually come with papers stating that they are registered. Registration, however, does not guarantee proper breeding conditions, quality or health. Indeed, the American Kennel Club specifically states on its website that it has no control over those engaged in the commerce of selling purebred dogs, or over the quality or health of the dogs produced or sold.

## State and Local Oversight of Pet Stores

Pet shops are required to be licensed annually by the municipality where they are located.<sup>3</sup> They are subject to inspections by the Department of Health and Senior Services and the local board of health to ensure their compliance with regulations governing the physical facility, feeding, watering, sanitation and disease control.<sup>4</sup> They are, of course, also subject to the cruelty laws of the state, which are administered by the local animal control investigator or the county or state SPCA, depending on the locale.<sup>5</sup> Where conditions are particularly egregious, or in violation of the applicable regulations or

the cruelty laws of the state, these agencies can take appropriate action. Such was the case with Puppies N Puppies, which opened in Toms River in June 2002 and closed in April 2003, after cruelty charges were filed against its owner, Matt Brady, and other involved individuals. In August 2003, Brady pled guilty to animal cruelty charges and was ordered to never again engage in the sale of animals in New Jersey.

A more insidious situation exists, however, when an uninformed purchaser with an untrained eye encounters a relatively clean shop featuring puppies that appear disease-free and later exhibit serious illnesses, congenital conditions or behavioral problems. The Pet Purchase Protection Act was enacted to address the concerns of this beleaguered consumer. But, despite its laudatory purpose, the author believes the act has failed to provide the consumer with adequate relief, and has had the unintended effect of perpetrating the puppy mill industry.

### **The Pet Purchase Protection Act**

Enacted in January 2000, the Pet Purchase Protection Act enhanced and codified in statutory form regulations already existing in the New Jersey Administrative Code.<sup>6</sup> Both the regulations that were adopted in 1976 and the act were enacted to further the aim of the Consumer Fraud Act as it applied to the sale of dogs and cats.<sup>7</sup> The regulations apply to pet dealers, which the act applies to pet shops and their employees, operators and owners. By statutory definition all pet shop owners and operators are pet dealers, and thus subject to the regulations as well as the act.<sup>8</sup> The act provides the consumer with recourse if within 14 days after the sale and delivery of the animal to a consumer the animal becomes sick or dies, and a veterinarian certifies within 14 days after the date of sale, that the animal was unfit for purchase due to a non-con-

genital cause or condition, or that the animal died from causes other than an accident. It also provides the consumer with recourse if the animal becomes sick or dies within 180 days after the purchase and a veterinarian certifies within the 180s days that the animal is unfit for sale due to a congenital or hereditary cause or condition, or a sickness brought on by a congenital cause or condition or died from such cause, condition or sickness.<sup>9</sup>

The consumer entitled to recourse may choose his or her recourse from one of the following:

1. The right to return the animal and receive a full refund of the purchase price, including sales tax, plus the reimbursement of the veterinary fees, including the cost of the veterinarian certification incurred prior to the receipt by the consumer of the veterinarian certification;
2. The right to retain the animal and receive reimbursement for veterinary fees incurred prior to the consumer's receipt of the veterinarian certification, plus the future cost of veterinary fees to be incurred in curing or attempting to cure the animal, including the cost of the veterinarian certification;
3. The right to return the animal and receive in exchange an animal of the consumer's choice, or equivalent value, plus reimbursement of veterinarian fees, including the cost of the veterinarian certification incurred prior to the consumer's receipt of the veterinarian certification;
4. In the event of the death of the animal from causes other than an accident, the right to a full refund of the purchase price of the animal, including sales tax, or another animal of the consumer's choice of

equivalent value, plus reimbursement of veterinary fees, including cost of the veterinarian certification, incurred prior to the death of the animal. Reimbursement for veterinarian fees is in all cases limited to twice the purchase price.

### **Twice the Purchase Price**

The cost of pet shop puppies ranges from several hundred to several thousand dollars. In recent years, veterinary care has undergone dramatic advancements along with concomitant increases in cost. Moreover, it bears no relationship to the cost of the animal. Veterinary care for low-end dogs costs the same as for high-end dogs. Twice the purchase price may be inadequate reimbursement for the purchaser who has incurred veterinary bills in the thousands in an attempt to cure a puppy.

### **No Compensation for Damage to the Psyche**

The purchase of a puppy is generally undertaken with the intent to bring joy into the home. Puppies are purchased by couples seeking to hone their nurturing skills, by parents as a birthday gift for a child, or as a holiday gift for a spouse, or in an attempt to ease the pain caused by the recent death of an animal. Yet, many soon find themselves navigating the world of veterinary clinics and emergency care facilities. The anticipated happy times of bonding with a puppy become lost in the shuffle of veterinary visits and medicine administering, and parents find themselves explaining to children and grappling themselves with the concepts of death and euthanasia. Guilt-ridden decisions regarding return versus cure and care versus euthanasia are driven by an inability to pay mounting veterinary bills or take more time off from work. The expectation of joy disintegrates into heartache for which the act provides no compensation.

## Unrealistic Timeframes

Often congenital conditions such as hip dysplasia, glaucoma and periodontal disease do not become apparent until after the six-month time frame imposed by the act on consumers seeking recourse. Other conditions, such as kennel cough, manifest themselves within hours of purchase, but develop into something more serious, such as pneumonia, resulting in the death of the puppy more than 14 days after purchase. This latter problem is exacerbated by pet shops that lull purchasers into a false sense of security by misadvising them that kennel cough is an expected condition that will readily yield to treatment; treatment that may stave off death until after the 14-day period has passed.

## Bias Against Treatment

From a financial standpoint, consumers who opt for a recourse of return fare best under the act. They receive a full refund of their purchase price or an animal of equal value, and are reimbursed for veterinary bills incurred prior to obtaining the unfit for purchase certification. Since those bills are generally minimal, these consumers stand a much greater chance of being made whole financially than the consumer who opts for a recourse of cure. Moreover, since most veterinarians require at least part of the payment upfront, and the act does not mandate that the pet shop make even an uncontested payment until 10 days after receipt of the veterinary certification, many purchasers simply cannot afford to opt for a recourse of cure as opposed to return. It should be noted that pet shops often find it financially expedient to cut their losses by euthanizing these returned puppies.

This bias against treatment not only perpetuates the concept that puppies are fungible property, but also implicitly accepts the notion that they are disposable.

## Suspension and Revocation Provisions

The act provides that the local health authority shall recommend to the municipality in which the pet shop is located suspension of the license and revocation of the license when specified levels of unfit for purchase certifications are issued in a given year. Revocation shall be recommended if 15 percent of the animals are certified unfit due to congenital or hereditary cause; 25 percent are certified unfit due to non-congenital conditions; 10 percent are certified to have died from a non-congenital condition; or five percent are certified to have died for a congenital condition.<sup>11</sup> The levels dictating a recommendation of suspension are 10 percent, 15 percent, five percent and three percent, respectively.

Unfortunately, the act places on the consumer the onus of reporting receipt of a certification of unfitness, and the onus is a permissive one, *i.e.*, the consumer *may* report. The consumer is often unaware of this provision and its intended purpose, or too spent from dealing with a sick puppy and the pet shop to undertake any voluntary reporting, which affords the consumer no apparent direct benefit. Even if the consumer decides to report, and the local health department complies with its obligation to recommend, the act does not mandate that the municipality act in accordance with the recommendation.

The numbers required to invoke the provisions of either the suspension or the revocation provisions are even more troublesome. The provisions that trigger the mandated recommendation of suspension and revocation operate individually—not in the aggregate. For example, a pet shop that sells 1,000 puppies annually could sell more than 510 in any given year that have died or been certified unfit without invoking the mandatory recommendation of revocation; 14 percent, or 140, certified unfit due to a congenital condition; 24 percent, or 240, certified unfit due to

non-congenital condition; nine percent, or 90, whose death is certified due to a non-congenital condition; and four percent, or 40, whose death is certified due to a congenital condition.

## Conclusion

Many animal rights practitioners believe the pet shop puppy sales industry should be prohibited—not regulated. A bill that reflected this view was introduced in the January 2005 session of the Connecticut Legislature. Titled An Act Prohibiting the Sale of Puppies by Pet Stores, it simply provides in its entirety:

That chapter 35 of the general statutes be amended to prohibit the sale of dogs under the age of one year by pet stores.

Its stated purpose was to prohibit puppy mills and prevent the sale of diseased animals by pet shops.<sup>12</sup> Until similar legislation is passed by each state, or on a federal level, consumers must continue to rely on pet lemon laws which fail to fully address the realities of the industry. ♪

## Endnotes

1. N.J.S.A. 56:8-92 *et seq.*
2. 7 U.S.C.A. § 2131.
3. N.J.S.A. 4:19-15.8.
4. N.J.S.A. 4:19-15; N.J.A.C. 8:23A-1.1 *et seq.*
5. N.J.S.A. 4:22-17; N.J.S.A. 4:22-1; N.J.S.A. 4:19-15.16(b).
6. N.J.A.C. 13:5A-1 *et seq.*
7. *Pet Dealers Association of New Jersey, Inc. v. Division of Consumer Affairs et al.*, 149 N.J. Super. 235 (App. Div. 1977); N.J.S.A. 56:8-95.
8. N.J.S.A. 56:8-93.
9. N.J.S.A. 56:8-95(h).
10. N.J.S.A. 6:8-95(i).
11. N.J.S.A. 56:8-96(c)(d).
12. CT HB 5010. This bill was not enacted into law.

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# Bear Hunt Controversy Shines the Spotlight on New Jersey's Wildlife Law

by Doris Lin

Wildlife law in New Jersey is a hot topic. Battles rage in the courts and in community forums over how our wildlife should be managed. The 2003 black bear hunt, the first in New Jersey in over 30 years, spawned seven lawsuits<sup>1</sup> and raised public scrutiny of New Jersey's wildlife management to an international level.

In early 2004, then-Governor James McGreevey acknowledged that the hunt generated more letters than any other public policy issue, including property taxes.<sup>2</sup> The New Jersey Supreme Court cancelled the 2004 bear hunt four days before it was scheduled to begin, when it reversed an Appellate Division decision regarding the authority of the commissioner of the Department of Environmental Protection over the Fish and Game Council.<sup>3</sup>

This article will begin with an overview of the Division of Fish & Wildlife and the Fish and Game Council, and then discuss the legal issues surrounding the bear hunt controversy.

## Division of Fish & Wildlife

With a few exceptions,<sup>4</sup> wildlife in New Jersey is managed by the Division of Fish & Wildlife of the New Jersey Department of Environmental Protection (DEP). Within the division, various programs govern endangered species, non-game species, habitat protection, and fishing and hunting.

The division's mission statement and agency goals are as follows:

### Mission Statement

The mission of the New Jersey Division of Fish & Wildlife is to protect and manage the State's fish and wildlife to maximize their long-term biological, recreational and economic values for all New Jerseyans.

### Agency Goals

- To maintain New Jersey's rich variety of fish and wildlife

species at stable, healthy levels and to protect and enhance the many habitats on which they depend.

- To educate New Jerseyans on the values and needs of our fish and wildlife and to foster a positive human/wildlife co-existence.
- To maximize the recreational and commercial use of New Jersey's fish and wildlife for both present and future generations.<sup>5</sup>

The last goal may be surprising to some. Under the division, wildlife is managed not solely for the health of the ecosystem, but also to maximize hunting and fishing opportunities. State statute provides more specific authority for stocking certain lands and waters with fish, game and birds.<sup>6</sup> The division states that it most directly serves hunters and anglers, and is funded primarily through sales of hunting and fishing licenses.<sup>7</sup> In fact, according to one popular hunting columnist, "Many of [the division's] biologists have, for years, been revered and on a first-name basis with the state's most avid sportsmen."<sup>8</sup>

## The Fish and Game Council

Within the division, the Fish and Game Council establishes the State Fish and Game Code:

For the purpose of providing an adequate and flexible system of protection, propagation, increase, control and conservation of fresh water fish, game birds, game animals, and fur-bearing animals in this State, and for their use and development for public recreation and food supply, the council is hereby author-

ized and empowered to determine under what circumstances, when and in what localities, by what means and in what amounts and numbers such fresh water fish, game birds, game animals, and fur-bearing animals, or any of them, may be pursued, taken, killed, or had in possession so as to maintain an adequate and proper supply thereof....The regulations so established shall be called the State Fish and Game Code.<sup>9</sup>

The council consists of 11 members. State statute requires that six members be sportsmen recommended by the New Jersey State Federation of Sportsmen's Clubs, three be farmers recommended by the agricultural convention held pursuant to statute, one be the chair of state's Endangered and Nongame Species Advisory Committee, and one be someone knowledgeable in land use management and soil conservation.<sup>10</sup> Although only six of the 11 members are required to be sportsmen, currently 10 members are hunters.<sup>11</sup> The sole member who is not a hunter, Jack Schrier, announced his desire to step down from the council in March 2005, effective as soon as a replacement is approved.<sup>12</sup> Schrier's likely replacement, Ernie Hahn, is a hunter,<sup>13</sup> so the council may soon be comprised entirely of hunters. It is important to note that the council's mandate is to manage fish and game "for their use and development for public recreation and food supply."<sup>14</sup>

### New Jersey's Black Bears

In the 1800s, black bears roamed throughout the entire state, but by the mid-20th century, there were fewer than 100 in New Jersey.<sup>15</sup> The council continued to allow bear hunting through 1970, but ended the hunts in 1971.<sup>16</sup>

In 2003, New Jersey held its first black bear hunt since 1970. Before the hunt began, division scientists had estimated the bear population to be 3,200,<sup>17</sup> while

an independent panel convened by DEP Commissioner Bradley Campbell estimated the population to be between 1,350 and 3,278.<sup>18</sup> The council based the decision to hold the 2003 bear hunt on a population estimate of 2,000 to 3,000,<sup>19</sup> but division scientists have since examined the data from the 2003 hunt and now estimate that there were only 1,490 bears at the beginning of the 2003 hunt.<sup>20</sup> Because of this newly lowered population estimate, and because of a desire to explore non-lethal bear management, Campbell wrote a letter to Council Chair W. Scott Ellis on March 5, 2004, asking the council to forgo a bear hunt in 2004.<sup>21</sup> Despite Campbell's request, the council voted to authorize a hunt, and scheduled it for December 6–11, 2004.

Campbell responded by instructing the division to withhold bear hunt licenses and closed state lands to bear hunting.<sup>22</sup> Although the council establishes the game code, the division issues hunting licenses<sup>23</sup> and the commissioner has the "authority to direct and coordinate the uses of all public lands under the jurisdiction of the department."<sup>24</sup> Hunters and hunting clubs responded by filing two separate lawsuits: *U.S. Sportsmen's Alliance Foundation v. N.J. DEP*<sup>25</sup> and *Safari Club International v. N.J. DEP*.<sup>26</sup>

### Commissioner's Authority to Cancel the Bear Hunt

In *U.S. Sportsmen's Alliance Foundation v. N.J. DEP*, hunters and hunting clubs filed an appeal with the Appellate Division challenging the commissioner's authority to withhold bear hunt permits. In its response, the state relied on N.J.S.A. 13:1B-28, which states in part:

In addition to its powers and duties otherwise hereinafter provided, the Fish and Game Council shall, subject to the approval of the commissioner, formulate comprehensive policies for the protection and propagation of fish, birds, and game animals and for the

propagation and distribution of food fish and for the keeping up of the supply thereof in the waters of the State.

The state argued that the council's authority to declare a hunt of a particular animal is part of its "comprehensive policies for the protection and propagation" of that animal, and is therefore subject to the commissioner's approval. The Appellate Division rejected this argument, interpreting the legislative intent in the phrase, "In addition to its powers and duties otherwise hereinafter provided." The court pointed out that the powers and duties that were "hereinafter provided" were those relating to the game code, and found that the commissioner's approval authority extended only to the council's policies outside of the code.<sup>27</sup>

The New Jersey Supreme Court reversed the Appellate Division's decision and issued an order canceling the bear hunt on December 2, 2004.<sup>28</sup> Reading N.J.S.A. 13:1B-28, -30, and -32 together, the Court found that these statutes were unclear regarding whether the commissioner has veto power over the council.<sup>29</sup> As quoted above, N.J.S.A. 13:1B-30 authorizes the council to establish the game code. N.J.S.A. 13:1B-32 states:

Any regulation of the council or amendment thereto adopted pursuant to the provisions of this article which relates to game birds, game animals or fur-bearing animals, after the council has first determined the need for such action on the basis of scientific investigation and research, may apply to all or any part of the State, at the discretion of the council, and may do any or all of the following as to any or all species or varieties of game birds, game animals, and fur-bearing animals:

- a. Establish, extend, shorten or abolish open seasons and closed seasons.
- b. Establish, change or abolish bag limits and possession limits.
- c. Establish and change territorial lim-



its for the pursuit, taking, or killing of any or all species or varieties.

- d. Prescribe the manner and the means of pursuing, taking, or killing any species or variety.
- e. Establish, change or abolish restrictions based upon sex, maturity, or other physical distinction.

The hunters and hunting clubs argued that the statutes empower the council to establish a hunt without the approval of the commissioner. The commissioner argued that a hunt must be in accordance with the commissioner's comprehensive policies. The court found the two interpretations "equally plausible," and the statutes "ambiguous at best," which required an examination of the legislative history.<sup>30</sup>

The Court examined a report written by the New Jersey Commission on State Administrative Reorganization in 1945, and found the reorganization commission did intend for the commissioner to have veto power over the council.

Indeed, the Reorganization Commission went so far as to suggest that the new Commissioner 'exercise veto power over the actions of the councils....' Specifically addressing the Division of Fish and Game, the report states, 'No action shall be taken by [the Fish and Game Council] except upon approval by the commissioner of conservation.'<sup>31</sup>

Also, based on comparisons to other DEP divisions and councils, the Court found that the commissioner has veto power over the council.

Our conclusion is bolstered by our review of the legislation governing other divisions and councils within the DEP. Every division discussed in N.J.S.A. 13:1B is headed by a director who operates under the direction and supervision of the Commissioner...Like

the Fish and Game Council, the Division of Parks and Forestry and the Division of Shell Fisheries, specifically the Shell Fisheries Council, are obligated to formulate comprehensive policies; the former body must do so 'as the Commissioner may direct.'<sup>32</sup>

However, the Court did find limitations to the commissioner's veto power. Although the council's comprehensive policies must be approved by the commissioner, the commissioner does not have veto power over the council's day-to-day activities.<sup>33</sup> Also, if the council formulates comprehensive policies on black bears that the commissioner approves, the council would then be free to initiate a bear hunt that conforms with those policies and the commissioner would have no power to stop the hunt.<sup>34</sup> The comprehensive policies should contain factors to be considered when determining whether to hold a bear hunt, possibly including "the absolute size of the bear population, the number of harmful bear-human interactions and the fiscal and human resources available to carry out the stated goals."<sup>35</sup>

Whether the council will now have to formulate such comprehensive policies for other species is a question that both hunters and animal advocates are asking.<sup>36</sup>

### **Commissioner's Authority to Close State Lands to Bear Hunting**

In a separate lawsuit, a hunting club challenged the commissioner's authority to close state lands to bear hunting. In *Safari Club International v. N.J. DEP*, a hunting club argued that N.J.S.A. 13:1B-32(c) conferred exclusive authority on the council to establish the "territorial limits" of a hunt.<sup>37</sup> However, N.J.S.A. 13:1B-5 confers upon the commissioner the authority "to direct and coordinate the uses of all public lands under the jurisdiction of the [DEP]."<sup>38</sup> The court found that while the council has the authority to determine "when and

where...hunting...shall take place, and which...game animals...may be taken and in what numbers[,] " private and public landowners still have the right to determine whether to allow hunting on their lands.<sup>39</sup> The court also rejected the appellants' argument that the commissioner's decision to close state lands to bear hunting was arbitrary and capricious.

[T]he mere fact that the Fish and Game Council has determined to authorize bear hunting does not make the Commissioner's statutorily authorized decision to close State lands to such hunting arbitrary and capricious, and appellants have not undertaken to demonstrate that there is any public safety or other vital public interest that requires State lands to be open to bear hunting.<sup>40</sup>

Furthermore, the appellants had not undertaken to demonstrate any public safety interest that would require the commissioner to open state lands to bear hunting.<sup>41</sup>

In fact, no one has been killed or seriously injured by a black bear in New Jersey in over 100 years.<sup>42</sup> The vast majority of bear complaints consist of bears raiding garbage and bird feeders, and similar nuisance complaints.<sup>43</sup> The population is described by the council not as overpopulated, but as "hunnable"—that is, a population that can be hunted without endangering the viability or long-term population of bears in New Jersey."<sup>44</sup> If there is no public safety interest and the bears are not overpopulated, why hold a hunt? In the author's opinion, the reason relates back to one of the goals of the division and the council—to manage wildlife for recreational use.

### **Science and Policy**

Population estimates are a scientific determination, but once a population is determined to be healthy, the decision whether to institute a recreational hunt of that population is a policy decision.

As the commissioner stated regarding the bear population: "It's a huntable population, but that doesn't answer the question of whether New Jersey, where public acceptance of bear hunting is not high, should have another hunt."<sup>45</sup>

The recent controversy over New Jersey's black bear hunt has sparked debate over the composition and authority of the council.<sup>46</sup> Separate bills sponsored by Assemblyman Anthony Chiappone<sup>47</sup> and Assemblyman Reed Gusciora<sup>48</sup> would change the composition of the council, balancing the sportsmen with environmental/animal advocates and adding the commissioner of the DEP as a member of the council. Under both bills, the game code would explicitly be subject to the approval of the commissioner.<sup>49</sup>

## Looking Ahead

New Jersey's wildlife management is at a crossroads. Regarding the council's reauthorization of a bear hunt in 2004 despite the commissioner's request to forgo a hunt, the commissioner wrote:

The Council's defiance is due in part to the composition of the Council, which by law has only one seat designated for a person with scientific training, and in part to the absence of any check on the council's seemingly absolute authority over the game code.<sup>50</sup>

Although the Court's decision in *Sportsmen's Alliance* has placed a check on the council's authority, the composition of the council is still at issue.

Because of the state's affinity for bears, and because of this species' history of decimation and recovery, bear hunting has drawn much more criticism and scrutiny than the hunting of any other animal in New Jersey in recent years. It is because of this unusual level of attention that these animals attract that New Jersey residents, and even the commissioner of the Department of

Environmental Protection, are questioning the composition of the Fish and Game Council and how the state's wildlife is managed. How these issues play out in the media, in the Legislature and in the courts remains to be seen, but it seems certain that bears will remain at the center of this controversy.

## Endnotes

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## NEW JERSEY ISN'T HORSING AROUND

# Operators of Equestrian Facilities Can Be Immune From Suit

by Anthony Bush

One of New Jersey's best-kept secrets is the significant amount of equestrian activities within the state. According to the New Jersey Department of Agriculture, equine is the third largest sector of New Jersey's agricultural business; in 2004, the state contained 3,034 farms boasting almost 27,000 horses and ponies.<sup>1</sup>

Working in suburban New Jersey, many readers probably have never thought it necessary to be knowledgeable about the legal issues associated with operating a horse farm. This could change, however, if a good client's spouse were interested in opening a stable and offering riding lessons to the public at the couples' Hunterdon County farm. Given the risks associated with learning to ride a horse, the client would naturally be concerned about potential liability claims, and asks for advice on limiting legal liability, managing the risk for an equine facility, and how they can best protect themselves. Fortunately, the New Jersey Legislature has recognized the importance of equestrian activities in the state and passed legislation that seeks to promote it as well as the companion objective of preserving open space through horse farms. In 1998, the Legislature adopted N.J.S.A. 5:15-1 *et seq.*, the Equestrian Activities Act (EAA). The EAA establishes by statute the responsibilities and limits the liabilities

for those involved in equine activities within the state. The act does not apply to the horseracing industry.<sup>2</sup>

Although the EAA does not grant complete immunity from suit, it does bar the filing of some suits and deters the filing of others. While the Legislature was clear that its intent was to limit liability for those involved in the equine industry, persons covered by the EAA can still be held responsible for injuries caused by certain conduct the Legislature defined as within their control. How the courts might define "control" is unknown, since there are no reported decisions interpreting the act since it became effective on January 8, 1998. An explanation of what the EAA really means, and what steps operators of equestrian facilities can take to protect themselves, follows.

### Definitions

The Legislature has defined to whom the EAA applies and the breadth of its scope.

1. Equestrian area is defined as all the property (real and personal) under the control of the operator utilized for equine animal activities.
2. Equine animal is defined as a horse, pony, mule or donkey.
3. Equine animal activity is defined as any activity that involves the use of an equine animal including such activities as training, selling equipment, riding, boarding, inspecting, transporting and/or providing veterinary treatment.
4. Operator is defined as a person or entity that owns or controls the area where individuals engage in equine animal activities, whether or not compensation is paid.
5. Participant is defined as any amateur or professional engaging in an equine animal activity or, if a minor, the natural guardian, or person standing *in loco parentis* and

shall include anyone accompanying the participant, or any person coming onto the property of the provider of equine animal activities or equestrian area whether or not the invitee or person pays consideration.

6. Spectator is defined as any person observing animal equine activity in equestrian areas, regardless of whether he or she is an invitee.<sup>3</sup>

### **Suits are Barred for Inherent Risks**

Under the EAA, operators are not responsible for an injury or death that is a result of an "inherent risk of equine animal activity," or, stated another way, for risks that are impossible or impracticable to eliminate or control. Inherent risks are defined by the EAA, and include, but are not limited to, the following:

- a. The propensity of an equine animal to behave in ways that result in injury, harm or death to nearby persons;
- b. The unpredictability of an equine animal's reactions to such phenomena as sounds, sudden movement and unfamiliar objects, persons or other animals;
- c. Certain nature hazards, such as surface or sub-surface ground conditions;
- d. Collisions with other equine animals or other objects; and,
- e. The potential of a participant to act in a negligent manner that may contribute to the injury to the participant or others, including but not limited to failing to maintain control of the equine animal or not acting within the participants ability.<sup>4</sup>

Participants and spectators are deemed to have assumed the risk of all inherent conditions and to know the range of their abilities and to conduct themselves within them.<sup>5</sup> This assumption of risk bars all suits brought against

operators for inherent risks.<sup>6</sup>

### **Exceptions to Limitations of Operator Liability**

The Legislature has defined certain actions of operators that are not within the inherent risks of equine animal activities, and for which they can be liable. In other words, there is liability for certain actions that the Legislature deems within the control of operators. The list of activities is not exhaustive, and could be read broadly by the courts. The enumerated exceptions to the bar against liability include, but are not limited to:

- a. Knowingly providing equipment or tack that is faulty to the extent that it causes or contributes to injury.
- b. Failure to make reasonable and prudent efforts to determine the participant's ability to safely manage the particular equine animal, based upon the participant's representation of his ability, or the representation of the guardian, or trainer of that person standing *in loco parentis*, if a minor.
- c. A case in which the participant is injured or killed by a known dangerous latent condition on property owned or controlled by the equine animal activity operator and for which warning signs had not been posted.
- d. Act or an omission on the part of the operator that constitutes negligent disregard for the participant's safety, which act or omission causes the injury, and
- e. Intentional injury caused by the operator.<sup>7</sup>

### **Protection Against Liability for Those Under the Influence of Alcohol or Drugs**

The EAA prohibits individuals from being spectators or participating in

equestrian activities if under the influence of alcohol or drugs. The EAA further exempts from civil and criminal liability an operator who prevents a participant or a spectator from engaging in or interfering with animal equine activity or being in an equestrian area, if the operator has a reasonable basis for believing the participant or spectator is under the influence of drugs or alcohol.<sup>8</sup> The EAA is silent on an operator's liability for an injury occurring to a participant or spectator under the influence of drugs or alcohol without an operator's knowledge.

### **Warning Signs are Required**

In order to obtain the protection of the EAA, operators must post signs that are visible to all participants and contain the following language in large capitalized print:

Warning: Under New Jersey law, an equestrian area operator is not liable for an injury to or the death of a participant in equine animal activities resulting from the inherent risks of equine animal activities, pursuant to P.L. 1997, c. 287 (C. 5:15-1 et. seq.)<sup>9</sup>

Unlike many other states that have equine animal activity statutes limiting liability for equine operators, New Jersey does not require that the warning be included in a contract or release in order to obtain the protection of the statute. Further, although the EAA does require that there be more than one sign, the act does not mandate the size of the type, size of the signs, number of signs or where they must be posted.

### **Prerequisites to Filing Suit Against an Equine Operator**

Prior to the commencement of an action against an operator, equestrian activity participants and spectators are required to provide notice of their claim. Potential litigants must submit a



written report to the operator setting forth all details of any incident within 180 days of the occurrence. The report must include when the incident occurred; who was involved or witnessed it; and the cause of the incident. Under the EAA, if it is not practical to submit the report within 180 days because of "severe physical disability" due to the participant's accident or injury, the report shall be submitted as soon as practical. (The requirement that a report be submitted is predicated upon the operator conspicuously posting notice to participants as required under the EAA.) A party can submit the report more than 180 days after the time of the incident if, at the discretion of a superior court judge, the operator is not substantially prejudiced.<sup>10</sup>

The statute of limitations for claims arising from equestrian activities is two years.<sup>11</sup> The above-referenced time frames do not begin to run in cases involving minors until they reach the age of majority, unless a parent or representative was present to make and approve decisions concerning conditions and riding ability.<sup>12</sup>

In the absence of case law interpreting the notification requirements, the manner in which the courts evaluate a party's efforts to file and serve a late affidavit of merit in suits against licensed professionals might be instructive. In those instances, the courts employ the substantial compliance test to excuse failure to meet similar deadlines. The test requires a defaulting party to demonstrate: 1) lack of prejudice to the defending party; 2) steps taken to comply with the statute; 3) general compliance with the purpose of the statute; and 4) a reasonable explanation for the failure to strictly comply with the statute.<sup>13</sup>

### The Use of Written Releases

The EAA grants immunity for injuries or death from the inherent risk of equestrian activities provided appropriate sig-

nage is posted. The act does not protect operators from their own negligence, whether intentional or otherwise. In view of the fact there are no cases interpreting the EAA, it is prudent for New Jersey equine operators to use written releases even though it is not required under the EAA. The primary reasons to use a release would be to have participants and spectators acknowledge the protections provided in the EAA, and to expand on them.

Some suggested additional protections that could be obtained include:

#### **A release for negligent conduct.**

A provision containing a general release for all negligently caused personal injuries and property damage arising from equestrian activities should be a part of any release. In addition to providing a blanket release for all negligence attributable to an operator, the provision should specifically release an operator from enumerated equestrian activities that could cause injury, such as mounting, walking, riding, boarding, grooming, or feeding an equine animal, or failing to understand an operator's instructions, or arising from control of an equine animal regardless of its ownership. In the absence of any case law interpreting this statute, it is possible that New Jersey's courts might find such a release void as against public policy, especially if the release sought to bar liability for intentional conduct. However, until a decision of this type is rendered, operators of equine activities should consider employing a release that includes a bar against claims relating to an operator's negligent conduct.

**A release for mandatory warnings.** Another benefit of an operator's use of a release of liability agreement could be to defeat any potential claim for insufficient posting of warning signs as required under the EAA. Again, the EAA is vague regarding the number of signs, location of signs, size of type or size of signage. The statute merely

requires that the sign be conspicuous. If a release has a provision that the releasor acknowledges and understands the warning set forth in the signs, it could serve to defeat a claim that might otherwise be allowed because a court found insufficient notice of the warning.

#### **A release of liability for failure to properly assess a participant's ability.**

The exception to the limitation of liability on the basis of an operator's failure to make reasonable and prudent efforts to determine the participant's ability to safely manage a particular equine animal could be avoided by use of a written release where the participant acknowledges and agrees to the reasonableness of the efforts made by the operator in assessing their own or their minor's ability to control any given equine animal.

#### **A release from liability for participants and spectators under the influence of drugs or alcohol.**

It also makes sense to have a release provision that expands on the EAA's bar to suit by spectators or participants in equine activities under the influence of alcohol or drugs. (Recall, the EAA doesn't address situations where the operator does not have knowledge of the participant's intoxication.) Such a provision could state that a participant understands and acknowledges that an operator is not responsible for injuries sustained while he or she is under the influence of alcohol or drugs regardless of the operator's understanding.

#### **A release for minors that could start an earlier running of the statute of limitations.**

It would be appropriate to include an acknowledgment in a release whereby a parent or someone acting as their representative acknowledges that they have sufficient knowledge of their minor's ability to engage in equine activities, and therefore hold the operator harmless. Such a provision could bar suits filed later by minors when they reach the age of majority, because the EAA states that if a

parent makes such an acknowledgment the two-year statute of limitations would begin to run at the time of the incident, not at the age of majority.

*the areas of commercial, corporate, negligence, product liability and equine law.*

## Conclusion

The EAA bars liability for equestrian operators for certain defined activities that the Legislature has deemed beyond their control. Although the legislation is very pro-business and pro-equestrian operator, it is not prudent for operators to rely on the statute alone for protection from suit. In order to minimize exposure to legal liability, it would be advisable for equestrian operators to use a release that incorporates the statutory language barring certain liability and expanding on it to include additional protections for negligence; adequacy of posting of warning signs; proper assessment of participant ability; further limitations on liability for those under the influence of alcohol or drugs; and an earlier running of the statute of limitations for minors. ♣

## Endnotes

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13. See *Mayfield v. Community Med. Assoc.*, 335 N.J. Super. 198 (App. Div. 2000).

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## A FINAL THOUGHT

# Pet Shop Standards and New Jersey's Current Law: Three Areas for Legislative Review

by Lawrence R. Jones

One need not be an animal expert to recognize the inherent cruelty in many pet shop operations. Most people have at some point in time witnessed disturbing displays of depressed-looking dogs and cats crammed as inventory into rows of undersized cages behind an observational window.

**T**he current state laws and regulations governing pet shop operations may not be effective in protecting against animal cruelty, and should be reviewed in at least three areas: 1) cage size; 2) opportunities for animal exercise; 3) climate control.

Since 1868, New Jersey has dedicated an entire chapter of its statutory law to the prevention of cruelty to animals under New Jersey Statutes, Chapter 22, Title 4. This chapter, which recognizes animal cruelty as a criminal offense, reflects an implicit public policy that our society should treat animals in a humane manner. Ironically, the provisions in this chapter do not address in any substantive fashion the issue of pet shop operations and commercial practices in the sale of domestic animals that might objectively be considered inhumane. Rather, the only true reference to pet shop conditions is found in a totally separate chapter of our law—Chapter 19, Title 4—which provides that the New Jersey Department of Health:

will prepare and promulgate rules and regulations governing the sanitary conduct and operation of kennels, pet shops, shelters and pounds, to preserve sanitation therein and to prevent the spread of rabies and other diseases of dogs within and from such establishments.

The provision focuses on sanitation for humans as opposed to animal cruelty. Further, the provision addresses only diseases from dogs, with no reference to cats or other domestic animals.

As directed under Chapter 19, the New Jersey Board of Health has, in fact, prepared and promulgated rules and regulations for the operation of pet shops. These rules are presently located in Chapter 8:23A of the New Jersey Administrative Code, and purport to establish minimum basic standards for operating a pet shop in New Jersey. The issue is whether these standards are so vague and minimal that they subject animals to cruelty in violation of public policy.

### Present New Jersey Law for Cage Size

Pursuant to N.J.A.C. 8:23A-1.6, a pet shop may keep an animal in a cage where there is “sufficient space for the animal to turn around freely, stand, sit and lie in a comfortable normal position.” There is currently no stated legal requirement that an animal have room to step forward or backward, or to walk in any direction other than turning in a circle. Further, there is no stated maximum time limit capping how many days the animal may be kept in a display cage.

A dog is entitled to an additional six inches in cage length. Pursuant to Section 1.6(b), the dog “shall be provided a minimum square footage of floor space equal to the mathematical square of the sum of the length of the dog in inches, as measured from the tip of its nose to the base of its tail, plus six

inches, expressed in square feet.” For a cat, the only requirement is that the cage space have a minimum of seven cubic feet and a litter receptacle for any adult cat caged for longer than 15 days, according to N.J.A.C. 8:23A-1.6(g). Grid-type flooring is expressly permitted by law under Section 1.6(f).

### **Present New Jersey Law for Exercise Opportunities**

Pursuant to N.J.A.C. 8:23A-1.6, there is no legal requirement for exercise opportunities for a dog whose cage is double the animal’s length and a foot. If an adult dog’s cage is smaller than the stated requirement, the dog must be walked 20 minutes per day, or exercised twice per day in a run. There is no stated legal requirement to exercise caged puppies or cats.

### **Present New Jersey Law for Climate Control**

N.J.A.C. 8:23A-1.4 requires that pet shops provide indoor animal facilities. However, the pet shop need only be sufficiently heated “when necessary” to protect the animals from cold and for their health and comfort. The law provides no distinction between different temperature needs for different animals. Further, pursuant to N.J.A.C. 8:23A-1.4, pet shop owners may keep indoor temperatures as low as 50 degrees Fahrenheit. Fans and air conditioning are only mandatory when the temperature exceeds 85 degrees Fahrenheit. While pet shops may keep temperatures comfortable for patrons during store hours, there are no requirements for stricter climate control after business hours.

Accordingly, technically under New Jersey’s present law, a pet shop owner may keep animals in extremely small cages with little exercise or climate control indefinitely. ♪

*ney, is a member of the New Jersey Lawyer Magazine Editorial Board.*

**Lawrence R. Jones**, a Toms River attor-

# ATTORNEY ETHICS

## Office of Attorney Ethics—Disciplinary Summaries

The following regular feature includes summaries of actual ethics cases provided by the Office of Attorney Ethics.

### **RPC 3.3 (Candor to the Tribunal)**

***In re Giorgi, 180 N.J. 525 (2004), (three-month suspension).*** The respondent represented the grievant, his long-time friend, in a personal injury action. During the course of the representation, the respondent made several loans to the client without disclosing the terms in writing, and without advising the client to consult with independent counsel. He earned excessive interest on the loans, which were not fair and reasonable to the client. He also arranged other improper loans to this client from another client.

During settlement negotiations with the defense counsel, the respondent represented that he had agreed to reduce his fee by \$25,000 in order to show his good faith and induce the carrier to increase its offer. The ploy was successful, as defense counsel represented that the carrier said it would not have increased its offer except for the fee reduction representation. The respondent then compounded his unethical conduct by repeating this misrepresentation to the court. The defense counsel requested that the settlement be placed on the record, whereupon, the respondent counseled his client to falsely testify to this fee reduction “story.” The respondent then elicited testimony from the client under oath confirming that there was an agreement to reduce the fee by \$25,000.

The Supreme Court suspended the respondent for violating, among other things: RPC 1.5 (unreasonable fee), RPC 1.7(a) (conflict of interest), RPC 1.7(b) (conflict of interest; representation materially limited by responsibility to another client or by the lawyer’s interests), RPC 1.8(a) (prohibited transaction with client), RPC 3.3(a)(1) (false statement of material fact to a tribunal), RPC 3.4(b) (counseling or assisting a witness to testify falsely), and RPC 8.4(d) (conduct prejudicial to the administration of justice).

***In re Forest, 158 N.J. 428, (1999), (six-month suspension).*** The respondent represented a husband and wife in a personal injury case. During the course of his representation, the husband died. The wife informed the respondent of

the husband’s death. Thereafter, the respondent served unsigned answers to interrogatories on defense counsel, purportedly answered by the husband. Neither the answers nor the cover letter indicated that the husband had died.

The respondent appeared at a mandatory automobile arbitration with the wife and advised her prior to the hearing not to voluntarily disclose the husband’s death. When the arbitrator inquired about the husband’s whereabouts, the respondent replied that he was “unavailable.” Arbitration awards were made in favor of the wife and husband. After the arbitration, the defense counsel tried to get a voluntary medical exam of the husband, and when that failed, he obtained a court order for an examination and the respondent finally informed him that the husband had died. At no time prior to the issuance of the court order did the respondent inform his adversary, the arbitrator or the court of the husband’s death.

The Supreme Court found that the respondent violated RPC 3.3(a)(5) (failure to disclose material fact to tribunal), RPC 3.4(a) (obstructing party’s access to evidence of potential evidentiary value), and RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation), and imposed a six-month suspension.

***In re Kornreich, 149 N.J. 346, (1997), (three-year suspension).*** Respondent Chen Kornreich was charged with motor-vehicle offenses arising from a car accident with another motorist. Thereafter, the respondent misled the municipal court, as well as her own attorney, into believing that her full-time babysitter had been the driver of the car at the time of the accident. As a result of those misrepresentations, the charges against the respondent were dismissed, and the respondent’s employee was charged with the motor vehicle offenses. At this point, the respondent unsuccessfully attempted to arrange for her employee not to appear at trial to defend against the charges. When the respondent’s scheme came to light, the charges against the employee were dismissed. The matter was referred to the county prosecutor,



who charged the respondent with criminal offenses based on her conduct. The criminal charges eventually were dismissed after the respondent completed the pretrial intervention program.

The Supreme Court found that, among other rules, the respondent violated RPC 3.3(a)(1) and (4) by offering false statements and evidence to mislead the municipal court; RPC 3.4(f), by attempting to dissuade her former housekeeper from attending court; and RPC 8.4(b) by committing crimes by falsely implicating her housekeeper, by attempting to interfere with the hearing on the charges against her, and by obstructing the enforcement of the criminal laws, crimes that reflect adversely on an attorney's honesty and fitness. The Court suspended her for a period of three years. ♣

# LAWYER'S BOOKSHELF

## **The of Counsel Agreement: A Guide for Law Firm and Practitioner (3rd ed.)**

**Harold G. Wren and Beverly J. Glascock**

American Bar Association, 2005

Once upon a time, the term "of counsel" was universally understood to mean a retired partner who occasionally consulted with the attorneys at the firm. Thus, in 1972, the American Bar Association's (ABA) Standing Committee on Ethics and Professional Responsibility characterized an of counsel attorney as one who had a close, continuing, personal relationship with the firm, but was not a partner or an associate.<sup>1</sup>

In recent years, however, the use of the term "of counsel" has increased, and a single meaning can no longer be attributed to it. As a result, in 1990, the ABA Standing Committee on Ethics and Professional Responsibility noted that in addition to retired partners, of counsel (as well as the terms "counsel," "special counsel" and "senior counsel") was being used by part-time attorneys (including semi-retired partners), associate and lateral attorneys not yet ready for partnership (*i.e.*, prospective partners), and senior associate attorneys who would not be made partner but would have a permanent relationship with the firm (*i.e.*, permanent senior associates). The committee also used the somewhat less restrictive term "close, regular, personal relationship" with the firm to characterize an of counsel attorney.<sup>2</sup> The New Jersey Committee on Attorney Advertising has also weighed in on the use of the term "of counsel" in Opinion 21.<sup>3</sup>

The proliferation of the use of such terms as "of counsel," "counsel," "special counsel" and "senior counsel" has generated more attention to the issues of contract liability, tort liability, income taxation, advertising, and conflicts of interest stemming from both the use of such terms and the relationships between such attorneys and firms. Attorneys and firms contemplating of counsel relationships should review *The of Counsel Agreement: A Guide for Law Firm and Practitioner (Third Edition)*, which is a well-written and organized text. It examines the foregoing issues as well as when the term "of counsel" can and cannot be used, and the differences between an of counsel attorney and a partner or associate.

The 266-page book, written by Harold G. Wren and Beverly J. Glascock and published by the ABA's Senior Lawyers Division, also includes six different forms of an of counsel agreement, as well as the text of Opinions 330 and 90-357 (which are contained on the CD-ROM accompanying the book).

## **Endnotes**

1. See Formal Opinion 330.
2. See Formal Opinion 90-357.
3. See 147 N.J.L.J. 979; 6 N.J.L. 475 (February 24, 1997).

**Reviewed by Gianfranco A. Pietrafesa**

## **Electronic Evidence: Law and Practice**

**Paul R. Rice**

American Bar Association, 2005

Electronic evidence has become more and more commonplace in the last 10 years, so much so that the discovery of such evidence is now specifically addressed in various court rules. In 2003, the United States District Court for the District of New Jersey added a rule concerning the discovery of digital information, including computer-based information.<sup>1</sup> Likewise, in August 2004, the federal judiciary proposed amendments to Federal Rules of Civil Procedure 16, 26, 33, 34, 37 and 45, concerning the discovery of electronic information. If approved, the amended rules would become effective on December 1, 2006.<sup>2</sup>

In light of the increasing importance of such evidence, the American Bar Association Section of Litigation recently published *Electronic Evidence: Law and Practice* by Paul R. Rice. Rice is a professor of law at American University's Washington College of Law, and a noted commentator and author of books and law review articles on evidence issues, including *Attorney-Client Privilege in the United States* published by West.

In his latest book, Rice expertly intertwines past and current law, predictions about future changes in the law, and practical advice on discovery, evidence and technological issues and strategies. Every litigator thinking about delving into electronic evidence should read this book.

The 387-page soft cover volume begins with the discovery of electronic information, including a general exposition of the law followed by a look at the issues specific to electronic discovery. Several sample forms are provided in the book, including a letter warning individuals to preserve electronically stored information in anticipation of litigation, interrogatories and document demands to elicit discovery of electronic documents and information, deposition notices, and even deposition questions.

The book also examines the issue of allocating the costs of electronic discovery, including the influential, if not seminal,

United States District Court for the Southern District of New York cases of *Rowe Entertainment, Inc. v. William Morris Agency, Inc.* and *Zubulake v. UBS Warburg, LLC*.

Rice's book also examines spoliation of evidence, which, for the lay reader or non-litigator, means the destruction of, or failure to preserve, electronic evidence. It includes a discussion of the case law on the issue of whether intent or bad faith is required to prove spoliation. The chapter also examines the increasingly important topic of an attorney's duty to preserve and produce such evidence, including a discussion of the most recent *Zubulake* decision (*Zubulake V*), and the various sanctions for the spoliation of evidence, including negative inference charges to the jury and exclusion of evidence.

The balance of the book is devoted to familiar evidentiary terms, including confidentiality, the attorney-client privilege, the best evidence (or original writing) rule, presumptions, authentication, and hearsay, as well as substantive laws such as the statute of frauds and the parol evidence rule. The discussion of these issues includes an examination and explanation of the issues and problems associated with existing (*i.e.*, old) law being used and adapted to modern technology, such as emails, e-commerce, web pages, and the Internet.

One of the more interesting discussions is on the recent phenomenon of clients copying their attorneys on emails, and whether those emails are protected under the attorney-client privilege. Another addresses how technology has increased the means of altering and forging documents, and the resulting effect of authenticating (*e.g.*, proving that the document is complete and unaltered) documents at trial. Yet another topic of interest is the authentication of electronic evidence through data trails, electronic signatures, and public key infrastructure (PKI) technology.

Professor Rice also examines the law of expert testimony as it relates to electronic evidence, including the Federal Rules of Evidence and the United States Supreme Court's decisions in *Frye*, *Daubert* and *Kuhmo Tire*, and the developing case law that is their progeny.

Readers will quickly note that much of the case law on electronic evidence is less than 10 years old. This is not our fathers' evidence law anymore. The modern-day litigator must be familiar with evidence issues relating to electronic information.

The author includes numerous comprehensive footnotes containing a treasure trove of case law, court rules, evidence rules, and technological information. Indeed, there is so much law cited in the book that a table of cases would have been extremely helpful for the reader to locate specific cases. Hopefully this one omission will be remedied in the next edition.

In sum, *Electronic Evidence: Law and Practice* contains everything a litigator ever needed or wanted to know about electronic evidence, and should be added to the litigator's library.

#### Endnotes

1. See Local Civil Rules 26.1(b)(2)(d) and 26.1(d).
2. See <http://www.uscourts.gov/rules>.

Reviewed by Gianfranco A. Pietrafesa

struggle to decide whether a convicted murderer should live or die.

Locked in a cramped room with the jury, the reader rides their rollercoaster of strong emotions—from certainty to doubt, from anger to peace—as the author explores how they arrive at a unanimous decision in the case of *The People v. Lane*. The jurors' voices are compelling and their reasoning fascinating, offering a rare look into how real people weigh the value of taking one life to pay for the loss of another.

*A Life and Death Decision* provides an important window into how real jurors deliberate death penalty cases. ♣

Reviewed by Cheryl Baisden

### **A Life and Death Decision: Juries and the Death Penalty**

**Scott E. Sundby**

Palgrave Macmillan, 2005

From the first line of his gripping 187-page book, Scott Sundby, a Washington & Lee University law professor, has the reader in the palm of his hand. It only takes a few well-worded pages to recount the murder of convenience store night clerk Carlos Castillo, and then the author plunges head first into the meat of the book—how 12 jurors

## LEGAL CREATIVITY



Divers exploring a shipwreck off the island of Curacao, January 2005.

Photo by Stuart A. Hoberman