Emerging Issues and Hot Topics in Animal Law

Wednesday, August 29, 2018
Scott Conference Center, Omaha
Emerging Issues and Hot Topics in Animal Law: Legislation & Litigation

1:00 pm
Animal Law for Local Governments
Katie Bray Barnett, Barnett Law Office LLC

This session will discuss developments in animal law for local governments. This session will touch on three main issues local prosecutors, city attorneys, and contracting animal shelters face: Breed specific ordinances; Pre-conviction forfeiture of animals; and Canine-law enforcement encounters.

These issues continue to emerge as our knowledge of animals grows concurrent to the increasing number of animals in households across the country. For municipalities, learning the most effective way to handle these cases when they arise, and ultimately preempting litigation, saves resources, and helps create safer and more humane communities.

2:30 pm Break

2:45 pm
A Turn of the Paw: The Legal Interface Between Individuals with Disabilities, the Animals that Serve Them, and the “Public” Around Them
Michael J. Elsken, Disability Rights Nebraska

Individuals with disabilities use animals to assist them. In some instances, animals are used by individuals without disabilities. This session will provide attorneys with an overview of the Americans with Disabilities Act, Fair Housing Act, Air Carrier Access Act and Rehabilitation Act and how each of them applies to an individual’s use of a “service animal” and “emotional support animal,” and when such animal is provided legal protection under the law.

At the conclusion of this session, attorneys will be able to:

- Define “service animal” and “emotional support animal” and how they apply under the law
- Recognize what can and can’t be done when dealing with individuals who have a “service animal” or an “emotional support animal”
- Identify defenses to excluding certain animals
- Discuss the obligations of the individuals with a disability regarding their animal
- Name resources available to addressing issues related to “service animals” and “emotional support animals”

3:45 pm
Prosecuting Animal Cruelty Cases – Unique Challenges, Implications, Statistics, and Proactive Solutions
Tannaz Kouhpainezhad, Husch Blackwell

Prosecuting and defending animal cruelty cases can present unique challenges and implications. This class will cover the various categories of animal cruelty, investigating animal abuse/neglect, preparing and trying your case, and what to do if you have a client facing charges that not only helps your client, but helps society. The goal is to handle animal abuse and neglect cases in such a manner so as to render long-term benefits, particularly because studies show that animal cruelty is a predictor of future criminal behavior with juvenile crime and domestic violence. This class will help guide you through the maze of prosecution to arrive at a proactive solution in combatting animal cruelty.

4:45 pm Adjourn
Faculty Bios

Katie Bray Barnett, Barnett Law Office LLC: Katie Barnett is Animal Welfare Counsel for the Lawrence Humane Society and manages a solo practice, Barnett Law Office LLC. Ms. Barnett is a graduate of the University of Kansas School of Law. During law school she worked as a contract lobbyist for Best Friends Animal Society and as a legislative attorney upon graduation. After traveling across the country working with animal shelters and local governments, she opened her own practice in Lawrence, Kansas, where she focuses on animal law and municipal law; representing pet owners, as well as cities; and training law enforcement on animal issues. In 2018, she began work as Animal Welfare Counsel at the Lawrence Humane Society where she is a liaison for legislative and legal issues on a state and local level.

Michael J. Elsken, Disability Rights Nebraska: Michael Elsken is a Staff Attorney with Disability Rights Nebraska. Before starting with Disability Rights Nebraska, he was in private practice and focused his practice in the areas of bankruptcy, civil, criminal and juvenile law. Since joining Disability Rights Nebraska, Mr. Elsken has engaged in a broad range of “protection and advocacy” activities for the agency on behalf of individuals with disabilities in the State of Nebraska, including litigating issues for individuals with disabilities, presenting at educational and training programs for individuals with disabilities, and for entities who supply services for individuals with disabilities; monitoring activities designed to protect the interests of individuals with disabilities, and training on a broad range of disability rights and cultural competency issues. He received his Juris Doctor from the University of Nebraska College of Law.

Tannaz Kouhpainezhad, Husch Blackwell: Tannaz Kouhpainezhad is a member of Husch Blackwell’s Commercial Litigation group. She is a seasoned litigator and client advocate who has litigated cases in a wide variety of industries, including commercial real estate development, financial services, corporate, and constitutional matters.

Prior to joining Husch Blackwell, Ms. Kouhpainezhad was a Deputy Attorney General for over ten years with the California Department of Justice, where she represented the State of California in the prosecution of over 300 criminal matters of varying complexities in both state and federal courts. She has defended over 100 cases that involved significant and complex statutory interpretation matters, regulatory issues, and constitutional challenges, which ultimately resulted in numerous favorable and nationally-used published opinions, particularly in the area of the Fourth Amendment and animal welfare.

Ms. Kouhpainezhad has also been an Adjunct Professor of Law at Loyola Law School, Los Angeles, where she taught Appellate Advocacy and Animal Law. In 2011, the Animal Legal Defense Fund named her as one of the nation’s “Top Ten Animal Defenders.”
I. INTRODUCTION

This session will discuss developments in animal law for local governments and the issues city attorneys, local prosecutors, and animal shelters face.

II. BREED SPECIFIC ORDINANCES

a. History In 1987 a swell of magazines and news media investigating dog fighting, and dog attacks, zeroed in on “pit bulls,” with one feature article having called pit bull dogs “time bombs on legs.” In response, over the next year, cities went on to convict the entire breed of dog commonly referred to as “pit bulls” as inherently vicious. Cities like Overland Park, Kansas, Denver, Colorado, and the entire state of Ohio enacted breed-specific ordinances and legislation that regulated or banned the “pit bull.”

b. What is “breed?” Pit bull shall be defined as any dog that is an American Pit Bull Terrier, American Staffordshire Terrier, Staffordshire Bull Terrier, Dogo Argentina, Presa Canario, Cane Corso, American Bulldog, …(City of Omaha, NE, City Code §6-163) See Am. Dog Owners Ass’n v. City of Lynn, 533 N.E.2d 642, 646 (Mass. 1989).

c. Constitutional Challenges The four general characteristics of a family’s constitutional challenge to a city’s breed-specific legislation are the (1) definition of the breed, (2) procedures for identifying and challenging the designation of the breed by the city, (3) ownership restrictions imposed, and (4) penalties for violating the law. Joan E. Schaffner, The Constitutionality of Breed-Specific Legislation: A Summary, in A Lawyer’s Guide to Dangerous Dog Issues 26 (Joan E. Schaffner ed., 2009) (citing Cynthia A. Mcneely & Sarah A. Lindquist, Dangerous Dog Laws: Failing to Give Man’s Best Friend a Fair Shake at Justice, 3 J. Animal L. 99, 112 (2007)).

d. Current Legal Landscape
   i. Vanater v. Village of South Point, 717 F. Supp. 1236, 1243 (S.D. Ohio 1990) (challenging a local breed-specific ordinance as facially vague); Am. Dog Owners Ass’n v. Dade County, 728 F. Supp. 1533, 1538, 1540–41 (S.D. Fla. 1989) (holding a breed-specific legislation was not facially vague for failure to provide notice because it covered a specific breed and breeds that were commonly referred to as pit bulls); Am. Dog Owners Ass’n v. City of Lynn, 533 N.E.2d 642, 646 (Mass. 1989) (discussing the facial vagueness of a breed specific ordinance because it lacked a more ascertainable standard for enforcement or a definition of the breed pit bull).
   ii. However, in 2010, the United States District Court for the District of Colorado in Dias v. City of Denver found that “a reasonable trier of fact may
find that . . . there exists no rational basis for a breed specific ordinance” because of developments in the study of breeds, aggression, and misuse of statistics in previous breed-specific legislation cases. It seems that this is where the evolution of case law is taking the substantive due process issue.

e. **Current Legislative Landscape** 21 states statutorily preempt any city from enacting a breed specific ordinance (or in some states includes regulations). Surrounding Nebraska: Colorado, South Dakota, Minnesota, and close states include Illinois and Utah.

f. **Current Scientific Landscape**

i. **Pseudo-Science** The county district court in *Hearn* found that pit bull dogs were unique in their unpredictability, or that they attacked without warning. However, a closer look at the expert testimony shows that the only documents relied upon were newspaper articles reporting attacks by pit bulls that occurred without warning. Similarly, in *Tellings*, although Dr. Dale Wright testified that pit bulls have some sort of mechanism that “makes [them] unpredictable and they give off no warning ‘signals,’ he acknowledged that he had done no studies, and had no scientific data, proof, or other evidence in support of his theory.” The county district court in *Hearn* found that “pit bull dogs are both more aggressive and destructive than other dogs,” based on testimony by Dr. Donald Clifford in a study on aggression that he performed on dogs and stuffed animals. Dr. Clifford drew the conclusion by stating that pit bulls (no parameters of which purebred breeds were examined, meaning it could be the American Staffordshire Terrier, Staffordshire Bull Terrier, or American Pit Bull Terrier, or any mixed-breed dog assumed to be mixed with one of those breeds) compared to other breeds of dogs (again, no parameters on breeds, sizes, breed groups, or control groups) were more aggressive toward stuffed animals than other breeds of dogs and would damage “stuffed toys.” (Transcript of Proceedings, *supra* note 123, at 424–25.).

ii. **Actual Data** A more recent and more scientific study, compared to that of Dr. Clifford’s stuffed toy analysis, involved the behavior of over 350 dogs and concluded that there was no significant variation of aggressiveness observed between any of the breed groups studied. It also found that “environmental factors could mask or even enhance breed differences.” For instance, dogs of all different breeds who spend most of their time living with the family in the house may be more similar to other breeds than of a dog of the same breed living outside. Additionally, a separate genetics study involving dogs with specific behavioral characteristics found only a small correlation between genes known to influence the nervous system or behavior and certain types of behavior. Finally, a study on the genes related to the neurotransmitter systems in canine brains revealed that risk of aggression is likely a complex issue of environmental, gene *communication*, and hormones. (Erika Mirkó et al., *Preliminary Analysis of an Adjective-Based Dog Personality Questionnaire Developed to Measure Some Aspects of Personality in the Domestic Dog* (Canis familiaris), 138 App. Animal Behav. Sci. 88, 90, 92 (2012); Kevin Chase et al., *Genetic Mapping of Fixed Phenotypes: Disease Frequency as a...*
Breed Characteristic, J. Heredity, Nov./Dec. 2009, at S37, S38; Jørn Våge et al.,
Association of Dopamine- and Serotonin-Related Genes with Canine Aggression, 9
Genes, Brain & Behav. 372, 373 (2010)).

g. Recommendations

III. PRE-CONVICTION FORFEITURE OF ANIMALS

a. American Bar Association Resolution 108B: RESOLVED, That the American
Bar Association urges federal, state, territorial, and local legislative bodies and
governmental agencies to enact laws and implement policies to ensure the humane
treatment and disposition of seized animals in a timely manner that: Establish
effective evidence collection and identification of each animal at the scene of the
seizure; Provide prompt and continuing veterinary attention for each animal as
warranted by each animal’s medical condition; Establish a protocol for humane and
appropriate confinement for the animals; Provide that the person who has
ownership or control of the animals at the time of the seizure must, consistent with
due process requirements, post a reasonable bond or security or, in the alternative,
promptly surrender the animals to the custody of the lawful authorities; Utilize a
timely process to determine the disposition of the animals and provide for prompt
transfer to an appropriate rescue organization or adoptive home with humane
euthanization occurring only if an animal’s medical or behavioral condition warrants
such action or it is determined, after reasonable time and effort have been expended,
that no appropriate placement for an animal exists; Provide that the localities and/or
organizations caring for the animals be granted restitution for the costs incurred for
the care of the animals not covered by a reasonable bond or security by any person
who does not promptly surrender such animals.

b. Neb. Rev. Stat. § 28-1012.01. “When a criminal complaint has been filed in
connection with a seized animal, the court in which such complaint was filed shall
have exclusive jurisdiction for disposition of the animal and to determine any rights
therein, including questions respecting the title, possession, control, and disposition
thereof as provided in this section.” Only applies to 28-1006 or 1012. Specific
procedures include within 7 days, application by county attorney, notice to satisfy
procedural due process, hearing to be held no more than 10 business days after
application is filed. Must be a finding of probable cause before disposition can be
determined. Options for the court include, immediate forfeiture to agency that took
custody, issue an order in which custody may be returned to the owner under certain
conditions, cost of care bond, and gives local governments to ability to enact their
own pre-conviction language without preemption of this statute.

c. Omaha City Code Sec. 6-46. Any person who owns, keeps, harbors, maintains, or
controls any animal involved in such impoundment shall pay all expenses, including
shelter, food, veterinary expenses, boarding, or other expenses, necessitated by the
impoundment of the animal for the protection of the public and other expenses as
may be required. The authority may require such person to pay, prior to the
expiration of ten days after the date of impoundment, an amount sufficient to pay all
reasonable expenses incurred in caring and providing for the animal, including
estimated medical care, for 30 days, inclusive of the date on which the animal was
impounded. If such payment is not made prior to expiration of this ten-day period,
the animal shall become the property of the authority to be disposed of as the
authority deems appropriate. Such payment will be required for each succeeding 30-
day period. If any such payment is not made prior to the end of each succeeding 30-
day period, the animal shall become the property of the authority to be disposed of
as the authority deems appropriate.

IV. CANINE-LAW ENFORCEMENT ENCOUNTERS


b. Training Most common claim under 1983 is “failure to train.” To succeed in a
“failure to train” claim against a City, must show (1. Deliberate indifference, and (2.
Failure to train must have caused the injury; States that have mandated training, but
also see other local agencies that may have their own. Colorado, Texas, Illinois,
Chapter 109; Texas HB 593 signed into law.

c. Legal Standard “an officer commits an unreasonable, warrantless seizure of
property, in violation of the Constitution, when he shoots and kills an individual’s
family pet when that pet presented: no danger, and when non-lethal methods of
capture would have been successful” (citing Brown v. Muhlenberg Tp., 269 F.3d
205, 210-11 (3d Cir. 2001), Fuller v. Vines, 36 F.3d 65, 68 (9th Cir.1994)).

d. Hells Angels: “[A] reasonable officer should have known that to create a plan to
enter the perimeter of a person’s property, knowing all the while about the presence
of dogs on the property, without considering a method for subduing the dogs
besides killing them, would violate the Fourth Amendment.” San Jose Charter of the
Hells Angels Motorcycle Club v. City of San Jose, 402 F.3d 962, 977-78 (9th Cir. 2005)

e. Reasonableness Whether the use of force is reasonable must be determined “from
the perspective of a reasonable officer on the scene, rather than with the 20/20
vision of hindsight.” Hinton v. City of Elwood, Kan., 997 F.2d 774, 780 (10th Cir. 1993);
SPLIT SECOND SHOOTING; OWNER PRESENT TO CONTROL THE
DOG(s); and THE EXTENT THE DOG POSES AN IMMINENT THREAT.

f. Body Cameras Officer “overreacted to the potential threat, responded with
excessive force, and acted with reckless indifference” when he shot the plaintiff’s
dog. The jury initially awarded the plaintiff’s a total of $620,000, but the Appellate
court reduced the amount by $400,000 as a matter of law. Brooks v. Jenkins, 220 Md.

g. How do these cases happen? Can happen during Patrol or Execution of a Warrant
(usually no-knock). Slightly different standard depending on the facts of the case.
Brown v. Muhlenberg Twp., 269 F.3d 205, 208-09 (3d Cir. 2001); Carroll v. Cnty. of
Monroe, 712 F.3d 649 (2d Cir. 2013).

h. Dogs are property, but what if the court determines they’re not? Smith et. al, v.
City of Detroit, et al. is addressing that in the City’s attempt to defend the shooting
of the Smith’s dogs, the Smiths failed to license and therefore: “Without any
legitimate possessory interest in the dogs, there can be no violation of the Fourth
Amendment.” (on appeal)
A Turn of the Paw: The Legal Interface Between Individuals with Disabilities, the Animals that Serve Them, and the “Public” Around Them

Michael J. Elsken
Disability Rights Nebraska

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A Turn of the Paw


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If You Are Not Confused, Then You Are Not Breathing.

• Just like everybody else, individuals with disabilities use many different tools to make their way through their lives. Often, however, the tools that are used by individuals with disabilities are not the same tools used by individuals without disabilities.

• This is not because the tools used are “designed” to address the issues created by the disability. These tools are not “special privileges,” rather, they are liberating devices which function to overcome the confinement created by the disability.

If You Are Not Confused, Then You Are Not Breathing

• Just like for individuals without disabilities, the same tool can serve different functions, depending on the circumstances. Understanding when and how a tool works, and when it does not, is part of comprehending the function of the tool.

• When talking about individuals with disabilities, animals can be another tool in the box used by that individual to overcome the impact of the disability on the life of the individual. Instead of focusing on whether the animal is a “pet,” focus on whether the animal is being used as an appropriate tool.
If You Are Not Confused, Then You Are Not Breathing

• Whether an animal can function as a tool for the individual with disability depends on the circumstances (where) that the animal is being used.
• Whether that animal is provided legal protection is dependent upon the circumstances (where) that animal is being used.
• Understand that there is a difference between function and legal protection, and the fact that these two aspects do not absolutely line up, is part of the reason that the “animal” issue is so confusing.

It’s The Law, But Which Law Is It?

• Different situations give rise to different legal protections regarding individuals with disabilities and animals. Whether legal protection exists depends on the situation, and what law applies to that situation.
  • Americans with Disabilities Act (ADA)
  • Fair Housing Act (FHA)
  • Air Carrier Access Act (ACAA).
  • Section 504 of the Rehabilitation Act (Section 504)
• Often, the term used to reference the animal is a reflection of the statutory provision being applied. The term “service animal” can apply to all of the above-mentioned provision, but “emotional support animal” does not apply to the ADA and may not apply to Section 504.

It’s The Law, But Which Law Is It?

• Part of the problem stems from the history related to animals and individuals with disabilities, and expectations raised by that history, and when the law was written.
• This issue has been made more murky because of the different focus of statutes and the history behind them. For example, the interpretation under the ADA, FHA, and ACAA all refer to “service animals,” but how that term is defined within the context of these statutes is different.
What is in a term? A relevant history of the concept of “Service Animal” and the ADA

- Department of Justice’s ADA guidance regarding “service animals” originally did not specifically identify what animals could qualify under the term.
- The general expectation was along the line of the “seeing eye dog” for a person who was clearly visually impaired, but the language was not specific.
- The concept of a “service animal” under the ADA was broader than that initial expectation, partly because of changes in the concept of “living with disabilities” and partly because of changes of what could be done.

- These changes meant that individuals not previously using “service animals,” and who did not have clearly visible disabilities, were using “service animals.” E.g., Dogs who alerted to onset for epileptic incidents.
- These changes also meant that animals not previously used as “service animals” were being trained to provide for the needs of the individual with the disability. E.g., Capuchin monkeys assisting individuals with physical limitations.
- This resulted in new Department of Justice guidance defining what could be considered a “service animal” under the ADA: Dogs and small ponies.

Service Animal v. Emotional Support Animal

- The ADA does not recognize protection for an “emotional support animal,” even if it is a dog/pony, and Section 504 tends to rely on ADA guidance, but under the FHA and the ACAA “emotional support animals” are protected.
- “Emotional support animal” is not limited to dogs and ponies like with the ADA. As such, a cat would not qualify for protection under the ADA, but could be covered under the FHA and/or ACAA.
- Neither a “service animal” nor an “emotional support animal” is merely a “pet;” as the individual must have a disability and the animal must address some need related to the disability.
Regardless Of The Applicable Law,
What Not To Do.

• Certification: Neither “service animals” or “emotional support animals” require any specific “certification.” The person with the disability does not have to show a “card,” or have their animal wear a vest/harness, or otherwise “prove” the status of the animal.

• Demand a statement of training: “Service animals” under the ADA and the ACA need to be trained to meet at least one specific need of the individual, but that training can be done by anybody, including the owner. You can ask what the animal does for the individual, but you cannot demand that you be shown what the animal does. “Emotional support animals” do not require training, because their mere presence provides the support.

Regardless Of The Applicable Law,
What Not To Do.

• Demand specific information about the individual’s disability (unless/except):
  • The fact that an individual indicates that they have a disability for which they use a “service animal” or an “emotional support animal” does not give free rein to explore details of the individual’s disability.
  • You may have the right to obtain medical verification that the person has a disability for which the animal provides assistance, but the doctor is not required to provide beyond that verification. Asking for medical verification of an obvious condition may be a violation.
  • When in doubt about whether you can inquire, do not inquire. The “need” to know is not license to know everything.

Regardless Of The Applicable Law,
What Not To Do.

• Do not assume, because that can spell doom:
  • There are locations where all animals can be excluded. Service animals can be locations “you” might think should not be allowed. This includes restaurants, hospitals, and even ambulances.
  • There is no way you can control that animal. The individual with a disability must control the animal, but do not assume inability to control because the size or breed of the animal. That “huge Maine coon” cat may seem big for the efficiency apartment, but it can still be a perfectly permissible “emotional support animal.”
Regardless Of The Applicable Law, What Not To Do.

- “Fear” by others does not drive status of the animal.
- That a person asserts that they are “allergic to cats” does not mean that their neighbor cannot have a cat for an emotional assistance animal.
- “That Irish Wolf Hound is so big and scary looking that you cannot have it at this public property” is an invitation for disaster.
- Although actual danger can be a defense to excluding a service animal, the mere assertion of danger is not sufficient to exclude. (Better approach would be to point out the danger and permit the individual to make a decision about “assuming the risk.”)

Defenses, At A Risk

- Entities can exclude an animal if allowing the presence of the animal would constitute a “fundamental alteration.”
  - This defense does not mean every alteration is fundamental. The alteration must go to the very core of the business impacted by the presence of the animal.
  - “But others might want to bring in animals” is not a fundamental alteration.
- Entities can exclude an animal if allowing the presence of the animal would create an “undue burden.”
  - Not every burden is undue. Generally this defense only is permitted if the presence creates a financial burden which cannot be readily absorbed by the business.
  - The claim must be real and actual, not merely supposition.

Obligations Of The Individual With A Disability Regarding Their Animal

- The individual with a disability ultimately remains responsible for exercising control over the animal, although it is possible for the individual with the disability to utilize another person to achieve this requirement.
- The individual with a disability can be required to show that the animal is properly vaccinated and licensed.
- Genuine failure to meet these obligations can be the basis for denying the presence of the animal.
Resources

Federal Government Resources

- U.S. Department of Justice ADA Guidelines which applies to service animals only.
- U.S. Department of Housing and Urban Development has letters relative to both service animals and emotional support animals.
- U.S. Department of Transportation has extensive information regarding both service animals and emotional support animals.
- U.S. Department of Education has information regarding service animals and, for college settings (residences), emotional support animals.

Other Resources

- Midwest ADA Center (specific for Nebraska) and other ADA Centers
- Regional Fair Housing Authority Office (Omaha)
- State Protection and Advocacy Agency (Disability Rights Nebraska)
- Academic Resources (Animal Legal and Historical Center with Michigan State University)
Prosecuting Animal Cruelty Cases – Unique Challenges, Implications, Statistics, and Proactive Solutions

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