

State Bar of Michigan Animal Law Section  
2010 Animal Law Symposium

**PRACTICAL CONSIDERATIONS FOR ATTORNEYS  
HANDLING ANIMAL LAW CASES**

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**I. Introduction**

Lawyers serving people and businesses with animal-related legal issues face unique challenges. We bring special compassion to our clients' concerns and a deep understanding of the importance of our clients' legal matters. Our interest in Animal Law (and attendance at CLE programs like those offered by the State Bar of Michigan Animal Law Section) gives us a good grasp of the legal issues and laws affecting our clients.

At the same time, our clients' matters will likely come before a legal system that does not typically handle or respond to animal-related legal issues. Judges and opposing counsel often trivialize our clients' concerns. This requires special attention to each legal matter we handle.

## II. Managing Client's Goals and Expectations

### A. Economics

A reality of animal-related law practice is that damages are frequently not significant. For example, the client might have a beloved house pet who was the victim of veterinary malpractice or mistreatment at a kennel, but even if the animal died, Michigan law would likely limit recovery to the animal's fair market value and possibly incidental out-of-pocket costs. These amounts can be substantially less than the legal fee involved.

Current Michigan law does not permit recovery of emotional distress-type damages over the injury to or loss of a pet. In *Koester v VCA Animal Hospital*, 244 Mich App 173; 624 NW2d 209 (2000), the Michigan Court of Appeals considered whether to award damages for emotional distress associated with the loss of a dog due to the alleged negligence of a veterinarian. The Court acknowledged that animals are considered to be personal property under Michigan law. In dismissing the emotional distress claims, the court stated:

There is no Michigan precedent which permits the recovery of damages for emotional injuries allegedly suffered as a consequence of property damage. Plaintiff requests that we allow such recovery when a pet is the property that is damaged, arguing that pets have evolved in our modern society to a status which is not consistent with their characterization as a "chattel." In essence, plaintiff requests that we create for pet owners an independent cause of action for loss of consortium when a pet is negligently injured by a veterinarian. Although this Court is very sympathetic to plaintiff's position, we defer to the Legislature to create such a remedy.

\* \* \*

We decline to allow the recovery of emotional distress damages arising from negligence committed against plaintiff's pet; therefore, plaintiff's complaint failed to plead legally cognizable damages and was properly dismissed by the trial court.

Emphasis added.<sup>1</sup>

Even if state law does not recognize emotional distress-type damages in relation to animal-related cases, some jurisdictions have nevertheless allowed animal owners to recover these damages when cases involve particularly egregious facts. One excellent, but sad, example of this is *Burgess v. Taylor*, 44 S.W.3d 806 (Ky. App. 2001). There, the plaintiff became ill and was unable to care for her two horses.

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<sup>1</sup> Despite long-standing Michigan law consistent with *Koester*, exceptions occasionally do exist. Members of the State Bar of Michigan Animal Law Section might recall the case of *Murray v. Bill Wells Kennels and Robert James Turner*, which was decided before *Koester*. There, the defendant boarding kennel allegedly gave a dog negligent care that led to the dog's death. In 1997, Wayne County Circuit Court Judge Kaye Tertzag issued a particularly newsworthy pre-trial ruling that permitted the plaintiff dog owner to recover emotional distress damages. This ruling was broadly publicized and earned Judge Tertzag an award from the State Bar of Michigan Animal Law Section.

She entered into an arrangement with the defendants to care for them without compensation. In violation of their agreement, however, the defendants sold her horses to a slaughter buyer for \$1,000 and subsequently lied to her about the horses' existence and whereabouts. She sued, and a Kentucky court awarded her damages of \$126,000 for the defendants' intentional infliction of emotional distress. This award was affirmed on appeal.

## **B. Client Expectations**

Animal law matters can be highly charged, emotionally. Animal law practitioners, for example, may have encountered situations in which the potential client wants to pursue a sales fraud case against a dog seller who sold a dog with a congenital disease. If the client has developed an emotional attachment to the dog, he or she might want you to pursue as damages a lifetime of upkeep costs for the dog and legal fees. As lawyers, we have the difficult job of explaining how the law cannot always fulfill the clients' expectations.

Lawyers, in deciding whether to accept animal law-related matters and in establishing the fee arrangement, might want to consider the following:

### **1. Expense of Litigation Compared to Outcome**

Time-intensive matters bring high litigation expense. This reality drives a profitable law practice, certainly, but not all clients are ready, willing, or able to accept this reality. And the risk of massive legal expense becomes even more real if the client insists on aggressive representation or if the matter at stake requires extensive research, briefing, and court appearances. For example, the client might want you to pursue litigation to "quiet title" on an animal that could require several trips to the courthouse for the Ex Parte Temporary Restraining Order, subsequent Show Cause proceedings, extensive briefing and affidavits, and time-consuming litigation before trial. Rarely do potential clients understand the complexity of these proceedings and they often want justice done quickly. Counsel would be wise to discuss anticipated legal fees up front with the potential client and reaffirm the risk of high cost in the retainer agreement.

As this author sometimes encounters, prospective clients in animal-related matters sometimes insist they will pay fees that far exceed the amount at stake because a "principle" justifies the expense. Common sense holds that this "principle" will wear off as your fees grow, and you will be left with a disgruntled client. As you seek to develop your practice and your reputation, you cannot afford disgruntled clients who will refuse to pay your bills, generate fee disputes, add aggravation to your work life, and discourage others from doing business with you.

## **2. Potential for Recovery of Legal Fees**

A common perception among proposed clients is that our legal process in Michigan is a “loser pay” system and that your legal fee will ultimately be paid when the opposing party loses the case down the line. As attorneys, we know that this is rarely the case because legal fees are recoverable in four scenarios:

- *Statute.* An applicable statute governs the matter through which attorney fees are potentially recoverable. These materials discuss a few of them. Many basic animal-related disputes simply do not qualify.
- *Contract.* The parties had a contract that carefully and properly addressed payment of attorney fees in the event of a dispute.
- *Court Rule, such as MCR 2.114.* An applicable court rule provides for attorney fees, typically as a sanction.
- *Penalty for Asserting a Frivolous Claim or Defense.* If a court specifically finds that the other party asserted a “frivolous” claim or defense in a lawsuit or has, in some way, acted in “bad faith” in a proceeding, he or she has the power to punish the wrongdoer by ordering the payment of sanctions and/or the opposing party’s attorney fees.

## **3. Potential for the Opposing Party Being Insured**

Counsel should consider the possibility that the opposing party is insured. On the positive side, if the defendant is insured for the matter at issue, this will obviously increase the chance of successfully collecting a judgment. On the negative side, the insurance company’s opposition to payment of a claim or a settlement could significantly increase the chance of an aggressive defense; in that event, your client’s litigation costs in opposing the insured party, will increase accordingly.

## **4. Potential to Maximize Recovery By Invoking a Statute**

Counsel representing plaintiffs can consider statutes that offer the potential to maximize recovery. For example, Michigan’s Consumer Protection Act, M.C.L. § 445.901, *et seq.*, allows plaintiffs to recover reasonable attorney fees and out-of-pocket expenses. M.C.L. § 445.911(2). Michigan law provides that plaintiffs need not prove willful violations. *See e.g., Temborius v Slatkin*, 157 Mich App 587; 403 NW2d 821 (1986). For people bringing animal law cases, cases invoking this statute can be effective and lucrative. As an example, representing plaintiffs in an equine sale transaction, this author pled a violation of the MCPA. When the plaintiffs won the trial, they were awarded well over \$25,000 in legal fees and costs, even though the transaction involved a \$7,500 show horse.

Consumer protection/deceptive trade practice laws in some other states allow even greater opportunities for recovery. Laws in some states, for example, allow recovery of treble damages against

the wrongdoer in addition to payment of the prevailing plaintiffs' legal fees.

## **B. Practical Considerations Before Filing Suit**

As counsel, we know that immediate litigation is not always the best answer for our clients. Consider these ideas before rushing into litigation:

### **1. Impact on Future Business Dealings**

If the parties to a dispute, based on where they live or the nature of their business, will need to work together or do business together in the future, the dispute could be appropriate for an alternative to litigation, such as facilitation or mediation. These alternatives might have a greater chance of protecting the parties' continued business relationship.

### **2. Negative Publicity**

An adverse judgment or verdict could be devastating to your client's reputation. Trial and appellate rulings on animal law matters can be newsworthy, particularly, for example, if a party recovers a large sum of money or if the court creates novel case law.

Before pursuing the matter, advise the potential client of the possibility of negative publicity and the fact that publicity cannot always be controlled. This fact might motivate the potential client to explore options to resolve the dispute or to keep it away from the litigation process. Possibly, through arrangement with the opposing party and its counsel, the matter can be resolved through a dispute resolution mechanism (such as arbitration, mediation, or facilitation), with an agreement for mutual confidentiality.

### **3. Potential for Counterclaims**

Your client's lawsuit could be severely complicated by a counterclaim, which will force your client to fight two legal matters at once. Before commencing litigation, discuss with your client whether grounds exist that could generate a counterclaim. For example, if your client is seeking a collection lawsuit for non-payment of horse boarding or training fees, consider the possibility that the defendant might file a counterclaim that asserts payment was deliberately withheld because your client materially breached the contract and provided sub-standard and negligent care to the horse.

As a practical matter, counsel can evaluate whether the statute of limitations on the principal claim will exceed that of a possible counterclaim. This means, for example:

- If your client seeks to bring a claim for non-payment of boarding fees (that would be pursued as a breach of contract action with a six-year statute of limitations), but the client fears that the defendant will assert a counterclaim for negligence, you can advise your client of the possibility of deferring litigation on the collection/breach of contract action until the expiration of the three-year negligence statute of limitations. That way, a counterclaim for negligence might be time-barred while the collection action can proceed.
- Similarly, if your client is a veterinarian who seeks to recover unpaid veterinary bills, you can advise him or her of the two-year statute of limitations for veterinary malpractice actions and, where appropriate, recommend that the collection litigation be deferred until after the malpractice statute of limitations has expired.

### **III. Litigating on a Shoestring**

Because animal related litigation often involves matters with relatively small amounts at stake, counsel seeking to reduce their clients' legal fees can consider a few options such as:

- *ADR.* Consider alternative dispute resolution (“ADR”), such as mediation, arbitration, or facilitation, if the other side to the dispute is agreeable. And when you draft contracts for animal-related businesses, consider including arbitration clauses.
- *Written discovery.* To spare the cost of depositions, consider utilizing carefully worded interrogatories, document requests, and/or requests to admit.
- *Early settlement.* Where appropriate and where approved by the client, consider sending well-written demand for settlement letters to the opposing party to encourage an early settlement of the dispute.

### **IV. Fee Agreements**

People and businesses in some industries, such as the equine industry, rarely utilize contracts in their transactions. But written fee agreements in the attorney-client relationship, especially in animal law-related transactions, are very important and can serve numerous beneficial purposes. The most common examples of fee arrangements in animal law matters are contingency, hourly, flat fee, and blended hourly/contingency fee.

First, ethics rules actually require written fee agreements in certain transactions such as contingency fee matters [See MRPC 1.5(c)], where the client gives the lawyer a security interest in real property to secure the fee [MRPC 1.8(j)], or non-refundable retainers.

Second, the written fee agreement helps prevent misunderstandings and starts the attorney-client relationship in a professional manner.

Third, written fee agreements can help prevent fee disputes, grievances through the Attorney Grievance Commission, and legal malpractice claims.

You can find sample fee agreements online for free at the State Bar of Michigan Practice Management Resource Center, [www.michbar.org](http://www.michbar.org). *See also*, ICLE, *Attorney Fee Agreements in Michigan, Second Edition* (2002).

**A. Contingency**

Fee agreements and retainer letters for contingent fee matters require special attention. Ethical restrictions limit the lawyer's percentage. MCR 8.121(A) provides that a one-third contingent fee on the net recovery is *per se* reasonable. *See also*, MRPC 1.5(c) and MCR 8.121.

**B. Hourly**

Establishing your hourly rate poses some challenges. If the economics of the matter are insignificant, you might be inclined to reduce your hourly rate out of a sincere interest in helping the client and easing the client's financial burden. Many lawyers who handle animal-related matters regularly proceed this way.

On the other hand, as a lawyer with particular experience in handling animal law matters, you might believe yourself entitled to seek a fee that is customarily charged by lawyers who have special expertise in unique areas of the law. That factor might have you considering a "premium" rate for your services.

While setting your fee, be aware of Model Rule of Professional Conduct 1.5(a) in regard to "reasonable fees." You can find sample retainer letters for hourly fees through the State Bar of Michigan Practice Management Resource Center.

**C. Flat Fee**

Flat fee arrangements could be desirable in several types of animal law matters, especially service contracts and transactional matters such as breeding contracts, animal boarding contracts, leases, and purchase/sale agreements. Counsel might find these arrangements especially risky in litigated matters, especially since the time and expense cannot always be predicted.

**D. Blended Fee Arrangements**

Fee arrangements can be creative. Some, for example, provide for a blended hourly/contingency fee that allows the lawyer to charge a mix of an hourly rate and a percentage. These arrangements are ethical as long as the fee is not "clearly excessive" as MRPC 1.5 forbids.

## V. Helpful Resources for Animal Law Practitioners

### *Animal Law Litigation*

Fershtman and Schaffner (editors), Litigating Animal Law Disputes: A Complete Guide for Lawyers (ABA Publishing, 2009).

### *Animal Law*

- Michigan State University College of Law Animal Legal & Historical Web Center  
<http://www.animallaw.info/>
- International Institute for Animal Law  
[www.animallaw.com](http://www.animallaw.com)
- Lewis & Clark Law School Center for Animal Law Studies  
[http://www.lclark.edu/law/centers/animal\\_law\\_studies/resources.php](http://www.lclark.edu/law/centers/animal_law_studies/resources.php)
- Lewis & Clark Law School Animal Law Review  
<http://legacy.lclark.edu/org/animalaw/>
- ABA-TIPS Animal Law Committee  
<http://www.abanet.org/tips/animal/>

### *General Law Practice Resources*

- State Bar of Michigan Practice Management Resource Center  
[www.michbar.org](http://www.michbar.org)

## VI. About the Author

Julie I. Fershtman is currently Of Counsel to Zausmer, Kaufman, August, Caldwell & Tayler, P.C., in Farmington Hills, Michigan. Her law practice is devoted to equine law as well as commercial litigation and insurance law and litigation. She has tried animal (equine) cases before juries in four states. She is currently Vice-President of the State Bar of Michigan and a Vice-Chair of the ABA-TIPS Animal Law Committee. She is also co-author and co-editor of The ABA-TIPS Guide to Litigating Animal Law Disputes (published in 2009) and author of Equine Law & Horse Sense and MORE Equine Law & Horse Sense. Along with Adam Karp, she has co-authored several issues of the ABA-TIPS “Annual Survey of Animal Tort and Insurance Law.” She has lectured on animal-related legal issues in 27 states. She is a graduate of Emory College and Emory Law School.