

The Veterinary Professional as an Expert Witness in Animal Cruelty Cases¹

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As interest in prosecuting serious animal cruelty cases increases and more such cases are brought before the court, veterinarians and veterinary technicians will increasingly be called upon to provide testimony in these cases. They will play an important role in providing the substance of a story of animals who have suffered and/or died. Most people, even highly trained professionals, are unprepared for the process of standing by their actions and opinions in a court of law. The process of serving as a witness in a criminal prosecution involving animal cruelty can be daunting to even the most confident veterinary professional.

In general, there are two types of witnesses who testify in criminal proceedings: factual witnesses and expert witnesses. A factual witness testifies only to what he or she saw, heard, felt, smelled, tasted, or did in association with an event. The factual witness is not generally allowed to tell what others have said (hearsay) or to offer opinions or responses to hypothetical questions.

A veterinarian who has examined a victim of animal cruelty can testify as a witness to the facts. In addition, any veterinarian associated with a case will likely be considered an *expert* witness, capable of rendering an opinion on the evidence that falls within her area of expertise. Any testimony she may give based upon review of evidence collected by others, such as another veterinarian, police officers or a cruelty investigator, will also be considered *expert* testimony.

A veterinarian may become *involuntarily* involved as a witness in the prosecution of an animal cruelty case, particularly if he examined at any time the animal who was the victim, even prior to the onset of abuse or neglect. For example, if a pet owner has been charged with starving their dog to death (criminal neglect), either the prosecution team or the defense may choose to subpoena any veterinarian who has previously examined that animal to attest to the level of care the dog was receiving at that time. In most cases, veterinarians are asked by either the prosecution or the defense to act as expert witnesses voluntarily, and may choose to be paid a reasonable professional fee for their involvement in a case.

Expert testimony has come under much closer scrutiny in recent years as courts have tried to deal with accusations of expert testimony based on “junk science” or unqualified experts. Most states regulate such testimony under rules based on Federal Rules of Evidence, specifically Rule 702, which defines who is qualified to give expert testimony, and Rule 703, which identifies what the testimony may be based on. However, states can vary in their application and interpretation of these rules, so it is important that the

¹ Based on material from Sinclair, L., M. Merck, and R. Lockwood. 2006. *Forensic Investigation of Animal Cruelty: A Guide for Veterinary and Law Enforcement Professionals*. Washington, DC: Humane Society Press. \$59.95

potential veterinary witness discuss these issues with the legal professionals who have retained his services.

The judge or jury is the sole independent finder of fact. Although the expert may have opinions of the guilt or innocence of those accused, the rules of evidence stipulate that the role of the expert witness is “to assist the trier of fact to understand the evidence, or to determine a fact in issue.” (Federal Rules of Evidence, Rule 702). In general, one qualifies as an expert through “knowledge, skill experience, training or education.” As modified by Congress in 2000, Rule 702 stipulates that a person may testify in the form of an opinion or otherwise if:

- (1) the testimony is based upon sufficient facts or data,
- (2) the testimony is the product of reliable principles and methods, and
- (3) the witness has applied the principles and methods reliably to the facts of the case

In animal cruelty cases, experts may include not only veterinarians, but also veterinary technicians, cruelty investigators, animal control officers, animal behaviorists, trainers, breeders, groomers, law enforcement officers and other technical experts. The proliferation of many self-styled “experts” on companion animal care, training and handling has created a climate in which the courts are increasingly concerned about the qualifications of those who might testify.

In some cases, a veterinarian may be asked to provide testimony on topics outside the basic common practice of veterinary medicine. For example, he may testify regarding analysis of bite wounds, toxicological or serological evidence, or on issues of animal behavior. Other animal-related professionals may provide testimony in areas such as dog training, which do not have a well-defined body of scientific literature. Since veterinary forensic pathology is a relatively new discipline, the application of forensic techniques to animal cruelty cases may face closer scrutiny than testimony dealing solely with the practice of conventional veterinary medicine. In cases of novel or unfamiliar application of expertise, the court is viewed as having a “gatekeeping” role to insure that any such testimony be on “good grounds”. The accepted standards for admissibility of expert opinions was established by the U.S. Supreme Court in **Daubert v. Merrill Doe Pharmaceuticals (1993)**, a case that relied heavily on expert testimony regarding the possibility that birth defects were caused by the morning sickness drug Bendectin.

Testimony based on novel application of forensic techniques to an animal cruelty prosecution is likely to be subjected to a **Daubert** test. Under Daubert, a court should consider:

- “(1) whether the expert’s hypothesis can be and has been tested;
- (2) whether the expert’s methodology has been subjected to peer review and publications;
- (3) how often the methodology yields erroneous results;
- (4) whether controls over the methodology exist and are maintained; and
- (5) whether the scientific community has accepted methodology.”

In a more recent case (*Kumho Tire Co. v. Carmichael*, 1999), the U.S. Supreme Court ruled that the Daubert standard should be extended from purely scientific testimony to include technical and specialized-knowledge testimony.

In general, scientific testimony has a disproportionate impact on jurors. In addition, veterinarians and others who care for animals may benefit from a “halo effect”, associated with their positive image as protectors of animal well-being, which can give them credibility outside their immediate area of expertise (Lockwood, 1985). Some judges, to guard against any bias this might produce, may set a higher standard for testimony from such professionals. The expert’s remarks should always be “probative” (i.e. they must address the truth of points being raised) and “non-prejudicial”, (i.e. they cannot be motivated by an attempt to place a suspect in a bad light.) When testifying in case of alleged animal cruelty it is vital to refrain from offering any opinions of the character of the defendant. Instead, you should evaluate the care or treatment of the animals to what you would consider to be a reasonable standard that you might expect from your clients or community.

Preparing to Testify

As in all phases of animal cruelty investigation, successful courtroom performance requires good record-keeping. The bulk of veterinary testimony will be based on case records. In addition to recording all clinical procedures, treatments, tests and analyses, those caring for or examining animal victims should also log all contacts with investigators, law-enforcement agencies and prosecutors in the case.

Prior to testifying, the witness should compile and review records, paying attention to time tables and the history of contacts regarding professional involvement in the case. The witness will not be expected to have all of this in memory and will be allowed to refer to these records when testifying, but any written work product that may be entered into evidence can be reviewed by opposing counsel. The witness should review any prior testimony (e.g. depositions) that she may have given in earlier proceedings to refresh her memory about what was already said. If conclusions or interpretations have changed since the earlier prior testimony, counsel should be advised of these changes and the reasons why your interpretation may have changed.

It is important to dress professionally for your court appearance in traditional business attire - not “scrubs” or other work clothes. The veterinarian should bring all files related to the case, several copies of any reports and lab work results, enlarged photographs, camera memory cards or negatives, all evidence, references, diagrams, radiographs and radiographic viewer, or pictures of the radiographs. In some cases, with the court’s approval, the animal may be brought to court to show the dramatic improvement of the animal’s condition. However, judges are usually resistant to any procedures that may disrupt the court decorum.

It is important to prepare counsel for using expert testimony effectively. The witness should provide an up-to-date c.v. and copies of relevant professional publications. She should review professional strengths and be forthcoming with the prosecutor or other counsel about potential weaknesses (e.g. “this is the first gunshot wound I have seen”.) Make sure counsel understands any arguments that need to be made and has sufficient understanding of the underlying principles to be able to ask questions in a way that will help inform the judge or jury of the significance of these facts.

In working with a prosecutor, the expert witness must remember that this individual, although an ally, is *not* his attorney, so discussions and correspondence are not protected

by attorney-client privilege. If the expert has concerns about participation in this process, he should consult with his own attorney. There is always the possibility that a defendant may take legal action against those who have testified against him, even when such testimony is clearly protected from such action by law. This should not discourage veterinary professionals from participating.

Testimony from experts is generally first introduced through the process of direct examination by the counsel that retained your services. In criminal prosecutions this will usually be the prosecuting attorney. There should be few surprises during this process, but the witness should be sure she understands each question and pause briefly before answering. Statements should be confident, but should not appear rehearsed.

For most professionals, the most stressful part of the courtroom experience is cross-examination by opposing counsel. This is the essence of the adversarial nature of our legal system. It is the opposing attorney's job to call into question the testimony of the expert witness. Common tactics used to accomplish this task include attacking the witness's education, background, experience, expertise, the manner in which he or she processed the animal(s) involved in the case, and the information contained in documents created by the witness.

Opposing counsel will try to uncover any ethical violations by the expert. This would include :

- misrepresenting academic credentials
- falsifying or altering data
- ignoring evidence helpful to his client
- improperly handling evidence
- testifying outside the expert's area of competence
- reaching conclusions before research or testing was completed
- accepting payment based on the results of examination, rather than on the time or effort expended

It is also common for attorneys to try to characterize experts as "hired guns". It is reasonable to expect payment for rendering professional services, but witnesses should be prepared to testify that any fees they have or will receive are consistent with what they may expect in other contexts, and that these fees are not contingent upon the nature or outcome of the testimony.

Expert witnesses in animal cruelty cases, particularly veterinarians, are often surprised by attacks on their expertise. Opposing counsel will attempt to characterize the expert as less than thorough, even incompetent. Since the standard for prosecution in serious felony cases is usually proof "beyond reasonable doubt", his role will often be to suggest that the evidence presented should be seen as not meeting this standard – to exploit normal professional caution and make it appear as doubt. He may point to a lack of special training in the area in question, relevant experience with the species involved, or *direct* knowledge of the animal, suspect or circumstances involved. (e.g. "You never actually *saw* my client break the cat's leg, did you?").

Even if the expert witness's testimony cannot be tarnished by examination, it may be damaged if the opposing can simply unnerve him or her by such examination. It may help the witness to remain calm to keep in mind that the opposing attorney is simply doing his

or her job; it is not a personal attack, although it may feel as though it is. Attorneys who are needlessly harsh in cross-examination run the risk of alienating juries who are often pre-disposed to respect witnesses who have cared for an animal. However, if a witness feels she is being unfairly treated, her counsel or the judge may intervene. The witness should not argue with opposing counsel, nor should appear arrogant or sarcastic. Integrity, accuracy and a professional demeanor are the best tools for effectively presenting evidence.

This professional approach should continue outside the courtroom as well. The media will often be eager for details of your findings or photographs or clinical details about an injured animal. These inquiries should be referred to the prosecuting attorney, who should be given an opportunity to review any reports that might be released. Veterinary experts should be particularly cautious about releasing photographs or videos of injured animals prior to legal action. Such publicity may be considered prejudicial and may affect the later admissibility of this evidence. In addition, these pictures are considered evidence and should be protected as such.

The experience of providing testimony can be stressful and unnerving for anyone, regardless of experience and professional expertise. When the result is a just verdict that may prevent future animal or human suffering, the experience can also be deeply satisfying.

REFERENCES

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