

# TALES OF JUSTICE

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## Ethical Considerations in the Prosecution of Animal Cruelty Cases

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### **THE TENACIOUS AND TRUSTING— ANIMAL CRUELTY PROSECUTORS AND THEIR VICTIMS**

Animal cruelty and neglect cases are among the most important cases for any prosecutor to prosecute. The victims are uniquely vulnerable. They don't complain. They can't talk. They are usually abused by the very people they most depend on and who have accepted but betrayed the responsibility of animal ownership. As the Animal Legal Defense Fund so aptly asks, who but such prosecutors represent clients who are all innocent?

The link between animal cruelty and human violence is well established. It is no coincidence that one adolescent characteristic shared by serial killers (in addition to fire-starting and bedwetting) is the killing and torture of animals. So, when a prosecutor seeks justice for a victimized animal, he or she is really addressing but one example of a common and universal problem — the exploitation of the weak by the strong. If the State has any legitimate interest and the criminal justice system any valid purpose, it is the protection of the underdog (pun intended) and the punishment of bullies.

The prosecution of animal cruelty cases is an essential and truly noble calling.

It can also be one of the most challenging. It can be gruesome and heartbreaking. It can be difficult and frustrating. Investigations can be wanting, time can be short, priorities can be competing, and the law can be exasperating. Moreover, animal cruelty prosecutions offer unique and extraordinary ethical challenges. They require aggressive, creative, and passionate animal advocacy within the confines of the law. *Where a prosecutor fails to take the high road, his or her case is lost. For animal protection advocates, not only is the case lost, but the cause may be lost, too. We are bound by stringent ethical rules including those promulgated by the ABA Model Rules of Professional Conduct and the NDAA National Prosecution Standards.*

This article is not about the ubiquitous ethical issues that present, generally, in any criminal case. It is not about meeting discovery obligations or avoiding improper remarks in a closing argument — those are easy. Rather, it tries to identify some of the very real, troubling, difficult ethical dilemmas faced by animal cruelty prosecutors every day. These are the quandaries that I lost sleep over during my fifteen-year tenure as an assistant state attorney in the Eighth Judicial Circuit of Florida. They are the ones that I'll bet haunt you, if you are one of those exceptional lawyers who strive to find justice for the non-humans with whom we share this planet.

## We are Seeing a Social Revolution

The issues and questions raised by this article are not rhetorical or theoretical—they appear more and more often because the world is changing. Whatever one might think about Michael Vick as a football player, there is no doubt that he raised the nation's collective awareness of the atrocities of animal fighting. That elevated consciousness about the welfare of animals pervades our everyday lives. It is now commonplace for animal issues to make the evening news—stories of abuse and fighting cases, animal hoarders, adoption efforts, “no kill” shelters, shark fin bans, endangered species—all are marketable to a highly-receptive general public. In 2006, there were only seven states with felony animal cruelty laws on the books. Today, there are only three states without them (Idaho, North Dakota and South Dakota). Where there once were none, there are now about 135 law schools with animal law curriculums. Animal cruelty is now correctly accepted as a real crime deserving of real attention, and we currently enjoy an exponential growth in the interest, awareness, and prosecution of animal crimes. The National District Attorneys Association even has the National Center for Prosecution of Animal Abuse to show their dedication to raising the bar on how these crimes are pursued in the courtroom.

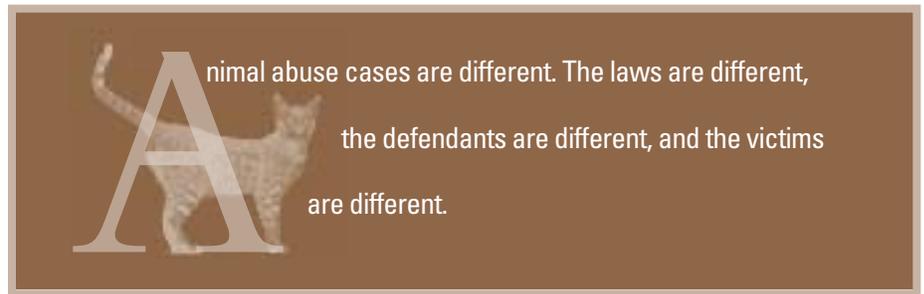
It is therefore more important than ever for prosecutors to remain ethically diligent. It is crucial, for example, for prosecutors to make carefully-considered charging decisions and realistic and appropriate sentencing recommendations. Now that we and our animal cases are being taken seriously, never before have we been more subject to scrutiny. Never before has our conduct been more scrupulously examined for flaws. Never before has the societal and legal landscape been more treacherous to our credibility. There is no legal power greater than a judge or jury accepting a lawyer's word at face value. There is nothing worse than the loss of that acceptance.

We must remain ever mindful that “The prosecutor is an independent administrator of justice. The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth. This responsibility includes, but is not limited to, ensuring that the guilty are held accountable, that the innocent are protected

from unwarranted harm, and that the rights of all participants, particularly victims of crime, are respected.” NDAA Rule 1-1.1 Primary Responsibility.

## What is this thing called “Ethics?”

There are many definitions of “ethics.” I like one of the most basic descriptions: “the discipline dealing with what is good and bad or right and wrong...” [*Webster's Third New International Dictionary*, 1993]



If we start with the premise that animal neglect, abuse, cruelty, and fighting are not right or good conduct and note that they are also illegal, it is easy to conclude that the prosecution of such conduct and the punishment of those who exhibit it is, in and of itself, ethical. The devil is in the details.

## The Nature of the Beast

Animal abuse cases are different. The laws are different, the defendants are different, and the victims are different. Some state statutes are archaic. Some are arcane. Some are just silly. Most cruelty statutes do not require proof of a specific intent to cause harm or death—they require proof of an intent to commit an act that results in harm or death. They generally proscribe inaction as well as action. The victims are the most vulnerable, the most helpless, the most dependent. They are generally unconditionally loving and, of course, utterly voiceless.

The extent of the ignorance that prevails among these offenders is mind-boggling. Most people just don't think of the consequences when they leave their pet in the car in July when they go shopping. They don't realize that the collar they put on their dog when it was a puppy is too small now and has embedded itself, now hidden by hair, forgotten, under the flesh of the dog's neck. I prosecuted a law student who kept his Doberman locked in a closet all day long while she went to

school and a woman who treated her Poodle's compound fracture with antiseptic cream. Some people do not have a clue what it takes to care for the most basic of their animal companions' needs. They fall pitifully short in providing basic nutrition, hydration, shelter, exercise, and veterinary care. Forget about emotional support. I am convinced that most of the time they do not mean to inflict the agony they do—they are just pathetically and tragically thoughtless. That is not to say that such offenders should not be held criminally responsible. I merely suggest that animal cruelty cases exhibit a greater range of varying circumstances than most any other type of crime, and we are obligated to consider the circumstances of each defendant and each crime to achieve the “justice” the NDAA rules require.

### Charging/Screening Decisions

Before even reaching the question of what crime should we charge the defendant with, we have to face the question of whether to charge at all. As the NDAA Commentary to Rule 4-1 recognizes, “It could be argued that screening decisions are the most important made by the prosecutors in the exercise of their discretion in the search for justice.” For me, that decision requires the fulfillment of three conditions:

1. A moral conviction that the defendant is guilty;
2. Confidence in the ability to prove guilt beyond a reasonable doubt; and
3. The existence of a legitimate state interest in the prosecution.

I once dropped a case midway through trial after watching my lead investigator testify differently from what he had told me before trial. I lost confidence in my ability to prove the case but, more important, I lost confidence in my belief that the defendant was guilty. I have never believed in cavalierly throwing evidence at a jury and letting the chips fall where they may—if I, as a juror, would not convict the defendant on the evidence I had, I would not file the case. In cases involving the credibility of witnesses or those with conflicting evidence (which is every case to a greater or lesser degree), that can be much easier said than done. NDAA Rule 4-2.2 says it this way, “A prosecutor should file charges...which he or she reasonably can be substantiated by admissible evidence at trial.” The NDAA Commentary to Rule 4.2 recognizes that “...commencing a prosecution is permitted by most ethical

standards upon a determination that probable cause exists...” The NDAA, however, endorses a “higher standard” in light of the “prosecution’s duty to seek justice” and his or her obligation to insure “the protection of the rights of all (**even the prospective defendant**)...” [Bold added]

I once reviewed a case of horrendous cruelty to a pet dog involving starvation, dehydration, and the failure to provide veterinary care. Basic investigation revealed that the owner/perpetrator was an 86-year-old woman suffering from dementia. Concluding that no legitimate state interest would be promoted by a criminal prosecution, I referred the woman to a therapeutic agency, seized the dog for adoption, and entered my nolle prosequi the same day. In another case, a canine police officer with a spotless record decided that the most merciful way to end his canine companion’s suffering was to shoot him in the head with his service revolver, a decision that broke at least two misdemeanor laws and offended most sensibilities. I chose not to prosecute in light of administrative sanctions that were imposed, the fact that the officer undeniably loved the dog, and the law enforcement community’s public condemnation of the officer’s conduct. Neither of these offenders seemed to present much, if any, chance of recidivism. While some animal advocates might be outraged by these decisions, I would argue that a knee jerk reaction in this context demonstrates both a deep passion “for the cause” but also a lack of basic understanding of the ethical obligations of a prosecutor to balance a host of competing factors in choosing the proper course of action.

Once we have determined we have a legitimate case to prosecute, what level offense do we seek? In most jurisdictions, there are a number of options for the handling of animal-related violations including warnings, civil citations, misdemeanors, and felonies. There may be severity levels within each category. Some may not be criminal at all, while others may carry the potential for a prison sentence. How does one decide? Sometimes it is mostly a matter of degree—how many animals, how much suffering, how long the neglect, is it an isolated incident or pattern of misconduct? I have considered an offender’s willingness to surrender the victim animal, his mental capacity, his education, his age, and his degree of remorse in making this decision. NDAA Rule 4-1.3 lists sixteen factors to consider and Rule 4-1.4 describes five factors that must be, ethically, ignored. They are not exclusive, and you may think of more.

The desired result should provide guidance. We should ask

ourselves, “What’s the real problem here?” The NDAA calls this factor “the goals of prosecution.” Individual cases may take very different courses depending on whether the underlying primary problem is ignorance, drug/alcohol abuse, mental health imbalance, or just plain meanness. Decide that early on, and the result will arrive faster and be more accurate.

We need to remember that the filing of a criminal charge against a person will likely result in his or her arrest. We have to consider what that means. Uniformed and armed law enforcement officers may go to the home or workplace of the accused, take him into custody, handcuff him, lock him in the back of a marked patrol car, take him to the police station, and cage him. This may happen in front of his spouse, children, employer, and colleagues. This may be perfectly fine and fair, but we must not forget that it happens. The reputation, marriage, and employment of the defendant may be placed in jeopardy even before he is convicted. All this, of course, must be balanced against the interests of the victim that, in our cases involving particular vulnerability, are often compelling. Filing decisions are not for the faint of heart.

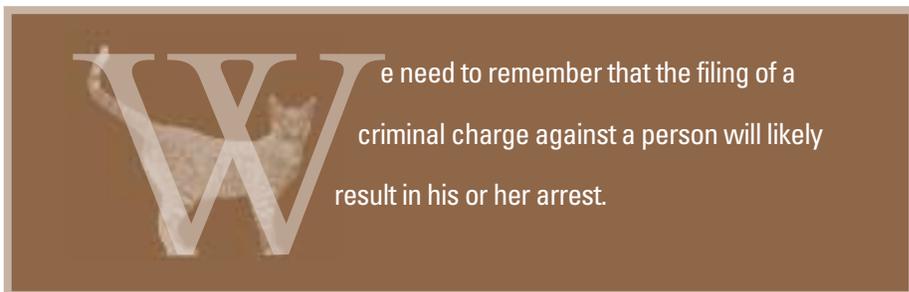
As the NDAA Commentary to Rule 4-2.4 recognizes, “In making a charging decision, the prosecutor should keep in mind the power he or she is exercising at that point in time. The prosecutor is making a decision that will have a profound effect on the lives of the person being charged, the person’s family, the victim, the victim’s family, and the community as a whole. The magnitude of the charging decision does not dictate that it be made timidly, but it does dictate that it should be made wisely with the exercise of sound professional judgment.”

I am careful not to over-charge to force a lesser plea. I suggest that that’s a lazy prosecutor’s tactic that risks a conviction of an exaggerated charge and an excessive sentence and, sometimes, when we fail to prove what we have alleged, the loss of the case altogether. We are obligated to do our homework, complete our investigation with reasonable diligence, and charge the defendant with what he or she did. Not more. As NDAA Rule 4-2.2 advises, “A prosecutor should file charges that he or she believes adequately encompass the accused’s criminal activity...” If we want to induce a plea, we might consider undercharging as an incentive, not over-charging. That’s a lot less thorny ethically.

## SENTENCING CONSIDERATIONS

### Mitigation

Unexpected illness, death, unemployment, and divorce can make the care of the family pet or livestock difficult. Unforeseen circumstances can drastically alter the prosecutorial landscape of a case. The recession can be a mitigating circumstance. So can mental illness, physical injury or infirmity, ignorance, and that ever-present stupidity. People accept unexpectedly available jobs that take them away from home for extended periods



of time out of financial necessity, leaving their pets in terrible straits. These factors make the prosecutor’s job complex in light of his or her indisputable ethical obligation to seek meaningful, punitive, sanctions for violations of our animal cruelty laws.

Under NDAA Rule 7-1.3, not only is a prosecutor obligated to consider mitigating factors, he or she is ethical obliged to “...disclose to the defense prior to sentencing any known evidence that would mitigate the sentence to be imposed.” As the Commentary to the rule further advises, a prosecutor should “...steer the court away from unfair sentences and unfair sentence disparities.”

Consider these scenarios:

1. A roommate with a beloved pet dog moves out of his house into an apartment where pets are not allowed. He relies on his ex-roommate’s promise to care for the animal, planning to reclaim the animal later. The roommate lets the dog starve almost to death. You charge the owner as the human responsible for the well-being of the dog. He comes to your office with his attorney and cries inconsolably. How do you handle this case?
2. A single mother who can barely support herself, her own two children, and a pet dog adopts her sister’s dog when the sister is hospitalized for drug addiction. She fails to provide expensive veterinary care when the dog falls ill. The dog dies. You charge her with felony cruelty. What sanctions would you seek?

3. A wife is left to care for her husband's two Rottweilers after he is sent to prison. She's genuinely afraid of dogs and leaves them tied to trees in the back yard of her house where they go round and round until they make trenches 6" deep in the lawn. The dogs go crazy. You charge her, as the responsible adult, with felony animal cruelty. Should she go to jail? For how long?

4. A lonely single man's dog gets sick. He treats it the best he can himself but the pet fails to respond. The man fails to get veterinary help and will not call animal control because he is afraid his dog will be euthanized. The dog is found moribund. It could have been saved had it gotten the required treatment. What sentence do you ask for when he pleads to felony cruelty?

5. You have convicted dad of cruelty to a horse, and his 8-year-old son has a puppy. As part of the sentence, do you request that the puppy be surrendered along with dad's other animals?

6. Your defendant, who undeniably neglected his pet, took possession of the animal as a stray with the best of intentions. He found himself emotionally, financially, and physically unable to provide basic sustenance to the animal and was charged when he delivered the suffering animal to the local shelter seeking help. Should he go to jail?

### Aggravation

Of course the flipside of any mitigation argument requires consideration of the aggravating circumstances. The factors that influence my decision-making the most include: the degree of vulnerability of the victim, the number of victims, the number in instances within a given time frame, severity of the injuries, the degree of suffering inflicted/endured, the duration of the abuse, the degree of pre-planning or premeditation involved; the absence of an economic motive; whether the victim animal was the subjected to mutilation or postmortem dismemberment; whether the offender documented the acts of animal abuse; whether the offender views him/herself as a "victim of the system" and other indicators of the offender's amenability to reformation.

For example, in a recent case, I tried and convicted a man of felony cruelty to animals who stabbed a Rottweiler fifteen times. The dog suffered horribly and was ultimately euthanized. His defense was that the Rottweiler was attacking a smaller dog, and he was coming to its rescue—a "defense of others" claim upon which the jury was instructed. The evidence showed, however, that after the initial threat was over, the defendant re-

attacked the Rottweiler some distance away and after the passage of a period of time. Due to the gratuitous nature of the second attack, the viciousness of the attack, the pain suffered, and the defendant's utter lack of contrition, I asked for prison. The court ordered a jail sentence of six months followed by a lengthy probation with numerous conditions.

In another recent case, I charged two men with animal cruelty and dog fighting by knowingly "attending" a fight. They plead no contest. Fourteen dogs were seized, but only two survived. One died at the scene from injuries, and the others were so psychologically damaged that they were unable to be adopted and were euthanized. Because of my firm conviction that animal fighting is a reprehensible, utterly unjustifiable and horrific blood "sport" conducted for no other reason than perverse amusement and greed, I asked for incarceration in state prison. Inexplicably, the judge ordered probation.

### What's a Conscientious Prosecuting Attorney to Do?

When I first started handling animal cruelty and fighting cases, I demanded a prison (not jail) sentence in every felony case. Brandishing a giant photograph of the abused animal (or projecting it six feet wide on the wall), I succeeded, more often than not, in convincing judges that "anyone who does *this* to an animal deserves to go to prison." I do not do that in every felony case any more. To paraphrase Jim Croce, *I used to be a terror, but now I am a wiser man* (or so I hope). I came to question my tactics and wonder if there might be a better approach.

Of course my first and primary goal in any case is the protection of the animals involved (and those in danger of being involved). Thus, gaining control of the affected animal so that it can be treated and adopted as soon as possible (regardless of the delay attendant in the criminal case) is top priority. That means I immediately ask the offender to surrender ownership of the animal to the State. I tell him/her, truthfully, that I will consider his/her willingness to do the right thing in my sentencing recommendation. That often works. When it does not, I employ every legal means I can to gain control of the animal(s) as soon as I can (examples include pre-conviction forfeiture, lien foreclosure and even unjust enrichment claims).

I am convinced that education is key to any sentence. Ignorance may be the reason most animals continue to suffer so often and so horribly. It confounds me that high schools teach calculus but not how to balance a checkbook. I was taught the fine points of English literature but not how to care for a child or a pet.

Assuming I am dealing with a defendant who is educable, I invite him/her to my office for a chat, with his lawyer, of course. NDAA Rule 5-2.2 describes when direct communication with a defendant is appropriate. I have made my "open door" policy known, so defendants often ask to talk with me. Thereupon, I listen to what the defendant has to say, and then read him/her the riot act, in no uncertain terms making it abundantly clear that I hold the key to their liberty, their happiness, and their lives. If they respond positively, and most do, I consider that as well when it comes time for disposition.

For that group of offenders who are unredeemable, I am content to educate through the satisfaction of knowing that when his/her cellmate asks why s/he is in jail or prison, s/he will have to give an answer which is repugnant in even those populations: "Because I didn't treat my dog right."

### Conclusion

Animal cruelty prosecutions present a perfect ethical storm.

The congruence of factors unique to these cases makes for very challenging work. On the one hand, we have difficult statutes that do not require proof of intent which criminalize behaviors having unintended consequences, offenses based on inaction rather than action, the existence of numerous mitigating circumstances, and the potential for severe punishment and community outrage. On the other hand, we have the often unspeakable agony of the extraordinarily vulnerable, helpless, non-human victims about which we care so deeply and the moral and ethical obligation to prosecute these cases consistently and aggressively.

These often competing circumstances require an exceptional degree of sensitivity, creativity, and expertise on the part of the criminal prosecutors who litigate animal abuse cases. Most of all, they require an unwavering devotion to the highest ethical standards. To be effective for the animals whose interests we represent, it is crucial for us to consistently do the "good and right thing."

Mr. Fleck is a contract lawyer for the Animal Legal Defense Fund (ALDF). Most recently, he was an Assistant State Attorney for the State Attorney's Office, 8th Judicial Circuit, Gainesville, Florida for 15 years. He had trial responsibility for complex white collar crimes, homicides, and other violent crimes and offenders. He served as the office's Training Supervisor and coordinated internal training in trial preparation and practice for the attorney staff. His passion, however, is the prosecution of animal cruelty and fighting cases. Prior to joining the State Attorney's Office, Mr. Fleck practiced in south Florida as a partner in the law firm of Friend & Fleck, P.A. where he specialized in criminal defense and post-conviction litigation. Mr. Fleck is a 1972 graduate of Emory University (B.A.) and a 1975 graduate of the University of Miami Law School. He currently lives in Melrose, Florida, with his wife of 29 years and two obnoxious mutts rescued from the pound. Mr. Fleck was honored nationally as one of the top prosecutors of the year by the Animal Legal Defense Fund and is vice chair of the Florida Bar Animal Law Committee.

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